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A Jewish Law View of World Law

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THE FOUNDATIONS OF LAW

I. INTRODUCTION

Professor Berman's conception of world law is dramatic in that it not only articulates a vision of international law for nations but also envisages a structure of world law for individual citizens of this planet. Before I undertake a systemic analysis of the incorporation of world law into Jewish law,[3] I need to put forward some of my own reservations, perhaps reflecting the Jewish tradition as I understand it, and perhaps stemming from the Jewish experience (with emphasis on the past as well as the present) as I comprehend it. Despite wonderful contemporary exceptions such as the United States[4] (and Canada),

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[3] Jewish law, or *halakha*, is used herein to denote the entire subject matter of the Jewish legal system, including public, private, and ritual law. A brief historical review will familiarize the new reader of Jewish law with its history and development. The Pentateuch (the five books of Moses, the *Torah*) is the elemental document of Jewish law and, according to Jewish legal theory, was revealed to Moses at Mount Sinai. The Prophets and Writings, the other two parts of the Hebrew Bible, were written over the next 700 years, and the Jewish canon was closed around the year 200 before the Common Era ("B.C.E."). The close of the canon until year 250 of the Common Era ("C.E.") is referred to as the era of the *Tannaim*, the redactors of Jewish law, whose period closed with the editing of the *Mishnah* by Rabbi Judah the Patriarch. The next five centuries were the epoch in which scholars called *Amoraim* ("those who recount" Jewish law) and *Savoraim* ("those who ponder" Jewish law) wrote and edited the two Talmuds (Babylonian and Jerusalem). The Babylonian Talmud is of greater legal significance than the Jerusalem Talmud and is a more complete work.

The post-Talmudic era is conventionally divided into three periods: (1) the era of the *Geonim*, scholars who lived in Babylonia until the mid-eleventh century; (2) the era of the *Rishonim* (the early authorities), who lived in North Africa, Spain, Franco-Germany, and Egypt until the end of the fourteenth century; and (3) the period of the *Aharonim* (the latter authorities), which encompasses all scholars of Jewish law from the fifteenth century up to this era. From the period of the mid-fourteenth century until the early seventeenth century, Jewish law underwent a period of codification, which led to the acceptance of the law code format of Rabbi Joseph Karo, called the *Shulhan Arukh*, as the basis for modern Jewish law. The *Shulhan Arukh* (and the *Arba'ah Turim* of Rabbi Jacob ben Asher, which preceded it) divided Jewish law into four separate areas: *Orah Hayyim* is devoted to daily, Sabbath, and holiday laws; *Even HaEzer* addresses family law, including financial aspects; *Hoshen Mishpat* codifies financial law; and *Yoreh Deah* contains dietary laws as well as other miscellaneous legal matter. Many significant scholars—themselves as important as Rabbi Karo in status and authority—wrote annotations to his code which made the work and its surrounding comments the modern touchstone of Jewish law. The most recent complete edition of the *Shulhan Arukh* (Vilna, 1896) contains no less than 113 separate commentaries on the text of Rabbi Karo. In addition, hundreds of other volumes of commentary have been published as self-standing works, a process that continues to this very day. Besides the law codes and commentaries, for the last 1200 years, Jewish law authorities have addressed specific questions of Jewish law in written *responsa* (in question and answer form). Collections of such *responsa* have been published, providing guidance not only to later authorities but also to the community at large. Finally, since the establishment of the State of Israel in 1948, the rabbinical courts of Israel have published their written opinions deciding cases on a variety of matters.

[4] For an explanation of why the American experience to date has been unmitigatingly positive, see JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 143–85 (2d ed. 2005).

the Jewish encounter with secular law has been routinely harsh, leading me to question any untempered optimism in an expansive system of world law.[5]

I would suggest that the glaring potential problem of world law is that it might end up being merely another version of legal positivism and majoritarian rule, such that the decisions of the many or the powerful become the standards of the group, which are coerced upon us all. World law, like municipal law in many locations across the globe, would revert to being, to borrow a term from Justice Holmes, a "game according to the rules,"[6] without justice—both procedural and substantive—as its goal. Confident as we would like to be that the collective decisions of the global community would produce just results, the remembered Jewish experience of being a minority religion, an *other*, in a vast society has hardly been overwhelmingly positive and has rarely inspired the Jewish community to believe that one can successfully put one's faith and trust in the just nature of one's neighbors.

Although Professor Berman views the South African experience with AIDS drugs as a positive step in the development of world law (as it represents the assertion of the voices of non-national stakeholders on the global stage),[7] others could reasonably look at it simply as theft by the majority of the rights of those who have invested their money, time, and effort into developing drugs. Indeed, Professor Berman himself offers no substantive defense of the matter, but simply reflects on the political pressure placed on a justice system until property rights are relinquished in the face of threats of mob violence. If all that world law becomes is the product of vast majoritarian democracy—with few, if any, minority or property rights because the community as a whole will determine what everybody can or cannot do—then the Jewish community and the Jewish tradition would view this development as a step backward in positive social evolution.

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[5] For an example of changes to Jewish law rising from its encounter with the just American system, see Michael J. Broyde, *Informing on Others for Violating American Law: A Jewish Law View*, 41 J. HALACHA & CONTEMPORARY SOCIETY 5 (2002).

[6] As Judge Learned Hand recalled:

> I remember once I was with [Justice Holmes]; it was a Saturday when the Court was to confer. It was before we had a motor car, and we jogged along in an old coupé. When we got down to the Capitol, I wanted to provoke a response, so as he walked off, I said to him: "Well, sir, goodbye. Do justice!" He turned quite sharply and he said: "Come here. Come here." I answered: "Oh, I know, I know." He replied: "That is not my job. My job is to play the game according to the rules."

LEARNED HAND, THE SPIRIT OF LIBERTY 306–07 (3d ed. 1960).

[7] Harold J. Berman, *The Historical Foundations of Law*, 54 EMORY L.J. 13, 22–23 (2005).

When one speaks about world law from the perspective of the Jewish tradition, it is not enough to consider the community that we are forming and the international treaties that are now developing; it is necessary instead to ponder the procedural and substantive safeguards that need to be put in place to protect the rights of people to be different and unique. For world law to truly succeed, nations and persons must be free to be individual and distinctive, free to preserve their own history and communities as they choose, and free from unjust pressure to conform to collective standards.

Taken to its logical extreme, world law has the potential to eliminate regional diversity and culture. It will compel adherence to communal norms that have never fit particular regions, religions, or geographical units. There is little text and context in the discussion of world law that presents it as something more than an Athenian democracy, where the sense of the majority is imposed on the minority. It is, in fact, only through minority rights that a real and just world law will be measured.

II. JEWISH LAW AND THE INCORPORATION OF WORLD LAW: A TECHNICAL ANALYSIS

Notwithstanding the jeremiad in the introduction, the rest of this paper will explore two basic Jewish law questions which reflect on the technical issues related to Professor Berman's world law proposal. The first question asks how Jewish law views public international law and whether public international law can be incorporated into the corpus of Jewish law. The second question asks how Jewish law generally incorporates domestic (municipal) law into Jewish law and if this classical paradigm of integration assists in formulating a Jewish law view of world law. To the best of my knowledge, the first matter is a question of nearly first impression[8] in the Jewish law literature.

A. Public International Law as Incorporated into Jewish Law

Public international law is—at its core—a system of treaties and agreements and can be readily analyzed within the Jewish law framework for international agreement. The book of Joshua recounts the story of the first treaty that the Jewish nation entered into as follows:

[8] At the Tenth Annual Orthodox Forum of Yeshiva University, March 2004, a draft paper on International Law and *Halakha* was presented by Rabbi Jeremy Wieder of Yeshiva University, which this author was privileged to read.

> The people of Gibeon[9] heard what Joshua did to Jericho and to Ai.[10] And they worked with trickery and they made themselves to look like ambassadors . . . And they went to Joshua at Gilgal and said to him, and to all the people of Israel, "We have come from a far land; make a treaty with us" . . . . And they said to Joshua, "We are your servants;" he said to them, "Who are you and where do you come from?" They replied, "From a very far away land . . . ." And Joshua [and the Jews] made peace with them and he signed a treaty with them which was sworn on [ratified by] the presidents of the tribes. And it was at the end of three days after the treaty was signed that [the Jewish nation] heard that [the Gibeonites] were neighbors and lived nearby. The people of Israel traveled and came to their cities on the third day . . . . And the people of Israel did not attack them since the presidents of the tribes had ratified [the treaty]—in the name of God, the God of Israel. The nation [of Israel] complained to the presidents of the tribes. The presidents replied, "We swore [not to attack them] by the name of the God of Israel and thus we cannot touch them."[11]

Though the treaty was entered into under fraudulent pretexts, the Jewish people nonetheless maintained that the treaty was morally binding on them. Indeed, Maimonides, in his classic medieval code of Jewish law, almost exclusively following this Biblical incident, codifies the central rule of treaties as follows: "It is prohibited to breach treaties . . . ."[12]

Rabbi David ben Solomon Ibn Avi Zimra (Radvaz) in his commentary on Maimonides's law code explains that "this is learned from the incident of the Gibeonites, since breaking one's treaties is a profanation of God's name."[13] According to this rationale, the reason why the Jewish nation felt compelled to honor its treaty with the Gibeonites—a treaty that in the very least was entered into under false pretenses—was that others would not have comprehended the entirety of the circumstances under which the treaty was signed and would have interpreted the abrogation of the treaty as a sign of moral laxity on the

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9 Non-Jewish Inhabitants of central Israel.

10 These two cities were destroyed.

11 *Joshua* 9:3–19 (internal citations added).

12 Maimonides, *Laws of Kings and Their Kingdoms* 6:3. Rabbi Moses ben Maimon, known as Maimonides or by the Hebrew acronym Rambam, was the foremost Jewish scholar and philosopher of the Middle Ages. Born in Cordova, Spain, in 1138, he eventually settled in Old Cairo and became personal physician to the sultan Saladin, as well as chief rabbi, head of the rabbinical court, and leader of the Jewish community. He died there in 1204.

13 Radvaz, *Commentary of Radvaz ad loc.* Radvaz, 1479–1573, left Spain for Safed, Israel, following the 1492 expulsion and served as the chief rabbi of Cairo for forty years. Such can also be implied from Maimonides's own comments in *Laws of Kings and Their Kingdoms* 6:5.

part of the Jewish people. One could argue based on this rationale that in circumstances where the breach of a treaty would be considered reasonable by others, it would be permissible to abrogate it.[14]

Rabbi Levi ben Gershon (Ralbag) understands the nature of the obligation to observe treaties differently; he claims that the treaty with the Gibeonites had to be honored because the Jewish nation "swore" (to God) to observe its obligation, and the nations of the world would have otherwise thought that the Jewish nation does not believe in a God and thus do not take their promises seriously (collectively and individually).[15]

Rabbi David Kimchi (Radak) advances an even more radical understanding of the nature of this obligation. Among the possible reasons he suggests to explain why the treaty was honored—although it was void as it was entered into based solely on the fraudulent assurances of the Gibeonites—is that others would not be aware that the treaty was in fact void and would (incorrectly) identify the Jewish nation as the breaker of the treaty. He states that this fear, that the Jewish nation would be wrongly identified as a treaty breaker, is enough to require that the Jewish nation keep all treaties duly entered into.[16] Views similar to each of these three views can be found among many other commentators and decisors.[17]

Each of these theories—whatever the precise parameters of the obligation to honor treaties is based upon—presupposes that treaties are basically binding according to Jewish law.[18] It is only in the case of a visibly obvious breach of the treaty by one party that the second party may decline to honor it. Thus, Jewish law accepts that when a war is over, the peace that is agreed to is

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[14] In Judaism, the tenn "*hilul haShem*" (desecration of God's name) denotes a prohibition whose parameters are fixed not by objective legal determinations, but by the perceptions of observers in the moral sphere. This is a very atypical prohibition in the Jewish legal system.

[15] Ralbag, *Commentary of Ralbag to Joshua* 9:15. Rabbi Levi, 1288–1344, lived and wrote in France.

[16] Radak, *Commentary of Radak to Joshua* 9:7. Rabbi David, 1160–1235, one of several outstanding grammarians and commentators of the Kimchi family, lived in Narbonne (Provence). This theory would have relevance to a duly entered into treaty that was breached by one side in a nonpublic manner and which the other side now wishes to abandon based on the private breach of the other side. Radak would state that this is not allowed because most people would think that the second breaker is actually initiating the breach and is not taking the treaty seriously.

[17] *Compare* Tosafot, *Gittin* 46a *s.v. kivan, with* Rashba *id. s.v. verabanan, and* Ritva *id.* (each of whom struggles to resolve certain crucial details). However, all three assume that valid treaties are binding.

[18] This is also the unstated assumption of the Babylonian Talmud, *Gittin* 45b–46a, which seeks to explain why treaties made in error might still be binding.

binding. Indeed, even in a situation where there is some unnoticed fraud in its enactment or ratification, such a treaty is still in force.

This broad approach to the binding nature of treaties is fully consistent with the general Jewish law conceptualization of universal law (called, in the Jewish tradition, "Noahide laws"[19]). Jewish law recognizes seven basic frameworks of universal commandments as part of a universal law code;[20] the final commandment in this universal code is the obligation to create "law enforcement" or a system of justice. Two different interpretations of this obligation are found among the early authorities. Maimonides rules that the obligation to create laws requires only that the enumerated universal laws be enforced in practice and that society need not create a more general universal law (although, presumably, it may). Maimonides states:

> How are all obligated to create laws? They must create courts and appoint judges in every province to enforce these six commandments . . . for this reason the inhabitants of Shechem [the city] were liable to be killed[21] since Shechem [the person] stole[22] [Dina], and the inhabitants saw and knew this and did nothing.[23]

According to Maimonides, every society bears an obligation to create and enforce the universal precepts of law that Jewish law believes to be binding on all humans. Nahmanides argues with this formulation and understands the obligation of justice to be much broader. In his view, it encompasses not only the obligations of society to enforce particular regulations of the Noahide canon, but it also obligates society to create general rules of law governing all aspects of justice such as matters of fraud, overcharging, repayment of debts, and the like.[24]

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[19] A reference to the fact that we are all descents of Noah. *See* AARON LICHTENSTEIN, THE SEVEN LAWS OF NOAH (2d ed. 1986).

[20] The Talmud (*Sanhedrin* 56a) recounts seven categories of prohibition: idol worship, taking God's name in vain, murder, prohibited sexual activity, theft, eating flesh from a living animal, and the obligation to enforce laws. As is obvious from this list, these seven commandments are generalities which contain within them many specifications—thus, for example, the single categorical prohibition of sexual promiscuity includes both adultery and the various forms of incest; according to Samuel ben Hofni, thirty specific commandments are included. *See generally* LICHTENSTEIN, *supra* note 19; ENCYCLOPEDIA TALMUDICA 3:394–96 (1956) (appendix).

[21] *See Genesis* 34.

[22] As to why Maimonides uses the word "stole" to describe abduction, see Babylonian Talmud, *Sanhedrin* 55a and Moses Sofer, *Hatam Sofer. Yoreh Deah* 19.

[23] Maimonides, *Laws of Kings and Their Kingdoms* 10:14 (internal citations added) (elsewhere Maimonides explained one of the commandments, and thus refers to only six in this context).

[24] Nahmanides, *Commentary of Nahmanides to Genesis* 34:14 (Bernard Chavel trans., 1960). Rabbi Moses ben Nahman, known as Nahmanides or by the Hebrew acronym Ramban, was the outstanding Jewish

World law would, in theory, be a fulfillment of this obligation. It is clear that Jewish law could well imagine the creation of world law in the field of public international law, grounded in reciprocal treaties, and mandated by society as a fulfillment of the obligation to create an ordered and just society. Treaties to impose international law—if properly entered into and enforced by the many nations of the world, would be fully valid in Jewish law. Jewish law might even smile on a proposal to universalize such justice, if it were properly done.

B. Private International Law: Common Commercial Custom

Any analysis of world law through they eyes of Jewish law cannot stop at treaties, as treaties would seem to be limited to areas of public international law, areas where the law is imposed on nations by agreements to which they mutually consent. Professor Berman's proposal goes much further than that—in that world law aims to bind individuals as well as nations. Jewish law has two distinctly different mechanisms for incorporating private international laws and norms into Jewish law. The first is common commercial custom, and its application to world law is quite crucial.

Jewish law provides that: (1) any condition that is agreed upon with respect to monetary matters is valid under Jewish law,[25] and (2) customs established among merchants acquire Jewish law validity,[26] provided that the practices stipulated or commonly undertaken are not otherwise prohibited by Jewish law.[27] These two principles are arguably interrelated; commercial customs are sometimes said to be binding because business people implicitly agree to abide by them.

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law authority, commentator, and disputant of his generation. Born in Gerona, Spain, in 1194, he immigrated to Jerusalem in 1267 and died there in 1270.

[25] *See generally* MENACHEM ELON, THE PRINCIPLES OF JEWISH LAW §§ 880–987 (1975).

[26] *Id.*

[27] Jewish law prohibits a debtor from offering a "pound of flesh" as collateral for a loan. Even if the borrower and the lender and the general community of merchants accept such a practice, Jewish law would nonetheless reject such practice as invalid. *See* Shelomoh Yosef Zevin, *Mishpat Shylock Lefi Ha-Halakhah* [Shylock in Jewish Law], *in* LE-'OR HA-HALAKHAH: BE'AYOT U-VERURIM 310–36 (2d ed. 1957).

The Mishnah pronounces the validity of commercial customs. It states:

> What is the rule concerning one who hires workers and orders them to arrive at work early or to stay late? In a location where the custom is to not come early or stay late, the employer is not allowed to compel them [to do so] . . . . All such terms are governed by local custom.[28]

The Shulhan Arukh makes it clear that common commercial practices override many Jewish law default rules that would otherwise govern a transaction.[29] Moreover, these customs are valid even if the majority of the business people establishing them are not Jewish. Rabbi Moses Feinstein, leading Jewish law authority of late twentieth century America, explains:

> It is clear that these rules which depend on custom . . . need not be customs . . . established by Jewish law scholars or even by Jews. Even if these customs were established by Gentiles, if the Gentiles are a majority of the inhabitants of the city, Jewish law incorporates the custom. It is as if the parties conditioned their agreement in accordance with the custom of the city.[30]

In addition, many authorities rule that such customs are valid under Jewish law even if they were established because the particular conduct in question was required by secular law.[31]

Nevertheless, authorities debate whether commercial custom can (by introducing non-native concepts) substantively alter Jewish law or merely

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[28] Babylonian Talmud, *Bava Metzia* 83a.

[29] *Shulhan Arukh, Hoshen Mishpat* 331:1; *see also* Jerusalem Talmud, *Bava Metzia* 27b (statement of Rav Hoshea, "Custom supersedes *halakha*"); Joseph Kolon, *Maharik*, at no. 102; Shlomo Shwadron, *Maharashdam*, at no. 108.

[30] Moses Feinstein, *Iggerot Moshe, Hoshen Mishpat* 1:72 (1964); *see also* Yehiel Mikheil Epstein, *Arukh HaShulhan, Hoshen Mishpat* 73:20. *See generally* Steven H. Resnicoff, *Bankruptcy: A Viable Jewish law Option?*, 24 J. HALACHA & CONTEMP. SOC. 10 (1992).

[31] *See, e.g.*, Yitzhak Blau, *Pit'hei Hoshen, Dinei Halva'ah*, at chap. 2, *halakha* 29, n.82; David Chazan, *Nidiv Lev*, at no. 12; Eliyahu Chazan, *Nidiv Lev*, at no. 13; Isaac Aaron Ettinger, *Maharyah HaLevi* 2:111; Moses Feinstein, *Iggerot Moshe, Hoshen Mishpat* 1:72 (1964); Israel Landau, *Beit Yisroel*, at no. 172; Avraham Dov Baer Shapiro, *D'var Avraham* 1:1. For example, Yosef Iggeret states:

> One cannot cast doubt upon the validity of this custom on the basis that it became established through a decree of the King that required people to so act. Since people always act this way, even though they do so only because of the King's decree, we still properly say that everyone who does business without specifying otherwise does business according to the custom.

Yosef Iggeret, *Divrei Yosef*, at no. 21.

create alternative methods and mechanisms which resemble existing Jewish law. For example, there are various conventions on how to "seal a deal." In some industries, it is said that a handshake is considered binding. These customs are referred to as *situmta*. It is agreed that *situmta* can effectuate the transfer of title to property (*kinyan*). This is true even though, but for the custom, the particular practice would not otherwise constitute a valid form of transferring title according to Jewish law. Thus, *situmta* can be used as a substitute for the normal procedures for achieving a *kinyan*. There is a classical controversy among medieval Talmudic commentators, however, as to whether the mechanism of *situmta* is capable of effecting actions or outcomes not normally possible according to Jewish law.

Rabbi Asher, Rabbi Solomon Luria, and others contend that *situmta* can accomplish more than traditional Jewish law forms of effecting a deal. For example, even though Jewish law has no native mechanism for transferring ownership of an item that does not now exist in the world, this approach argues that, if the commercial practice of a particular society included a procedure for such transfers, Jewish law in that place would incorporate the practice as valid and enforceable.[32] Again, no basic Jewish law form of *kinyan* permits someone to sell *something* that does not yet exist or to sell to *someone* who does not yet exist.[33] Nevertheless, Rabbi Solomon ben Aderet (Rashba) states:

> Great is the power of the community, which triumphs even without a *kinyan* . . . . Even something which is not yet in existence can be

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[32] Asher ben Yehiel, *Responsa of the Rosh* 13:20 (Asher ben Yehiel (1250–1327) was a Franco-German Tosafist who relocated to Toledo, Spain); Meir ben Baruch (Maharam) of Rothenberg (1215–1293; Franco-German Tosafist and teacher of Rabbi Asher), cited in *Mordekhai*, on Babylonian Talmud, *Shabbat*, at no. 472.; Solomon Luria, *Maharshal* 36 (Luria, a Pole, lived from 1510–1574); *see also* Jacob Lorberbaum, *Netivot HaMishpat. Biurim on Shulhan Arukh, Hoshen Mishpat* 201:1 (appearing to agree).

[33] Jewish law distinguishes between different categories of things "that do not yet exist." Perhaps the most contentious case concerns a person's ability to agree to sell property that exists but that he does not possess. The origin of this controversy is found in a difference of opinion between the Sages (a term used to refer collectively to a number of Talmudic Rabbis) and Rabbi Meir regarding the case of a man who attempts to take all the legal steps necessary to marry a woman at a time before it is legally permissible for them to be wed.

"Suppose a man says to a woman, 'Be wedded to me after . . . your husband dies.' . . . [Then the woman's husband dies. The Sages rule:] she is not wed. Rabbi Meir rules: she is wed." Babylonian Talmud, *Kiddushin* 63a. According to Jewish law, formation of a Jewish marriage requires a man to acquire "ownership" interests in his intended and the woman's agreement to transfer herself to him. Consequently, the Talmud interprets the debate between the Sages and Rabbi Meir as founded on the basic issue as to whether a person has the power to effectuate a deal involving property not yet in existence or not yet in his possession. The Talmud applies and extends this argument to the sale of a field that the seller has not yet acquired to "what my trap shall ensnare," to "what I shall inherit," and to "the fruit that will grow on a particular tree in the future." Babylonian Talmud, *Bava Metzia* 16b, 33b. In each of these cases, the Sages rule that the agreement is not legally effective or binding.

> sold to someone who does not yet exist [if community practice so provides].[34]

If Aderet is correct and commercial custom can allow transactions to be accomplished that could not otherwise have been achieved under Jewish law, it is possible that world law would create obligations profoundly not found in Jewish law, yet they could be introduced into Jewish law under the rubric of common commercial custom.

Other Jewish law authorities, however, maintain that Aderet is wrong to attribute expansive powers to non-native mechanisms. Rabbenu Yehiel and others posit that a customary convention functions only as a *substitute* method by which to transfer title and cannot be more effective under Jewish law than the forms of *kinyan* recognized by the Talmud.[35] According to this view, then, the capacity of Jewish law to assimilate world law precepts and private obligations would be somewhat more limited in that it would only be able to incorporate by convention those that could, as a matter of Jewish law theory, be accomplished by Jewish law mechanisms.[36]

C. The Obligation To Obey the Law of the Land and World Law

Jewish law has another framework for understanding and relating to other legal systems, and though it is usually invoked to assess Jewish law's relationship to municipal law, it should be relevant to a discussion of world law as well. The Jewish law doctrine that "the law of the land is the law" provides that, in certain circumstances and for particular purposes, secular law is legally effective under Jewish law. A survey of the scope of the obligation to obey secular law generally is well beyond the scope of this Essay. However, a brief review of the relevant theories is required to appreciate how the doctrine of the "law of the land is the law" would impact on the acceptance of world law in the Jewish tradition.

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[34] Solomon ben Aderet, *Responsa of Rashba* 1:546. Aderet, 1235–1310, was the chief rabbi of Barcelona.

[35] Rabbenu Yehiel ben Joseph of Paris (born late in the twelfth century and died in 1286 in Palestine) is cited in *Mordekhai*, on Babylonian Talmud, *Shabbat*, at no. 473 and in *Tashbetz (Katan)*, at no. 378. A similar approach can be found in David ibn Zimra, *Radvaz* 1:278, and is accepted as correct by Aryeh Leib HaKohen Heller, *Kitzot HaHoshen on Shulhan Arukh, Hoshen Mishpat* 201:1.

[36] For an excellent application of this dispute, see Michael J. Broyde & Steven H. Resnicoff, *Jewish Law and Modern Business Structures: The Corporate Paradigm*, 43 WAYNE L. REV. 1685 (1997) (examining corporations from a Jewish law view).

There are three principal perspectives explaining why "the law of the land is the law" is a binding doctrine in Jewish law:

1. Rabbi Solomon ben Meir (Rashbam)[37] posits that the ruler of a country governs with the consent of the governed, and law is a form of social contract binding on the community because they all agree to a process that creates law, even if they do not agree with the content of the final law.

2. Rabbi Solomon Luria posits that the ordered structure of society requires that law exist and that it cannot be solely defined by religious faith. "If this is not the case, the nation will not stand and will be destroyed."[38] Communities need law, and without it society will collapse into anarchy.

3. Rabbenu Nissim posits that the people (perhaps only the Jewish people) reside where they do solely by the grace of the king or government which owns that land. Just as one needs to obey the wishes of one's host when one visits in another person's home, so too one must obey the wishes of one's host nation when one resides in a country.[39]

Each of these theories gives rise to a particular stance concerning robust private world law. A social contract theory has no natural limits on the rule of law, and world law is binding on individuals in the same way as municipal law—it is not the geography that makes the law, but the acceptance. The same can be said for the functional structuralist approach in Jewish law. If the foundation of law is order, then world law is just as binding as national law, which is just as binding as local law. Only those who limit law's binding authority to its coercive authority to expel might limit international law, although if world law becomes an accepted legal institution, it will ultimately acquire the coercive authority to be binding in the Jewish tradition in this theory as well.

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[37] Rashbam, *Commentary of Rashbam to Babylonian Talmud, Bava Batra* 54b, at *s.v. veha'amar Shmuel dina de'malchuta dina*. Rabbi ben Meir, one of the first Tosafists, was born in France ca. 1080 and died ca. 1160.

[38] Solomon Luria, *Yam Shel Shlomo, Bava Kama* 86:14; *see also* Solomon Luria, *Yam Shel Shlomo, Gittin* 81:22.

[39] Rabbi Nissim ben Reuven of Gerona, *Commentary of Rabbenu Nissim to Babylonian Talmud, Nedarim* 28a, at *s.v. bemuhas ha'omed me'alav*. Rabbi ben Reuven was born in Barcelona in 1320 and died in 1380.

A more complex conversation among Jewish law authorities concerns the type of legislation that may be implemented though the "law of the land is the law" doctrine, be it municipal or world law. Three theories again predominate:

1. Rabbi Joseph Karo[40] posits that secular law is binding under Jewish law only to the extent that it directly affects the government's financial interests. Thus, secular laws imposing taxes or tolls would be valid

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[40] Rabbi Joseph Karo, born in Toledo, Spain, in 1488 and died in Safed, Israel, in 1575, is known as the "Author" (*haMehaber*) because of his authorship of the *Shulhan Arukh*. A note on the titles of books in the Jewish legal tradition is needed, if for no other reason than to explain why the single most significant work of Jewish law written in the last 500 years, the *Shulhan Arukh*, should have a name which translates into English as "The Set Table." Unlike the tradition of most Western law, in which the titles to scholarly publications reflect the topics of the works (consider DAVID WESTFALL, FAMILY LAW (1994)), the tradition in Jewish legal literature is that a title rarely names the relevant subject. Instead, the title usually consists either of a pun based on the title of an earlier work on which the current writing comments or of a literary phrase into which the authors' names have been worked (sometimes relying on literary license).

A few examples demonstrate each phenomenon. Rabbi Jacob ben Asher's classic treatise on Jewish law was entitled "The Four Pillars" (*Arba'ah Turim*), because it classified all of Jewish law into one of four areas (see *supra* note 3 for more on this). A major commentary on this work that, to a great extent, supersedes the work itself is called "The House of Joseph" (*Beit Yosef*), since it was written by Rabbi Joseph Karo. Once Karo's commentary (i.e., the house) was completed, one could hardly see "The Four Pillars" it was built on. A reply commentary by Rabbi Joel Sirkes, designed to defend "The Four Pillars" from Karo's criticisms, is called "The New House" (*Bayit Hadash*). Sirkes offered his work (i.e., the new house) as a replacement for Karo's prior house.

When Rabbi Karo wrote his own treatise on Jewish law, he called it "The Set Table" (*Shulhan Arukh*) which was based on (i.e., located in) "The House of Joseph." Rabbi Isserles's glosses on "The Set Table"—which were really intended vastly to expand "The Set Table"—are called "The Tablecloth," because no matter how nice the table is, once the tablecloth is on it, one hardly notices the table. Rabbi David Halevi's commentary on the *Shulhan Arukh* was named the "Golden Pillars" (*Turai Zahav*) denoting an embellishment on the "legs" of the "Set Table." This type of humorous interaction continues to this day in terms of titles of commentaries on the classic Jewish law work, the *Shulhan Arukh*.

Additionally, there are book titles that are mixed literary puns and biblical verses. For example, Rabbi Shabtai ben Meir HaKohen wrote a very sharp critique on the above mentioned "Golden Pillars" (*Turai Zahav*), which he entitled "Spots of Silver" (*Nekudat Hakesef*), which is a veiled misquote of the verse in Song of Songs 1:11 which states "we will add bands of gold to your spots of silver" (*turai zahav al nekudat hakesef*, with the word *turia* "misspelled.") Thus, HaKohen's work is really "The Silver Spots on the Golden Pillars," with the understanding that it is the silver that appears majestic when placed against a gold background.

Other works follow the model of incorporating the name of the scholar into the work. For example, the above mentioned Rabbi Shabtai ben Meir HaKohen's commentary on the *Shulhan Arukh* itself is entitled *Siftei Kohen* "the words (or, literally, the lips) of the Kohen," (a literary embellishment of "Shabtai HaKohen," the author's name, that derives from *Malachi* 2:7—"For the lips of the Kohen [Priest] shall preserve knowledge, and law will be sought from his mouth"—and thus a further example of the motif of referencing biblical phraseology). Rabbi Moses Feinstein's collection of responsa is called "Letters from Moses" (*Iggerot Moshe*).

Of course, a few leading works of Jewish law are entitled in a manner that informs the reader of their content. Thus, the fourteenth-century Spanish sage, Nahmanides (Ramban) wrote a work on issues in causation entitled "Indirect Causation in [Jewish] Tort Law" (*Grama BeNezikin*) and the modern Jewish law scholar Eliav Schochatman's classical work on civil procedure in Jewish law is called "Arranging the Case" (*Seder HaDin*), a modern Hebrew synonym for civil procedure.

under Jewish law,[41] but laws for the general health and safety of society would not.

2. Rabbi Moses Isserles agrees that secular laws directly affecting the government's financial interests are binding, but adds that secular laws which are enacted for the benefit of the people of the community as a whole are also, as a general matter, effective under Jewish law.[42] In this model, all health and safety regulations would also be binding.

3. Rabbi Shabtai HaKohen disagrees with Rabbi Isserles in one respect. He believes that even if secular laws are enacted for the benefit of the community, they are not valid under Jewish law if they are specifically contrary to indigenous Jewish law precepts.[43] Thus, general health and safety rules would be binding, but—for example—Jewish law has a rule that rooftop railings must be about a meter high,[44] and a secular law setting a lower height would not be accepted as valid in Jewish law.

There is substantial debate among Jewish law authorities as to which approach to follow.[45] Nevertheless, it seems that most modern authorities agree that, at least outside of the State of Israel, Rabbi Isserles's view should be applied.[46] Should world law become a legal framework, there is no reason

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[41] *Shulhan Arukh, Hoshen Mishpat* 369:6, 11 (1896).

[42] *Id.* Rabbi Moses Isserles, 1525–1572, lived in Krakow, Poland, and is known as the "Rama."

[43] Shabtai ben Meir HaKohen, *Siftei Kohen (Shakh) on Shulhan Arukh, Hoshen Mishpat* 73:39. Shabtai ben Meir HaKohen, from Lithuania, lived from 1621–1662. Thus, for example, according to Shakh, secular law can require that one return lost property in a case that Jewish law permits, but does not mandate that it be returned, but cannot permit one to keep a lost object that Jewish law requires be returned.

[44] *Shulhan Arukh, Hoshen Mishpat* 427:1.

[45] *See, e.g.*, SHMUEL SHILO, DINA DE'MALKHUTA DINA 145–60 (1974) (listing authorities adopting either the approach of Shakh or Mehaber); Yaakov Breish, *Helkat Yaakov* 3:160 (1965).

[46] This was the approach of Rabbi Moses Feinstein. *See* Moses Feinstein, *Iggerot Moshe, Hoshen Mishpat* 2:62 (1966); Yosef Eliyahu Henkin, *Teshuvot Ibra* 2:176 (1986); *see also* SHILO, *supra* note 45, at 157 (asserting that most Jewish law authorities adopt the Rama's view and lists many of these authorities).

A contemporary rabbi, Menashe Klein, questions whether *dina de'malkhuta dina* applies in the United States, and his view would be the same of world law. He states:

> [The applicability of the principle of] *dina de'malkhuta dina* in our times, when there is no king but rather what is called democracy needs further clarification. As I already explained the position cited in the name of Rivash quoting Rashba, one does not accept *dina de'malkhuta dina* except where the law originates with the king. But in a case where the law originates in courts, and the judges have discretion to rule as they think proper, or to invent new laws as they see proper, there is no *dina de'malkhuta dina*, as there is no law of the king . . . . Indeed, even the government sometimes creates law and the Supreme Court contradicts it. Certainly in such a system there is no *dina de'malkhuta dina* according to Rivash and Rashba.

to assume that this same rule would not apply to it—broad doctrines of law would be binding as the law of the land.

Of course, just as with respect to commercial custom, there is a question as to precisely what "the law of the land is the law" can accomplish. Some Jewish law decisors clearly rule that when this doctrine incorporates secular law into Jewish law, the secular law so incorporated can even accomplish things that would have been hitherto impossible under Jewish law.[47]

Before leaving this subject regarding the significance of secular law under Jewish law it is important to note that the three principal approaches to "the law of the land is the law" described above dealt with the Jewish law validity of secular law as it applies directly to Jews. But Jewish law also takes a position as to the validity of secular law in transactions between non-Jews.

As discussed above in Part II.A, Jewish law provides that non-Jews are bound to observe "the seven laws of Noah," referred to as the "Noahide Code."[48] In part, the Noahide Code requires non-Jews to establish a system of

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Despite Klein's views, it is important to note that most authorities have held that *dina de'malkhuta dina* does not apply only to laws issued by a king. Menashe Klein, *Mishnah Halakhot* 6:277 (1979). Moreover, a number of preeminent Jewish law authorities have specifically held that *dina de'malkhuta dina* applies within the United States and have not found any problems caused by the democratic form of government, the judiciary, the jury system or the possibility of judicial review. See, *supra*, references to Rabbis Moses Feinstein and Eliyahu Henkin.

Indeed, once one acknowledges that *dina de'malkhuta dina* applies to nonmonarchical governments, it is unclear why these other factors would, as a general matter, be problematic as a matter of Jewish law. Furthermore, there is no apparent Jewish law deficiency in the secular system for interpreting the law. Even if a king were to promulgate written laws, he would undoubtedly delegate the daily responsibility of judging cases to others, and such judges would have to interpret the law.

Judges are also required to determine whether legislative acts are consistent with legally superseding documents—such as treaties, constitutions, or even certain other legislative acts. There seems to be no reason why a secular legal system division of power between legislative and judicial branches should impair *dina de'malkhuta dina*.

47 *See* Aryeh Leib HaKohen Heller, *Kitzot HaHoshen* and Jacob Lorberbaum, *Netivot HaMishpat* on *Shulhan Arukh, Hoshen Mishpat* 201:1.

48 Interestingly, today there are individuals who state that they believe themselves to be obligated to observe the Noahide Code. Indeed, some Noahide communities exist. *See, e.g.*, *Ex-Christians Drawn to Noah's Law*, SAN JOSE MERCURY NEWS, Jan. 27, 1991, at 11D. In part, the article states:

> Some are former Christian clergymen who no longer consider themselves Christians. They use many Jewish practices, but don't convert to Judaism.
>
> About 250 of them met in Athens, Tenn., recently, reports Ecumenical Press Service. James D. Tabor, member of an advisory council, says members tend to be "disenfranchised former Christians" who "do not denounce belief in Jesus" but the "most they would say is that he was a great teacher."

commercial laws. According to most Jewish law authorities, such laws may differ from the rules governing transactions that are only between Jews.[49] Moreover, the majority view is that, in a country governed by non-Jews, the secular (municipal) law consequences of transactions among non-Jews is valid and can generally be relied upon by Jews.[50] For example, assume that A and B are not Jewish, and that A sells B a widget in a transaction that would not be effective under Jewish law,[51] but is effective under secular law. C, a Jew, can rely on secular law to establish that B owns the widget and, by purchasing it from B, C becomes its owner under Jewish law. Consequently, it seems reasonable that world law, too, would be a fully effective mechanism between non-Jews and their society, and third-party Jewish participants need not question the efficacy of world law in such contexts.

Tabor says members want to identify with the "ethical monotheism" of Judaism without converting to it. He says that they uphold the "laws of Noah," such as those against idolatry, blasphemy, bloodshed, sexual sins and theft.

Id. These communities seek rabbinic guidance. *See Tennessee Church Studies Judaism*, SUN SENTINEL, May 31, 1991, at 5E (discussing involvement of local Orthodox rabbi). At the time this Essay was written, there was even at least one site on the Internet dedicated to Noahide law. *See* www.noahide.com (last visited Feb. 25, 2005).

[49] *See, e.g.*, Moses Feinstein, *Iggerot Moshe, Hoshen Mishpat* 2:62 (1966); *see also* MICHAEL J. BROYDE, THE PURSUIT OF JUSTICE IN JEWISH LAW: HALAKHIC PERSPECTIVES ON THE LEGAL PROFESSION 83–99 (1996). It is true that Moses Isserles, in *Responsa of Rama* 10, and Moses Sofer, in *Hatam Sofer, Likutim* 14, believe that Nahmanides (commenting on Genesis 34:13) interprets the Noahide commandment regarding laws (*dinim*) as incorporating Jewish commercial rules into the Noahide Code. Nevertheless, an overwhelming number of authorities believe that the Noahide commandment provides non-Jews with the flexibility to adopt different commercial laws. *See, e.g.*, Maimonides, *Laws of Kings and Their Kingdoms* 10:10. The following commentaries within Maimonides, *Laws of Kings and Their Kingdoms*, further address this issue. *See* Abraham Isaiah Karelitz, *Hazon Ish ad loc.*; Issser Zalman Meltzer, *Even haAzel Hovel uMazik* 8:5; Yom Tov Ishbili, *Teshuvot HaRitva*, at no. 14 (quoted by Beit Yosef, *Tur, Hoshen Mishpat* 66:18); *Tosafot*. Babylonian Talmud, *Eruvin* 62a (*s.v. ben Noah*); Yehiel Mikheil Epstein, *Arukh HaShulhan heAtid, Melakhim* 79:15; Naftali Tzvi Berlin, *He'amek She'alah* 2:3; Abraham Isaac Kook, *Etz Hadar* 38, 184; Zvi Pesah Frank, *Har Tzvi Orah Hayyim*, vol. II, *Kuntres Milei diBerakhot* 2:1; Ovadiah Yosef, *Yehaveh Da'at* 4:65; Yitzhak Yaakov Weiss, *Minhat Yitzhak* 4:52:3. For a more complete analysis of this issue, see Nahum Rakover, *Jewish Law and the Noahide Obligation to Preserve Social Order*, 12 CARDOZO L. REV. 1073, 1098–1118 (1991).

[50] Secular rules enacted pursuant to the Noahide Code *may* be enforceable by a Jewish litigant against another Jewish litigant, but only if the latter has no substantial connection to Jewish law and would not wish to be governed by Jewish law. Thus, Sternbuch, in *I Teshuvot veHanhagot*, at no. 795 (1989), suggests the possibility that a litigant who does not generally observe Jewish law and who would not adhere to Jewish financial law when it would be to his detriment *may* not be entitled to insist on Jewish law's rules when they would inure to his benefit. In some areas of law, an apostate has the same status as a non-Jew. Sternbuch states that it is not clear whether this rule applies to commercial transactions in which it would operate to the apostate's detriment. For more on this, see Yehudah Amihai, *A Gentile Who Summons a Jew to Beit Din*, 12 TEHUMIN 259, 265 (1991). Thus, even authorities who would not ordinarily apply *dina de'malkhuta dina* to enforce secular law against religiously observant Jews enforce secular law against non-observant Jews.

[51] For example, the sale might be void or voidable as violative of the Jewish law prohibition against price gouging. *See, e.g.*, AARON LEVINE, FREE ENTERPRISE AND JEWISH LAW 99–110 (1980).

A brief conclusion is needed to these three technical matters. Jewish law generally recognizes that international law as enacted by treaties agreed to by nations is a valid form of law in the Jewish tradition and becomes binding on all citizens of those nations. Furthermore, Jewish law recognizes that even when no formal treaty is enacted, international law could become valid through the doctrine of "the law of the land is the law" being a valid source of law. Finally, Jewish law notes that even when there is no law, either national or international, the rubric of common commercial custom, which is fully binding under Jewish law, can form the foundation for global commercial interactions. World law thus could be a possibility in Jewish law.

III. CONCLUSION

Even if an expansive world law in both public and private spheres could be incorporated into a Jewish law framework, intemperate faith in and an unbridled pursuit of world law solutions might still be a bad idea. Jewish law recognizes that even when all of the procedural requirements for law have been met, there are situations and cases where governmental action does not rise to the level of law[52]—because such "laws" violate basic rules of substantive due process. Authority alone does not in the Jewish tradition create law; law must rest on pillars of justice and fairness as well as basic right and wrong. Though medieval scholars of Jewish law tended to point to arbitrary taxation[53]—a procedural violation of due process—as emblematic of unjust regimes, in fact the pursuit of justice entails a much broader obligation: Before law can be truly valid, there must be *both* procedural and substantive fairness in the legal system. Absent that, the Jewish tradition coined a phrase, "the theft of the government of the land is not law,"[54] and insisted that no person could bear an obligation to obey unjust regimes.

I suspect that world law will never meet this dual standard, in that it requires the depoliticization of international law, where the wrongs of the mighty are judged by the same standards as the wrongs of the weak and the powerful are held to the same standards of conduct as the powerless—and where the community of nations arrives at these standards without trampling on the rights, freedoms, and beliefs of its minority members. And, of course,

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[52] *See Dina de'malkhuta dina*, ENCYCLOPEDIA TALMUDICA 7:295–308 (1964).

[53] *See* Jacob ben Asher, *Tur, Hoshen Mishpat* 128; Samuel de Medina, *Responsa of Maharashdam, Hoshen Mishpat* 135, 389; Elijah ben Hayim (Ranach), *Second Responsa Mayim Amukim*, at no. 95.

[54] *See* ENCYCLOPEDIA TALMUDICA, *supra* note 52, at 297 n.24.

those standards must themselves be just in the deepest sense of that holy word.[55]

[55] "Justice, justice shall you pursue." *Deuteronomy* 16:20.