Human Rights in Jewish law by Haim Cohn Quotes

Scriptural law is explicit in making the king subject to all God's laws, "that he may learn to fear the Lord his God, to keep all the words of this law and these statutes, and to do them" (Deut. 17:19), and there is no valid reason to assume that the king would not also be subject to, and bound by, the fundamental prohibition of shedding blood. But once the royal prerogative to mete out capital punishment had been established, it was soon extended to authorize the regular courts to impose extralegal capital punishment, "where time and circumstances require potential criminals to be deterred and evil hands to be broken." Extralegal measures such as these were stated to be justified or even mandatory whenever the court considered them necessary for upholding the law's authority and enforcing its observance (B. Yevamot 90b, J. Hagiga 2:2). With the lapse of capital jurisdiction in the year 70 (with the destruction of the Temple), this emergency power was called in aid to enable the courts to administer criminal law and uphold law and order generally; the lapsing of jurisdiction created the "emergency" which justified the assumption of such powers. Thus, courts were exhorted to inflict punishment—including capital punishment—on offenders who were not liable to be so punished under the law (Maimonides, Sanhedrin 24:4). It was stressed, however, that no change of the law was to be involved in any exercise of any such power. Courts had to act on an ad hoc basis and satisfy themselves first that in the particular case before them justice required them to act as they did (ibid.); and they were in duty bound not only to consider "the necessities of the day" but always to respect the sanctity of human life and human dignity (ibid. 10). This is a remarkable instance of the adaptability of Jewish law to changing conditions and to the requirements of particular unforeseeable situations: not even God's own prerogative to take human life, or to lay down in what cases and under what circumstances human life may be taken, could stand in the way of providing for the taking of life in cases of necessity for upholding the law…It appears that such extralegal emergency measures were in fact taken only in the most extreme cases. Indeed, post-talmudic jurists could (and would) look to their Talmudic predecessors for a fundamentally negative attitude to all capital punishment. It is reported of four of the foremost second-century Talmudists that they engaged in the following discussion: "A court (Sanhedrin) that passes a capital sentence once every seven years is to be called lethal. R. Elazar ben Azarya said, once every seventy years. R. Tarfon and R. Akiva said, had we ever sat in the Sanhedrin, no man would ever have been executed. R. Shimon ben Gamliel said, they (i.e., R. Tarfon and R. Akiva) would have caused murderers to multiply in Israel" (M. Makkot 1:10). In a later discussion of this Mishnaic exchange of opinions, the question was raised as to how such great scholars could have performed their judicial duties according to law and still have abstained from passing sentences of death. The answer was proffered that the most complicated (and often rather

absurd) forms of cross-examination would be devised to confuse the witnesses, make them contradict each other and themselves, and thus render their evidence untrustworthy—which would unavoidably result in the acquittal of the accused (B. Makkot 7a). It comes to this: that these scholars would have gone to any lengths within the procedural possibilities to circumvent the law which compelled them to impose capital punishment—the divine will and command reflected in this law notwithstanding; and it is rather significant that their opponent does not use against them the argument of disregarding the divine will, but only invokes the criminal-policy requirement of deterring potential murderers. Maimonides was not at all satisfied with such humanitarianism; he writes that courts must at all times be careful in weighing the evidence, but once they are satisfied that there is sufficient and reliable evidence to support a conviction, it is their duty to pass a sentence of death and "to have even a thousand convicts executed on one day if that is what the law of the Torah requires them to do" (Commentary ad M. Makkot 1:10). There is nothing surprising in such a legalistic-positivistic approach; what is surprising is the spirit of liberty and independence with which the great Talmudists overcame explicit commandments of God's own laws for the sake of saving human lives.[1]

A slave who ran away from his master, presumably because he had been maltreated, was not to be returned to his master but to be given refuge: "He shall dwell with thee, even among you, in that place which he shall choose in one of thy gates, where it liketh him best" (Deut. 23:15-16). The rule was later interpreted to relate only to a slave who had fled from abroad—the repetitive exhortations that he shall dwell "with thee," in thy "place," in thy "gates," being taken as an indication that he has not come to you personally to seek refuge, but to your country—and it is from the country that he may not be extradited (cf. Maimonides, Avadim 8:10). This is an entirely unwarranted misreading of the text; the language of the verse is clear and unambiguous to the effect that the compulsory return of any fugitive slave to his master is prohibited, and that everybody is under a personal obligation to receive him into his house and let him live wherever he likes (literally: wherever he feels good). But the fact that the rule was narrowed down by later interpretation is significant enough: the tendency is unmistakable to reduce the interference with the aggrieved master's legal rights to such a minimum as would appear unavoidable if God's explicit will is not to be thwarted. Withholding fugitive slaves from their rightful masters, and giving them refuge and shelter, must not only have been regarded as a highly unfriendly act against the masters, being instrumental in depriving them of their property, but in earlier systems of law had been branded as a severe criminal offense, punishable even with death (Code of Hammurabi 15, 16, 19), and would in the minds of the peoples of antiquity be associated with moral turpitude

[1] 30-31

of the worst kind—and it remained, indeed, a criminal offense, albeit not capital, even in later Roman law (Codex Theodosianus V 17.2). The priority divinely ordained for the wellbeing and protection of the unlawfully escaped slave over the lawful rights of his wronged master demanded some rather revolutionary thinking, not easily palatable to legally trained minds.[2]

Prophecy is the classical manifestation of biblical freedom of speech. "For Zion's sake will I not hold my peace, and for Jerusalem's sake will I not rest" (lit.: "keep quiet") (Isa. 62:1), is the leitmotif of all prophetic oration. It is said of the prophets that they were poets, preachers, patriots, statesmen, social critics, moralists (Heschel xiv)—and passionate fanatics who put their innate or cultivated pathos to most impressive use. Their main trait was the courage to say no to their society, condemning its complacency, waywardness, and syncretism (ibid. xix); nor had they any inhibition or compunction about telling the kings and princes to their faces exactly what they thought about them. It is true that the prophets preached under divine afflatus, whether because of their true conviction that it was indeed God who used them as His mouthpiece, or because of their statesmanship, knowing full well that their words would have no impact and their threats no effect unless they came from God. But this does not in any way derogate from their courage and undeterred: on the contrary, the recruitment of God Almighty and His blazing rage to reinforce and fortify their outbursts testifies to their determination to make themselves heard and listened to at all costs.[3]

[2] 59.
[3] 110.