

In What Sort of Polity of Polity Can a Jew Live in Good Faith?

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1. The Questions: Moral, Political, and Historical.

The question: *In what sort of polity can a Jew live in good faith?* can also be stated as: *In what sort of polity can a loyal Jew live with moral integrity?* By Aloyal Jew@ I mean a Jew who sees himself or herself to be a full member of the Jewish people here and now, and who sees himself or herself morally accountable to the normative Jewish tradition as he or she receives it from the past, interprets and applies it in the present, and transmits it into the future.

This moral question assumes that a Jew has a choice where to live and where not to live, and that he or she ought to live in a polity governed in a way the Jewish tradition regards to be morally valid. Chronologically, this moral question can be asked after the political question: *What sort of polities are available today to a loyal Jew to choose from?* Here one must take into serious consideration two rather recent political facts: one, a Jew now has the option of living in the officially Jewish polity, the State of Israel, as an equal citizen in good faith; two, a Jew now has the option of living in many diaspora polities as an equal citizen in good faith. It might be noted, however, that for much of Jewish history neither option was available to Jews. Nevertheless, as we shall see, there are some ancient precedents for asking the moral question, even though it was asked at a time when the real political options available to Jews were quite different.

Before looking at the past, we must locate our vantage point in present political reality (what some have called *Realpolitik*), and that means asking the political question first. The moral

question, though logically prior, can only be asked in the context the answer to the political question supplies; otherwise it is only hypothetical. Only thereafter in this logical sequence can one ask the historical question about precedents. To ask the moral question apart from the political context is to engage in *Aidealistic@* speculation (in the pejorative sense of the term.) To ask the historical question apart from the moral question is to engage in the type of *Aobscurantism@* or *Ahistoricism@* that makes the past irrelevant to the moral concerns of the present. Yet not to ask the historical question presumes that the moral questions facing Jews today not only need to be answered *de novo* (i.e., that answers to past questions cannot simply be repeated), but that these moral questions can be answered *ex nihilo*, as if they were never asked in the past. And, indeed, some Jews think moral questions facing the Jews today can only be answered by repudiating past Jewish history altogether, which makes their Jewish identity something arbitrarily constructed rather than a continuity with the past. And there are other Jews who distort past Jewish history by making the moral questions and answers proposed then no different from the questions and answers they propose in the present. The confinement of Judaism to past history and the obliteration or distortion of past Jewish history, are both morally disingenuous since they are both based on distortions of truth.

It seems there are a number of political options available to Jews who ask the moral question of where to live in good faith, especially the option to live in the State of Israel, and to either repudiate the validity of any Jew living in good faith elsewhere or not.

One, there are Zionists (both secular and religious) who would answer that the only polity to which a Jew can pledge his or her allegiance in good faith is the State of Israel. Two, there are religious anti-Zionists who would answer that a Jew cannot pledge his or her good faith to the State of Israel because this polity is not governed according to traditional Jewish law

(*halakhah*), or more extremely, the establishment of a Jewish state in the land of Israel is invalid unless reestablished by the Messiah. Nevertheless, most of these anti-Zionists could argue that they can live in non-Jewish polities in good faith because these polities are governed by law that the Jewish tradition recognizes as morally valid for any human polity that affirms it, and that polity is therefore morally valid for any human being who chooses to live there in good faith. (And, obviously, that law must not prohibit the public affirmation of Judaism by the Jews living within its jurisdiction, i.e., it can be Anon-Jewish@ but not Aanti-Jewish.@) Three, there are secular anti-Zionists who argue that they cannot live in the State of Israel in good faith because they can only live in good faith in a constitutional democracy. For them, though, the State of Israel is no such polity. (But, what makes this anti-Zionism AJewish@ inasmuch as the primary loyalty of these secular anti-Zionists seems to be to their notion of Aconstitutional democracy,@ which for most of them has displaced their loyalty to Judaism and the Jewish people?) Four, there are Jews C and I would submit they are the vast majority of loyal Jews today C who do not believe their affirmation of the Jewish validity of the State of Israel precludes the ability of any Jew to live in good faith in a diaspora polity. Moreover, for many of them, that also includes the belief that the most optimal Jewish life today is available to those Jews who have chosen to live in the land of Israel and become citizens of the State of Israel there. In this case the choice is between good or better, not between good or bad (as it is for those Zionists who deny that a Jew can live in any diaspora polity in good faith).

It is only when one takes seriously the four kind of Jewish answers to the moral question of where a Jew can live in good faith that a Jew can appreciate that his or her own answer to the question is a true choice and not an historical inevitability. Being responsible for one=s choice in answering this question readily requires one to think out the reasons for making this choice.

I count myself as a loyal Jew of the fourth kind. And my task in this paper is to explore the question: *To what sort of diaspora polity can a Jew like myself live in good faith and why?* That means: *What sort of polity can I respect as a Jew, and what sort of a polity can respect me as a Jew and why?* As we shall see, only a polity that is essentially just could conform to these two criteria of respect. In other words, the respect that is my duty owed such a polity and the respect that is my right to claim from such a polity, both the duty and the right are two sides of the same political coin.

As a diaspora Jew (*galutnik*), I should only question my relationship with the diaspora polity in which I now live. And that question concerns the moral status of that relationship, because *Arespect@* is a moral concept. To ask the *moral* question: *Whom can I respect?* is not the same as asking the *Apragmatic@* question: *Who or what is most useful in and for my current political situation?* This second question should not be the primary question of anyone committed to the Jewish tradition, which is a tradition that makes many moral demands upon Jews. So, in deliberating on the moral question of respect for a non-Jewish polity, I should formulate my answer out of the sources of Jewish morality. Pragmatic-political considerations should only be of concern when they are consistent with both the physical and moral well-being of the community for which they are made, specifically when they indicate where and where not Jewish moral norms can be prudently applied and where Jewish interests may be safely advocated.

To live anywhere *in good faith* is to ask what sort of polity deserves one=s respectful participation. One might call any such polity *Adignified@* in the sense of *dignus*, the Latin word for being *Adeserving@* or *Aworthy@* of respectful consideration. To ask the question of whether or not a Jew can respect *any* non-Jewish polity where he or she lives assumes that a Jew should

only *want* to live in a polity which he or she could respect. Surely, a Jew should only want to live in an essentially just polity, because only such a polity can be the object of a Jew's authentic respect. We certainly know there are and have been non-Jewish polities where Jews have *had* to live, but in which they did *not want* to live. In fact, many of these polities could only be the objects of Jewish disrespect or disgust, not only for the unjust way they treat Jews, but also for the unjust way they treat everyone under their power. In fact, even in those polities where Jews have been the chief victims of their injustice, more often than not they have not been the only victims of their injustice. The question, though, is whether all non-Jewish polities have been invalid for Jews *ipso facto*. Were there any non-Jewish polities that were just, and could a Jew have lived there without sacrificing his or her Jewish integrity in the process? Did Jews in the past look upon all non-Jewish polities as essentially anti-Jewish or not?

2. What Makes a non-Jewish Polity Morally Legitimate?

The legitimacy of a non-Jewish polity for a Jew is a question that is both legal and ethical. It is a legal question inasmuch as how it is answered will determine what a Jew may and may not *do* in his or her formal, legally structured relations with citizens of that non-Jewish polity. It is an ethical question inasmuch as the institutions of that polity, within which these Jewish-gentile relations take place, are *formulated* on the basis of ideas of human nature. Thus a Jew must not only know the legal system of any polity within whose jurisdiction he or she lives, a Jew must also know the ethical theory underlying that legal system. That is because there is no legal system that doesn't appeal to some ethical theory, and there is no ethical theory that doesn't

have legal ramifications.¹ Surely, a false ethical theory cannot underlie a just legal system. And, surely, a just legal system could only presuppose a true ethical theory, even if most of its practitioners are unaware of that theory or are disinterested in it.

Looking at the legal system, whose norms will govern a Jew=s interactions with others living under its rule, one should judge whether that legal system is essentially *just* or not. If the system is just, a Jew can then live under these laws honestly (*bona fide*), because a Jew *should want* to live with justice. AJustice, justice you shall pursue@ (Deuteronomy 16:20) is an obligation that not only devolves on a Jewish polity, but it also devolves on each and every Jew whenever and wherever he or she might be living.² The obligation seems to be to both seek a just legal system and correct a legal system that is just in principle even when it is presently unjust in some of its applications. Moreover, the first obligation of a non-Jewish polity and the non-Jews who make it up is to set up the legal apparatus for justice to be done and for the system itself to be regularly purged of unjust applications of its norms.³ It stands to reason, then, that the citizens of a polity having a just legal system are morally obligated to bring their civil cases to the courts that adjudicate according to that system of law, and to obey the decisions of those courts in both civil and criminal matters. Hence the pursuit of justice and the flight from injustice when it cannot be corrected are obligations that devolve on all human beings, both individually and collectively. And that is because Ajustice is God=s@ (Deuteronomy 1:17), and all human beings Acreated in God=s image@ (Genesis 9:6) are obliged to become God=s associates by effecting as much justice as they can in the world.⁴

¹ For the relation of law and ethics in Judaism, see David Novak, *Jewish Social Ethics* (New York: Oxford University Press, 1992), 3-21.

² See *Babylonian Talmud* [hereafter "B."]: Sanhedrin 32b.

³ *Tosefta*: Avodah Zarah 8.4; B. Sanhedrin 56a.

⁴ See B. Shabbat 10a; B. Sanhedrin 6b; *Palestinian Talmud* [hereafter "Y."]: Sanhedrin 1.1/18b.

If the system, however, is incorrigibly unjust, one might *have to* live under its laws, but he or she should not want to live under them; and, certainly, a Jew should try to leave this kind of polity as soon as possible. One also needs to judge the ethical theory that underlies the legal system to see whether it is essentially *true* or not. If it is true, then one can honestly accept it. But, if this ethical theory is not true, how can one honestly live under the system of laws it seems to underlie? Furthermore, in order to answer these questions, where does one begin: with the practical law and then the theory, or with the theory and then the practical law?

Let us now look at some rabbinic texts with the questions in hand. Understanding them correctly, and understanding what they imply for us, might suggest how to formulate Jewish public policy in our various diaspora societies. It is best to first look at the law, since the law of any society is more evident than the theory that stands behind it.

The most significant way a Jew can practically respect a non-Jewish polity is to bring his or her civil disputes for adjudication in an officially authorized court of that polity. Along these lines the Mishnah states:

All legal documents [*kol ha-shtarot*] which are processed in official non-Jewish courts [*arka=ot shel goyim*], even though those attesting to these documents are themselves gentiles, these documents are valid for Jews [*kasherim*], except for bills of divorce, etc.⁵

Following the ruling of the Mishnah, this permission only applies to documents that attest to what we would call civil matters. That is, this permission applies to transactions between two or more parties where there is nothing peculiarly Jewish about the transaction itself. The prime

⁵ *Mishnah* [hereafter "M."]: Gittin 1.5.

example given in the Babylonian Talmud is a bill of sale.⁶ However, since Jewish divorce procedures are peculiarly Jewish, Jews should not involve a non-Jewish court in anything pertaining to them. Here we are dealing with two different legal realities. But in matters not peculiarly Jewish, it is most likely the Jewish law and the non-Jewish law are similar enough for the official acts of a non-Jewish court to be similar to the official acts of a Jewish court, hence Jews can recognize these official non-Jewish acts to be valid for Jews. In matters peculiarly Jewish, though, like the processing of Jewish divorce papers (*gittei nashim*), Jewish law and non-Jewish law are essentially different, even if some specific procedures happen to be similar.⁷ Moreover, some post-talmudic authorities wanted to even exclude other civil matters between Jews that can be validated in a non-Jewish court.⁸ That is, they tried to limit as much as possible this permission of the use by Jews of non-Jewish courts. They were clearly uncomfortable with permitting Jews to freely choose between Jewish and non-Jewish courts. More about this shortly.

In the Babylonian Talmud, the legal reason given for this permission is the principle formulated by the third century Babylonian authority, Mar Samuel of Nehardea: The law of the state is law. *B dina de-malkhuta dina.*⁹ (Literally, *dina de-malkhuta* means The law of the kingdom, since the Babylonian state and all other contemporary states were ruled by kings or emperors; however, it certainly applies to any constitutional polity.) That is, the law of the state (*dina de-malkhuta*) is binding on Jews (*dina*). But, does this mean any law of the state can be used to judge a Jewish case? No, it only means the civil law of the state, which is the law that pertains to all citizens of the state in general, whatever their particular religious tradition. In later

⁶ B. Gittin 10b.

⁷ See Y. Kiddushin 1.1/58c.

⁸ See B. M. Lewin, *Otzar ha-Geonim* 10: Gittin (Jerusalem: Mosad ha-Rav Kook, 1941), 15.

⁹ B. Gittin 10b. The *locus classicus* of this principle is B. Baba Batra 54b. The standard monograph on this principle is Shmuel Shilo, *Dina de-Malkhuta Dina* [Heb.] (Jerusalem: Jerusalem Academic Press, 1974). Also, see Leo Landman, *Jewish Law in the Diaspora* (Philadelphia: Dropsie College, 1968).

talmudic language, one could say that civil matters (*mamona*) and religious matters (*isura*) function by different rules.¹⁰ Indeed, were the state to rule in religious matters, Jews (and I think members of other religious traditions) could not possibly accept such non-Jewish rulings in good faith. That is why the Mishnah rules (in the very same tractate) that a Jewish divorce ordered by a non-Jewish court is invalid (*pasul*).¹¹ Here the principle *the law of the state is law* clearly does not apply. However, in every other case involving civil matters, it seems this principle does apply. It does not seem that Mar Samuel wanted to restrict the application of this principle to only *some* civil matters. And, in fact, we know that Mar Samuel himself was an active participant in the Babylonian legal and political system.¹²

However, there is an altogether different approach to the question of the use of non-Jewish courts by Jews. In the Babylonian Talmud, when discussing the ruling of the Mishnah that a Jewish divorce ordered by a non-Jewish court is invalid, we find the following ruling of the second century Palestinian authority, Rabbi Tarfon: “Anywhere you find gentile courts, even though their laws are like the Jewish laws [*she-dineihem ke-dinei yisrael*], you are not permitted [*iy attah rash=ai*] to become involved with them.” Rabbi Tarfon bases his ruling on Exodus 21:1, which literally states: “These are the laws [*ha-mishpatim*] you [Moses] are to place before them [the Israelites].”¹³ But he reads this verse to mean: “These are the cases [*ha-mishpatim*] a Jew should bring to a Jewish court [*lifneihem*],” and then he infers: “But not to non-Jewish courts.”¹⁴ The only legal judgments that are valid for Jews are those made by properly appointed Jewish judges, in properly authorized Jewish courts, employing explicitly Jewish law. And, in

¹⁰ See B. Berakhot 19b; B. Ketubot 40a.

¹¹ M. Gittin 9.8.

¹² See e.g. B. Baba Batra 115b.

¹³ See *Mekhilta de-Rabbi Ishmael* re Exod. 21:1, ed. Horovitz-Rabin (Jerusalem: Bamberger and Wahrman, 1960), 246.

¹⁴ B. Gittin 88b.

fact, this prohibition not only pertains to non-Jewish judges, it also pertains to Jewish judges who do not have an official Jewish appointment (*hedyotot*).¹⁵ It seems these unofficial Jewish judges will either not be employing Jewish law at all, or they will not know enough to employ Jewish law properly.¹⁶ Therefore, there is no doubt that Rabbi Tarfon is ruling against any Jew who brings any *civil* dispute to a non-Jewish court, whether the judges are gentiles or even Aunofficial@ Jews. It is clear that Rabbi Tarfon means that such a civil dispute may not be brought to a non-Jewish court *ab initio*, and if a Jew does bring his or her legal dispute to a non-Jewish court, any verdict of that court B because of *who* are making the ruling B is invalid *post factum*.¹⁷ In other words, a Jewish court ought not enforce any such invalid verdict or require any Jew to comply with it. It also seems that *whatever* similarity there might be between Jewish civil law and non-Jewish civil, that similarity is only accidental.

The contradiction between these two opposite positions about the permissibility of a Jew bringing a civil case to a non-Jewish court calls for some kind of resolution. Neither position can be rejected as the opinion of a lone individual (*da`at yahid*), so one ruling must be accepted as the basic position of the law (*halakhah pesuqah*), and the other ruling can only be taken as a qualification of the basic position.

Most post-talmudic authorities took the position of Rabbi Tarfon to be the basic position of the law, and that the position of Mar Samuel only qualifies it. That is so, even though Mar Samuel=s principle is given as the underlying reason for the ruling of the Mishnah (the official code of law) about the permissibility of bringing a Jewish civil case to a non-Jewish court. Thus Maimonides (*Rambam*), in the twelfth century, at the conclusion of his extensive treatment of the

¹⁵ Ibid.

¹⁶ See e.g. B. Sanhedrin 23a.

¹⁷ See Nahmanides, *Commentary on the Torah*: Exod. 21:1.

role of Jewish courts, represents the position of Rabbi Tarfon about the prohibition of Jews bringing cases to non-Jewish courts to be the official position of the law itself. He even adds that those who do bring their cases to non-Jewish courts are thereby insulting the Torah of Moses our Master.”¹⁸ The only time a Jew may bring his case to a non-Jewish court is when the defendant he is suing in the Jewish court is obstinate and too powerful for the Jewish court to force him to pay what the Jewish judges have decided he is obligated to pay the plaintiff.¹⁹ As one commentator noted, the political impotence of the Jewish court should not allow injustice to succeed.²⁰ Nevertheless, a Jew who cannot get results from the Jewish court still has to obtain permission (*reshut*) from the Jewish court to go to the non-Jewish court as his last resort.²¹ This seems intended to not make the Jewish court totally superfluous. (Today, when Jewish courts do not have civil jurisdiction anywhere, the situation is the opposite, viz., a Jewish court can only function as a panel of mediation authorized by a non-Jewish court which does have civil jurisdiction, and the subordinate authority of the Jewish court must be voluntarily accepted by the litigants in a civil case turned over to the Jewish court.²²)

Maimonides clearly saw the contradiction between the position of Rabbi Tarfon and the position of Mar Samuel. The question is why this obvious contradiction was not discussed in the Babylonian Talmud where both positions are originally presented. Perhaps the reason for this omission is because the historical context of the position of Rabbi Tarfon is fundamentally different from the historical context of the position of Mar Samuel. Each sage was living under a

¹⁸ *Mishneh Torah* [hereafter “MT”]: Sanhedrin, 26.7.

¹⁹ *Ibid.*

²⁰ *Hagahot Maimoniyot* thereon quoting Moses of Coucy, *Sefer Mitsvot Gadol*, pos., no. 107.

²¹ MT; Sanhedrin, 26.7. However, when a Jewish court has civil jurisdiction and the political power to deliver justice, Jews are obligated to bring their cases there for adjudication. See Maimonides, *Teshuvot ha-Rambam*, ed. Blau (Jerusalem: Mekize Nirdamim, 1957), 1, no. 27.

²² In other words, a Jewish court now has no more civil authority than a panel of mediation (*pesharah*) had at the time when Jewish courts (*batei din*) did have civil authority. See B. Sanhedrin 6b-7a.

very different non-Jewish political regime. If that is true, there is much precedent in both Talmuds for showing that what appears to be a contradiction in law is only a difference of fact. Different situations call for different, but not contradictory, legal responses. So, perhaps Mar Samuel would agree with Rabbi Tarfon *if* he were ruling in Rabbi Tarfon=s political situation; perhaps Rabbi Tarfon might agree with Mar Samuel *if* he were ruling in Mar Samuel=s political situation. I also think that the political situation today of most diaspora Jews is closer to that of Mar Samuel than it is to the political situation of Rabbi Tarfon. More about this later.

The position of Mar Samuel, moreover, seems to be more attractive philosophically, because it seems to be concerned with the imperative that *justice be done*, irrespective of *who* is causing that justice to be done here and now. Here the explanation of Rashi, the great eleventh century commentator, is very helpful, because it explains both the ruling of the Mishnah about the permissibility of bringing Jewish cases to non-Jewish courts and the principle *the law of the state is law*. Rashi explains that the underlying reason here is because ANoahides are commanded to adjudicate justly [*al ha-dinin nitstavu*].”²³ The term ANoahides@ (*benei Noah*) refers to all humankind.²⁴ A non-Jewish polity can be considered validly ANoahide@ when that polity=s official system of law is just and is therefore worthy of respect from Jews. The practical result of this respect, as we have seen, is that Jews may bring their legal disputes to *these* gentile courts for adjudication. This official practice of justice means two things.

First, the official practice of justice in this *dignified* gentile society is *systematic*. Thus the thirteenth century Sephardic authority, Nahmanides (*Ramban*) contrasts *dina de-malkhuta* (Athe law of the state@) with *dina de-malka* (Athe law of a king@).²⁵ In other words, the arbitrary rule of a ruler, answerable to no system of law, is unjust tyranny that deserves no respect. It is essentially immoral, even if some of the rulings there *happen* to be just.

We know, however, that an entire system of law can itself be unjust. (Remember Nazi or Soviet Ajurisprudence.@) Therefore, the second requirement is that the legal system itself must acknowledge a higher law, according to which that legal system can

²³ B. Gittin 9b and Rashi thereon, s.v. “huts me-gittei nashim.”

²⁴ See David Novak, *The Image of the Non-Jew in Judaism* (New York and Toronto: Edwin Mellen Press, 1983); also, *Natural Law in Judaism* (Cambridge: Cambridge University Press, 1998), 156-64.

²⁵ *Hiddushei ha-Ramban*: Baba Batra 54b.

continually correct itself. That higher law is what the Rabbis called *dinim* (or *dinin*). And in the Bible it is what is called *mishpat* or *Ajustice*.”²⁶ Now the Jewish tradition recognizes that, in principle, its criteria for the practice of justice are no different from the criteria the Jewish tradition recognizes as the criteria the Noahides have accepted for their practice of justice. In other words, there is essential (and not merely accidental) commonality between Noahide justice and Jewish justice. Thus the thirteenth century Ashkenazic authority, Rabbi Isaac of Vienna, argued that the ruling of a non-Jewish court is valid in a case involving Jewish litigants is valid, provided these Jews accepted the authority of the non-Jewish court voluntarily, i.e., it was not forced upon them against their will.²⁷ Yet Rabbi Isaac does remark that Rabbi Tarfon=s prohibition of going to a non-Jewish court should be upheld at least *ab initio*.

3. Babylonia and Palestine: The Difference.

It seems that Mar Samuel was convinced that the Babylonian polity, under whose government he was living, was in fact doing what it ought to be doing. Its legal system was just, primarily because it administered just laws, and these laws were not seen to be made by the rulers of the society at will. Following Rashi=s interpretation, the rulings of the rulers B especially the rulings of the courts B were taken to be applications of the justice that is originally divine command. Indeed, one can only be ultimately (even if not immediately) *commanded* by a law *not made* by oneself or by anyone like oneself.²⁸ Thus one can justify Mar Samuel=s endorsement of non-Jewish civil law (and criminal law

²⁶ See e.g. Gen. 18:25.

²⁷ *Or Zarua* 3: Hilkhot Arkaot, no. 3. See Rabbenu Asher ben Yehiel, *Responsa*, 18.4.

²⁸ See David Novak, “Law: Religious or Secular?” *Virginia Law Review* 86 (2000), 569-96; reprinted in Novak, *In Defense of Religious Liberty* (Wilmington, DE: ISI Books, 2009), 141-82.

too) for Jews on more than pragmatic grounds. That is, there is a deeper reason for his acceptance of non-Jewish legal authority than the merely pragmatic-political purpose of wanting to show how Jews can be loyal citizens of the Babylonian regime and thus deserving of its respect and protection. (In fact, the justice of the Babylonian system itself included the acceptance of the Jewish community as one of its constituents.) To be worthy of the respect of this regime would not be possible if Jews themselves could not genuinely respect this regime. That seems to presuppose that both the Jews and the regime share some common morality that enables each to respect the other.

The political situation in the land of Israel in the time of Rabbi Tarfon B that is, in the Roman province of Palestine B was altogether different. First of all, the Jews were living there as a conquered people, and their Roman masters did not even regard them to have the rights that belonged to other peoples living under Roman rule. Even though these other peoples did not have the full rights guaranteed by Roman civil law (*ius civile*) to Roman citizens, they still had the rights provided by the body of Roman law that pertained to what might be called Anon-Roman resident-aliens.@ That body of law is called Athe law of the nations@ (*ius gentium*). Moreover, both Roman civil law and *ius gentium*, which might be called ARoman provincial law,@ both of these systems of law claimed to be in essential harmony with Anatural justice@ (*ius naturale*). Jews in Roman Palestine, however, had no legally determined rights at all. They lived under the arbitrary rule of whoever happened to be the Roman governor at the time. His task was to collect revenues for Rome, defend the eastern border of the Empire from the Parthians (that is, the empire that included Babylonia), and to put down any insurrections or even any suspected insurrections. The administration of any consistent, rationally based, justice

was not required. In fact, the administration of any authentic justice by the Roman governor would very likely make him suspect in the eyes of his superiors in Rome. It would be likely that his superiors would resent such consideration for a people who were regarded as being a community of criminals, ever ready to rebel and throw off Roman rule.²⁹

It is no wonder Rabbi Tarfon ruled that Jews should avoid the courts that were instruments of such an immoral, basically unjust, government. Even if a particular law that the Roman imperial governors happened to be applying B or inventing *ad hoc* B was similar to Jewish law and thus just *ipso facto*, acceptance of the decision of such a court would be a tacit acceptance of the legitimacy of the government who authorized these judges to rule in any case that came before them. Furthermore, going to such a court, when a functioning Jewish court having at least some civil jurisdiction was available, was seen to be an insult to whatever little legal autonomy Jews still had under the Roman occupation of the land of Israel. For many of the Rabbis, Roman rule in Palestine was hopelessly corrupt and cruelly unjust.³⁰ Roman institutions were to be avoided as much as possible.

4. The Babylonian Precedent.

One could say that the political situation of diaspora Jews today, in relation to the non-Jewish societies in which they live by choice, is generally similar to the political situation of Babylonian Jewry at the time of Mar Samuel. A specific difference, though, is that during the time of Mar Samuel in Babylonia, Jewish courts had some civil

²⁹ For an excellent study of the legal situation in Roman Palestine, see A. N. Sherwin-White, *Roman Society and Roman Law in the New Testament* (Oxford: Oxford University Press, 1963), 1-43.

³⁰ See B. Shabbat 33b; B. Baba Metsia 84a; Y. Eruvin 3.5/21b.

jurisdiction; Jewish courts today have no civil jurisdiction anywhere. At that time, then, the question for Babylonian Jewry was how to integrate their system of civil law with the civil law of the larger polity, but without losing altogether their quasi-independence in civil matters. Today, however, nowhere in the Diaspora do Jewish courts have any real jurisdiction at all. (That is even so in the State of Israel, but there the relation of religious courts and secular courts is much more complex, largely because the State of Israel has no real constitution.) And without civil jurisdiction, Jewish Acourts@ have no power to subpoena anyone to present his or her case before them.³¹

Because of this lack of civil jurisdiction, I do not think a Jew has any obligation (*hovah*) to bring his or her civil case to a Jewish religious court, or answer the summons (*hazmanah*) of a Jewish religious court for a judgment according to Jewish law (*din torah*), even if that case involves a fellow Jew. At most, it is commendable (a *mitsvah min ha-muvhar* in talmudic language) to do so *if* one chooses to do so. And there is no legal penalty for choosing not to do so. Minimally, going to a Jewish court today is optional or permitted (*reshut*).

We now have the opposite of what Maimonides saw as what is to be done when Jewish courts do have civil jurisdiction. To realize the political situation Maimonides assumes, where a Jewish court has civil authority, that seems to be almost utopian. It would require the reestablishment of the Sanhedrin, with the State of Israel accepting this Sanhedrin as both its legislature and Supreme Court.³² (And even then, it would be questionable whether this reestablished Sanhedrin would have any civil authority over the

³¹ See David Novak, "Jewish Marriage and Civil Law: A Two-Way Street?" *George Washington Law Review* 68 (2000), 1059-78.

³² For an interesting proposal for the reestablishment of the Sanhedrin, written by the State of Israel's first Minister of Religious Affairs (*sar ha-datot*), Judah Leib Maimon, see his *Hiddush ha-Sanhedrin be-Medinatenu ha-Mehuddeshet* [Heb.] (Jerusalem: Mosad ha-Rav Kook, 1967).

Jews of the Diaspora, anymore than any Israeli legislature or court B secular or religious B has any such authority now.) Most political realists today do not see the possibility of any such political situation being realized in the foreseeable future.

A Jew who is a citizen of a constitutional democracy thereby accepts the legal authority of that state by his or her free ascent to the social contract each citizen of that state is a party to, either by becoming a citizen of that state when born somewhere else, or by exercising one=s citizenship when becoming an adult in the same society where one was born.³³ In fact, this is the way the twelfth century Ashkenazic commentator, Rabbi Samuel ben Meir (*Rashbam*), the grandson of Rashi, justified Athe law of the state is law@ (*dina de-malkhuta dina*): the law is binding on the citizens of the state because they have accepted the authority of that state and its law of their own free will (*mi-retsonam*) B and that includes the Jewish living in that state and accepting its jurisdiction in civil and criminal matters.³⁴ Once that authority is accepted, a diaspora Jew has the obligation to bring his or her civil case before an authorized secular court B even if afterwards that same secular court authorizes a panel of mediation made up of rabbis to decide the case according to Jewish law. But Jewish law here is binding only because the secular court has permitted Jews to accept the ruling of its rabbinical judges of their own free will. But not to do so, does not seem to contradict Jewish law. One cannot find an explicit source in the sources of Jewish law that actually forbids a Jew from becoming a citizen of a non-Jewish state and being governed by its civil and criminal law, when that state does not require a Jew to renounce Judaism as the price of admission.

³³ See David Novak, *The Jewish Social Contract* (Princeton, NJ: Princeton University Press, 2005), 1-29.

³⁴ Baba Batra 54b, Rashbam, s.v. “ve-ha’amar Shmuel.”

5. The Question of Divinely Mandated Law.

To follow the Babylonian precedent I have just described and analyzed, it seems one could only do so in good faith (*bona fide*) today if he or she accepted the authority of the law of a non-Jewish state because that state, somehow or other, considers itself answerable to a higher law. Any state that claims ultimate moral authority for itself is itself immoral, certainly by Jewish criteria. Being answerable to that higher law means that higher law is not answerable to the state that draws its legitimacy from it. The state cannot repeal that higher law because the state did not make that higher law. A state can only repeal a law it has made, just as the citizens of a state can repeal the very existence of the state they have made. Indeed, by the criteria of that higher law, the legitimacy of a state can be denied, even by its own citizens. (Remember the recent dissolution of what is now the former Soviet Union.)

For American and Canadian Jews, this is not a problem. The American *Declaration of Independence* (for many the true preamble to the Constitution of the United States) states that “all men are created equal, that they are endowed by their Creator with certain unalienable rights.”³⁵ And the Canadian *Charter of Rights and Freedoms* begins with these words: “Whereas Canada is founded on principles that recognize the supremacy of God and the rule of law.” (And I read that statement to be two phrases in apposition, viz., the supremacy of God underlies a law rooted in God’s will.) Nevertheless, many European nation-states do not affirm any divine warrant. And, in fact, there is now great debate in Europe about whether the proposed constitution for the European Union should or should not mention God.

³⁵ See Novak, *In Defense of Religious Liberty*, 42-49; *Jewish Social Ethics*, 232-34. However, cf. Alan Dershowitz, *America Declares Independence* (Hoboken, NJ: John Wiley and Sons, 2003), 100.

Whether or not the absence of God from a constitution makes that the establishment of atheism *de facto*, that is hard to say. However, without an explicit affirmation in theory of the God-human connection, how can the uniqueness of human being can be consistently affirmed and respected in practice? Surely, one could make a strong argument for the fact that what makes human beings distinct creatures in the world is their concern for God, and their belief that God is concerned with them. Without that affirmation of the uniqueness of human being, what reason is there to protest the policies of those who have political, military, or economic power in the state from treating human beings as things it owns and can therefore keep or discard at will? Without a divine warrant, how can human rights be regarded as anything but revocable entitlements from the state? Without a divine warrant, who else could create human rights and judge those who violate them except the state? Here the state is what Hobbes famously called Athis mortal god.³⁶ Like all mortals this Agod@ is a creature and not the Creator. To ascribe ultimate moral authority to any creature is the sin of idolatry (*avodah zarah*). Perhaps that is why the third century Palestinian authority, Rabbi Yohanan bar Nappaha, assumed that Babyonian idolatry is only Aancestral custom@ (*minhag avoteihem be-yadeihem*).³⁷ He might have said that because: How could a just legal system be based on the falsehood (*sheqer*) of idolatry? If the Babylonians were really idolaters, wouldn=t their legal system be unjust as the legal system of the Roman idolaters who rule Palestine?³⁸

I would add that Rabbi Yohanan=s opinion is quite different from that of many contemporary atheists, who presume that *all* religious references in secular legal systems are only meaningless cultural remnants that should soon be forgotten altogether. Rabbi

³⁶ *Leviathan*, chap. 17, ed. Michael Oakeshott (New York: Collier Books, 1962), 132.

³⁷ B. Hullin 13b. See B. Avodah Zarah 65a.

³⁸ For the recognition of at least Babylonian idolatrous praxis, see e.g. B. Eruvin 80a.

Yohanan, conversely, believed that ultimately the Babylonians and the Jews acknowledged the same one true God.³⁹

Even when the laws of such a God-denying society are consistent with the rational principles of justice derived from divine law B Noahide and Mosaic B it seems such similarity is like the similarity between divinely founded Jewish law and some of the laws of Roman occupied Palestine (as we have seen), that similarity is accidental, not principled. Being accidental, it is also ephemeral: here today; gone tomorrow. In that situation, a Jew can still live in such a polity; indeed, he or she can still even want to live in such a society because of its many benefits: political, military, and economic. Such a state can provide one with much individual freedom, much physical security, and much financial opportunity. The question is whether a Jew can sincerely pray for such a society to the God that society has denied by forgetting its religious past. And if one cannot pray for such a society, by Jewish moral criteria can one really live there in good faith (*b=emunah*)? That is the great moral question facing diaspora Jews today.

³⁹ The recognition that Christians and Muslims worship the One God and accept divinely mandated law led the 14th century Provençal commentator, Menahem ha-Meiri, to argue that the various civil disabilities the ancient Rabbis decreed for free gentiles living under Jewish rule (itself something totally hypothetical at the time) no longer apply, because only these earlier gentiles were taken to be idolatrous antinomians. See *Bet ha-Behirah: Baba Kama 38a*, ed. K. Shulsinger (Jerusalem: Mosad ha-Rav Kook, 1967), 122; also, Novak, *The Image of the Non-Jew in Judaism*, 351-56.