THE CONTRAST BETWEEN *MISHPAT IVRI* AND HALAKAH

**INTRODUCTION**

Not infrequently, when I discuss with someone in rabbinics or the yeshivah world, or with someone who is engaged in scholarly talmudic studies, my involvement in *mishpat Ivri* (or Jewish law),¹ I find that it is unclear to my companion exactly what I am doing. Are not the terms *mishpat Ivri* and halakhah interchangeable? My purpose in this essay is to delineate clearly the differences between halakhah and *mishpat Ivri*, or more precisely, the differences between scholarship in *mishpat Ivri* and halakhah—both traditional and modern.

Before going further, let me dispose of those scholars—of whom I am not one—who concentrate their endeavors in biblical law. Clearly they are doing something quite different from what is being done in yeshivot or by halakhic scholars; were *mishpat Ivri* to be equated with biblical law, there would be no need to ask how it is distinguished from halakhic scholarship. *Mishpat Ivri*, however, encompasses the entire Jewish legal tradition from biblical times to this very moment. To distinguish the *mishpat Ivri* approach from that of halakhic scholarship, therefore, requires our careful attention.

I

Halakhah and *mishpat Ivri* deal with the same substantial material. To be sure (and this has already been noted by others) those engrossed in *mishpat Ivri* are concerned primarily with those aspects of the halakhah whose equivalent is customarily covered in other contemporary legal systems, that is, matters pertaining to the relations of man and man, rather than the relation of man to God.² This, however, cannot be regarded as an essential distinction between *mishpat Ivri* and halakhah. Were this the only difference between the two disciplines, it would merely define

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¹ *Tradition*, 20(2), Summer 1982
² 41-0608/82/1400-0091$02.75 ©1982 Rabbinical Council of America
mishpat Ivri as a specific province of halakhah, a part of the whole, not as something essentially different. Moreover, no one involved in the study of mishpat Ivri would seriously question the fact that all of halakhah is interwoven, so that it is almost impossible to delve deeply into any topic of the civil law without having recourse to some text or principle concerning matters of ritual.

Let me give you an example from a topic I am presently researching, ha’arama, evading the law. The question whether one is avoiding the law or evading it by using legal fictions is an important legal issue. To both layman and lawyer, the area of taxes immediately comes to mind. When is my action legal so that I can avoid paying a tax; when does it become illegal so that I become a tax evader? This is certainly a juridical topic; but anyone familiar with the question of avoidance and evasion of the law in the Jewish legal system is at once aware that the question is discussed primarily in connection with that part of the halakhah which can be described as dealing with matters of ritual, such as avoiding the payment of tithes, selling one’s hamets before Passover, and skirting the law concerning the sanctity of the firstborn of one’s cattle.3

If this be so, and the ritual and nonritual aspects of the halakhah are so intimately connected, what then makes mishpat Ivri, Jewish law, a discipline of its own?

Earlier I said that both Jewish law and halakhah deal, essentially, with the same substance; but identity of subject does not entail identity of the disciplines dealing with it. What matters is, of course, the way one looks at his subject, the purpose of one’s observations and the manner in which one expresses himself. We must seek the difference between those engaged in the study of mishpat Ivri and those engaged in the study of halakhah in the questions that each one asks and in the methodology used. Each is engaged in a different pursuit.

As to the halakhist, we must differentiate between two paradigms: the student of the halakhah (typically incarnated by the Rosh Yeshiva) and the poseq. The former studies the halakhah and delves deeply into its intricacies on the theoretical and the analytic plane. His purpose is not to decide how to act in a given situation, but to understand the sources, and, if possible, to achieve their theoretical unification. He is, ideally, an analyst of halakhic concepts. The poseq, by contrast, is interested in determining, through study, what the law is, what should be done. The poseq may be a talmudic scholar who is accepted by the community as an authority on the law, or a private poseq, studying in order to arrive at the halakhic solution to the question of how he, personally, should act in accordance with the halakhah.

It should be noted that for either type of halakhist Jewish law is first and foremost a religious law, that is to say, a law commanded by God.
For the secularist, however, Jewish law is of interest because of its cultural-national components, as a part of the Jewish heritage, independent of the theonomous authority of the halakhah. The great interest in Jewish law in our century was and is undoubtedly linked with the idea of a Jewish homeland in the land of Israel and a cultural renaissance; it is similar to the type of cultural aspiration best reflected in the rebirth of the Hebrew language as a spoken, modern means of communication. That the scholar engaged in mishpat Ivri does not, in his work, emphasize its religious normative dimension, does not negate that dimension, just as the Hebrew language can be treated as a secular tongue without negating its sanctity, or even the land of Israel can be considered in terms of national-cultural import for the Jewish people without negating its religious importance. The orientation of mishpat Ivri thus does not contradict that of halakhah, but, nonetheless, serves as a basis of differentiation.

Another methodological difference between the scholar of mishpat Ivri and the halakist (albeit one of lesser permanent significance) is that as the jurist views it, Jewish law is the living, practiced law; hence an emphasis on the responsa literature. (Responsa literature is equivalent to the case law which plays such a decisive role in the evolution and framing of the Anglo-American legal tradition. Without the record of cases already decided, the law has little meaning for the lawyer; its soul is missing.) In the talmudic academies, the yeshivot, it is, by way of contrast, almost unheard of to study systematically the responsa literature. I do not regard this difference as essential because I have the feeling that this emphasis on the responsa literature by mishpat Ivri scholars is already beginning to influence traditional talmudic academies, and that they will turn more and more frequently to this literary genre in their institutions.

Before detailing the major differences between halakhah and mishpat Ivri, I want to state un categorically a view with which some people will disagree: I maintain that only someone who has had a secular, legal education can truly be a scholar in the field of mishpat Ivri; being a talmid hakham is not enough.

II

What is the approach of those engaged in mishpat Ivri? Or, to be more precise, what are their approaches?

Although the comprehensiveness of the following classification is debatable, it is customary to divide the methodology of legal studies into four different categories. They are:

1. a dogmatic or analytical approach;
2. a historical approach;
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3. a comparative approach; and
4. an ethical or philosophical approach.  

*Mishpat Ivri* is concerned with all four approaches. The halakhah is generally interested in only two of the four; even concerning those two which are relevant to both the halakhist and the scholar of *mishpat Ivri*, the paths of halakhah and *mishpat Ivri* do not converge—although, of course, there are similarities between them. I wish to speak here about the first three of these approaches.

The dogmatic or analytical approach is probably where halakhists and scholars of Jewish law are closest to each other. The good halakhic scholar will analyze halakhic texts, or even legal institutions; at times he does succeed in making sense out of certain seemingly diffuse and contradictory halakhot. This approach is, of course, an ahistorical one, and its essence is the harmonization of halakhic rules by attempting to grasp the underlying principle behind them. One is sometimes awed by the intellectual breadth and depth of some halakhists and the outcome of these analyses, such as the hiluq developed so brilliantly by R. Hayim of Brisk.  

Such an approach is certainly valid not only in the eyes of the halakhist, but also in the eyes of the scholar of *mishpat Ivri*. For the latter, however, it is incomplete as an analytical approach to the halakhah. Let me explain this point: it is no secret that Jewish law is predominantly casuistic. Although there have, of course, been great men like R. Hayim throughout the ages whose outstanding minds sought the general beyond the particular, most of halakhah, in the past as well as in the present, is content with the lack of systemization and with casuistry. Even the greatest of codifiers, the Rambam, did not make the leap from a casuistic formulation of the law to an analytic one.

Let us take some concrete examples. I am sure that you are familiar with the first *mishnah* of Bava Kamma: The four principles of tort are listed as the ox, the pit, *mave*—whose definition is debated in the Talmud—and fire. The Talmud then subdivides the ox into three different categories: tooth, horn, and foot. These seven physical objects which form the basis for an entire part of the law of torts—if not for all of the law of torts—are, of course, based on broad concepts when classified analytically. But it is up to the lawyer, versed in Jewish law, to translate and transform these concepts into their broader aspects—both juridical and linguistic.

Take another function of the analytic approach: systematization of the law. Here, too, the casuistic approach still reigns to the detriment of system and analysis. For example, Rambam, in his classic code, has a
section on the law of agency. Many basic problems of agency are discussed there, but one is struck with the fact that there is no mention of the right of an agent to appoint a substitute agent. Did not the halakhah deal with this problem? If so, why is it missing from Rambam's discussion? The answer to these questions is that the halakhah did indeed discuss the substitute agent, but in the Talmud it was brought up in connection with the granting of a divorce. Therefore, true to the Talmud's casuistic manner, Rambam put the law concerning a sub-agent in the book of Women in his code. Maimonides was, of course, well aware that the question of a substitute agent is not limited to an agent for divorce but is a basic question in the general law of agency. His method of arrangement, however, was true to the methodology of the halakhic system, and this methodology determined the placing of this law in the book of Women. The contemporary jurist would negate such an approach to law in general, and to a code of law, in particular. It is one of the tasks of the scholar of mishpat Ivri to make this much needed shift in systematization by analysis and arrangement so that all the relevant pieces of the law are placed in their proper legal perspective. This is one of the pressing tasks for the scholar of mishpat Ivri. The halakhist can live, and live well, with matters as they are; the jurist cannot.

As we have just seen, both halakhists and Jewish law scholars are engaged in the analytical approach, despite the difference in emphasis between the schools. When we examine the next two approaches, the contrast is much more evident.

The historical approach includes two methods: external and internal. By external, I mean the factors in the society within which the Jewish people lived at any given time and place, which influenced the development of halakhah, and how this came about. Few today will debate that outside influences did affect, at least sometimes, the development of Jewish law. I am sure that there are still fundamentalists in the halakhic schools who would question this statement. What is more important, however, is that even those halakhists (whatever their number) who agree with us regard the study of this phenomenon as of little or no interest. To the jurist, of course, it is a valid and important field for research. There is no need (here) to bring examples of Jewish legal institutions and practices which were so influenced.

To me, personally, it is the internal historical approach, however, that is both intellectually gratifying as scholarship, and is more appropriately assigned to the legal scholar, as opposed to the historian, by virtue of his aptitude and training. I mean by an internal historical approach the attempt to understand and explain the law as it developed from stage to stage by formulating criteria within the Jewish legal system rather than by seeking outside influences. First, one must discover the stages
in the evolution of the law and chart out when and where certain views or legal institutions were amended or changed.\textsuperscript{11} This is not an easy task, but it is necessary before proceeding further in one’s research. Let me add that the proper execution of this work, that is, establishing where and how the law developed and perhaps changed, is itself an important contribution to Jewish law scholarship. But one should, if possible, go further in a number of directions. Let me mention a few which I believe are the most important ones.

In a paper delivered some years ago\textsuperscript{12} concerning impotence as a ground for divorce, I demonstrated, convincingly, I hope, that a seemingly sudden change of attitude on the part of the halakhic literature is connected with simultaneously changing views regarding a different halakhic problem. This question, like others, required employing both the internal and the external historical approaches. In my study of the legal problems of impotence in Jewish law, I noted that Rambam’s enunciation of his view concerning impotence and sterility was probably influenced by the medical teachings of his mentor in medicine, Avicenna. It should be clear that these observations concerning this important halakhic problem are different in nature from the type of analysis done in yeshivot. The difference, at this point, lies in my use of external historical data. The scholar in mishpat Ivri, in his desire to grasp the internal development of the law, will attempt to observe and discover how a certain rule was formulated and later developed. He will ask, for example, if it originated in a tradition that was later expanded by exegesis or interpretation and was then amended by the logic of one of the rabbis—by a sevara; or if it is based on a judicial decision or conduct of an halakhic scholar in a particular concrete case which was later incorporated as a custom and then finally recorded as a takanah or gezeira, an ordinance. Again, these inquiries, which are undoubtedly a part of the halakhic system as a whole, are not directly pursued by the halakhist.

One must also note the basic difference between the legal scholar’s use of variant text readings and the utilization of newly published works formerly available only in manuscript, and the traditional halakhist’s attitude. Some of the leading halakhic authorities, like the Vilna Gaon, were very careful about correct readings of ancient texts, and would have been eager to partake of the textual scholarship being pursued today in Judaic studies. Many other halakhists, however, including some of the most prominent, are not interested in novel textual emendations if these conflict with a traditional reading and are not (very) impressed by the publication of heretofore unpublished works by past halakhic scholars if the contents of such treatises are liable to rock the traditional halakhic boat. As the Hazon Ish said, referring to Levin’s monumental Ozar Ha’ Geonim: The old material we have; the new we don’t need. He explained:
The sources already printed, are found in the works of the rishonim, organically within the context in which they are quoted and the way they are discussed and treated; the sources now printed for the first time from the *Geniza* manuscripts, whatever their importance may be for academic study, are irrelevant to halakhic consideration. 13

With regard to the matter of correcting texts and publishing manuscripts, the *mishpat Ivri* scholars display an orientation different from that of the traditional halakhist, but also different from that of the university talmudic scholar. For the latter, textual work can be, and too often is, an end in itself. For the jurist, it is a means to an end.

As a final observation regarding the historical approach, I must add that Jewish law is interested in knowing both what the law was or is as stated in the various law books and also how the law was in fact implemented in life. There is not always an equation between the two, as lawyers know. The halakhist usually ignores the gap between the law and its implementation.

It is, however, in the comparative approach where the legal scholar can display his erudition and acumen in a manner which is unique because of his legal training. If, perhaps, the halakhist can compete with him on the analytic side, the historian in the historical approach, and the philosopher or ethicist in their respective disciplines, no one can rival the jurist when the object of one’s research is to place Jewish law within the context of other legal systems.

There are three major areas where, I believe, the comparative method can be, and is, fruitful.

Two types of comparative research have been common in the past. There are scholars who have sought to investigate the influence of Jewish law on other legal systems; alternatively, there have been scholars who attempted to show where other legal systems have affected Jewish law. The former question has been pursued, for example, by the late Professor Rabinowitz of the Hebrew University, who has come up with some interesting, albeit debatable theories, such as Jewish law’s very important place in the development of commercial law (especially that of bills of exchange) and Jewish law’s singular influence on the development of the English mortgage. 14 Today, this type of scholarship is comparatively dormant. It remains a fascinating field for anyone inclined to such work; but it probably has more pitfalls than other avenues of scholarship in Jewish law because of the real difficulty in establishing convincingly that Jewish law did, in fact, materially influence some legal institution in another legal system in the course of the development of the law.

The second field of research I mentioned, that of foreign influences on Jewish law, has had its practitioners since Jewish law became an accepted discipline. In the past, Roman law was looked upon as the legal
system most likely to have affected talmudic law, but there is now an awareness that scholarly inquiry should be widened to Greek law and the legal system prevalent in the Persian empire. Because of problems of language, paucity of sources and other impediments, this line of research is still in its embryonic stage. Here, too, one must be very wary before concluding that another legal system influenced Jewish law. Similarity does not prove influence.

The most important and fruitful aspect of the comparative method, however, is the in-depth study of legal institutions, both in the Jewish legal system and in other legal systems, in order to understand how universal questions of law (and let us remember that most legal problems seeking a solution, are universal in nature) are answered by Jewish law as compared with other legal systems. Often, the solutions to similar problems resemble each other in all legal systems, but many times Jewish law has its own unique approach to a question or a legal institution. Where the solutions are similar, it is important to define the precise nature of the similarity. Where they differ, it is of utmost importance and interest to the scholar of mishpat Ivri to be able to reveal the unique approach and structure of Jewish law and how it has developed its own, original, legal institution or solution to a question at issue.

For those who are especially interested in legal history, a most fruitful path of research is to study how well Jewish law corresponds to general theories of the development of legal institutions. For example, does the evolution of Jewish law fit into the patterns described by Maine in his classic Ancient Law? I deliberately choose Maine because he is still the intellectual giant in this field of research although some of his theories have been strongly questioned and criticized. Maine was not well versed in Jewish law and his theories were developed by studying other legal systems. Does Jewish law follow the patterns hypothesized by Maine? Does Jewish law display development from status to contract, for example? If Jewish law deviates from a pattern of development which appears to be universal, why does it?

This brief discussion of the comparative approach is sufficient to establish its absence from the halakhist’s framework. Because of his special and specialized training, the scholar of mishpat Ivri has another significant frame of reference for his study of Jewish law not available to the traditional halakhist.

In concluding I want to note some general observations. One important contribution of the resurgence of scholarship in Jewish law over the past twenty or thirty years is the revival, if one may call it that, of certain aspects of Jewish law which were more or less moribund. Certain topics such as public law in general and takanot kahal—communal leg-
islation—in particular, which are undoubtedly an integral part of Jewish law, had been neglected for many years. The renewal of interest in these topics is the product of comparatively recent scholarship. There is no doubt in my mind that the emergence of a Jewish State in the land of Israel gave impetus, conscious or subconscious, to these studies. It is to the credit of Professor Menachem Elon, now a Justice of Israel’s Supreme Court, who called attention to, and wrote scholarly articles on these topics, and they have consequently been dealt with by other scholars.

It is my own belief that the scholarly study of mishpat Ivri in the State of Israel is not only of pure academic interest, but has had, and I hope will have, even more in the future, a special legal-cultural influence. The desire for such an extra-academic impact is not unusual for the jurist; any jurist is involved in a practical pursuit side-by-side with the academic one. Law is not only history, but life itself. How much more so in Israel where a young state is groping to find its way to an indigenous legal system. The product of our scholarship can, and does to some extent, influence the Israeli legal system. Some scholars of Jewish law in the past, such as Gulak, Freimann and Silberg, have advocated the preparation of a modern code of civil law, for possible incorporation in the State of Israel, based on the principles of Jewish law, but not identical with the Shulhan Arukh. I, personally, am not a proponent of such a code, but those who are, face a major challenge for the acumen of the lawyer who is well-versed in Jewish law.

In fact, some aspects of Jewish law have been incorporated in the legislation of the State of Israel, and one can find that many decisions of the Israeli Supreme Court are interspersed with precedents from Jewish law in general, and the responsa literature in particular. Though the solution to a problem may be similar in American, English and Jewish law, I undoubtedly prefer a quote from the Noda B’Yehuda concerning Reuven and Shimon, than a precedent concerning John Doe versus Harry Smith. This, of course, may be viewed as a personal tendency, but I think that I am speaking for the vast majority of Jews who are culturally committed to the Jewish heritage. The practical application of Jewish law to a modern legal system no more derogates from the so-called scientific study of Jewish law, than Ben-Yehuda’s dictionary of the Hebrew language which greatly influenced modern Hebrew, detracts from the scholarly standing of this monumental dictionary.

Not all of the above-mentioned methods of research must be employed by everyone engaged in research in mishpat Ivri. In fact, it is well-nigh impossible for any one individual to deal with a subject from all these angles. That is one of the most compelling attractions of scholarship in Jewish law. The field is wide open: an individual with the proper
training and a personal interest in the subject can find the approach or approaches most suitable to him and can contribute to the young but growing community of lawyers engaged in *mishpat Ivri*.

NOTES

3. See entry *ha'arama* in *Encyclopedia Talmudic*, volume 4, p. 597.
4. See, in general, on the problems of research in Jewish law, B. Jackson (ed.), *Modern Research in Jewish Law* (Leiden, 1980).
5. See, for example, on the *hiluq*, N. Solomon, "*Hilluq and Hqirah: A Study in the Method of the Lithuanian Halakhists*," *Dine Yisrael* Vol. IV, p. LXIX, (English Section).
7. *Bava Kamma* 2b.
8. *Hilkhot Sheluhin Ve'Shuufim*, chapters one and two.
11. An excellent example of this type of scholarship is M. Elon's *Herut haPerat beDine Geviyat Hov baMishpat Halvri* (Jerusalem, 1964).
15. The outstanding scholar who devoted his life to the comparison of Roman law and Jewish law was Boaz Cohen. See his two volume *Jewish and Roman Law: A Comparative Study* (New York, 1966).
16. Professor Saul Leiberman has been demonstrating this for many years about Greek law, see, e.g. his *Hellenism in Jewish Palestine* (New York, 1962). The late E.S. Rosenthal has similarly been preaching the need for the study of Persian law for a proper understanding of talmudic law. See E.S. Rosenthal, "*LeMillon haTalmud—Berur Millim velyne Nusah*," in *Tarbiz* 40 (1971) pp. 178-201.
22. See, for example, Y. Goldsmith, "*Jewish Law in the Legislative Activity of the Knesset,*" *Dine Yisrael*, vol. 5, XCIV (English Section); the references to various articles on the subject in N. Rakover, *Ozar haMishpat* (Jerusalem, 1975), p. 130.
23. See the periodic surveys in the volumes of *Dine Yisrael*, "*Jewish Law in the Law Reports*" compiled by S. Meron and N. Rakover, *Ozar haMishpat*, p. 132.