Journal of Criminal Law and Criminology

Volume 31
Issue 4 *November-December*

Article 7

Winter 1940

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Recommended Citation
Max May, Jewish Criminal Law and Legal Procedure, 31 Am. Inst. Crim. L. & Criminology 438 (1940-1941)

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JEWISH CRIMINAL LAW AND LEGAL PROCEDURE

Max May[1]

Ancient Jewish law was not created by Moses in its final form; law, being part of a nation's culture, is the product of a slow process of growth and development. Moreover, Jewish law absorbed elements of other cultures and was particularly influenced by ancient Babylonia. This study, however, does not intend to deal with the results of historical research or of comparative jurisprudence; rather it aims to outline the basic characteristics of Jewish criminal law and its legal procedure. For it is proper to devote attention to this subject even without considering the problems of history and comparative law, because of the intrinsic value of Jewish legislation.

Ethics and Law.

It is significant for the close relationship that exists between Jewish ethics and Jewish law that both emerge from the same source: the religious code. Jewish law is sacred, Divine law. Its basis is the Bible and Talmud. Though both are primary sources for the knowledge of Jewish law, it must be borne in mind that it was the task of the Talmud to interpret God's word as proclaimed in the Bible. The Talmud, on the other hand, not only interprets but also extends the scope of the Biblical teachings in accordance with the social and economic conditions that prevailed during the long period in which this gigantic work came into being.

The dominant idea in Biblical law was the lex talionis. Since the first century B. C., however, the Rabbis tried to modify this principle with the result that the Pharisees almost abolished it. Their views became Jewish criminal law. The Sadducees, however, insisted upon its application.

It would indeed be strange if the idea of retaliation were missing from ancient Jewish law, for it was prevalent in the very early beginnings of communal existence. It was thus present as well in Egyptian, Indian and Greek jurisprudence and is preserved today. For retaliation is still the first instinctive reaction to an injustice.

The blood feud, which is the most primitive form of retaliation was recognized by Jewish law at first as a legal measure. Thus the closest relative of the killed person was expected in very ancient times to avenge the death of his kin upon the clan of the murderer. Moses, however, tried to limit the practice of such feuds through the institution of cities of refuge, where the slayers might flee for safety.[2]

The belief that punishment serves as a deterrent of crime was likewise widespread, as we can infer from the public administration of capital punishment and flogging as well as from the verse:

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[2] Num. 35.9; Deut. 19.1-13 and Josh. 20.

"And all Israel shall hear, and fear, and shall do no more any such wickedness as this in the midst of thee."[3]

The existence of the law, "An eye for an eye, a tooth for a tooth," might lead us to regard Mosaic legislation as being unduly severe or even barbaric. Indeed such traits are not altogether lacking. But on the whole, they are overshadowed by instances of leniency and consideration. Jewish law bears the mark of its times but surprises the historian with concepts that go beyond the limits of time and space.

Oriental despotism trampled on the dignity of man, denied the doctrine of equality before the law owing to the existence of the caste system and knew no legal procedure whereby all might obtain equal justice. The Mosaic legislation, on the other hand, proclaimed the doctrine of equality before the law and attached such conditions of legal procedure as would guarantee a just trial and sentence. Not a few of the Mosaic laws can be considered exemplary even today. The provision that all human beings were entitled to the same benefits of legal protection thus distinguished Jewish law from the other legal systems of the times. Whereas even the legislation of the Hindus, which otherwise reached a high level of development, differentiated between those of noble birth and the lowborn, the Bible declared: "One law shall be to him that is homeborn, and unto the stranger that sojourneth among you."[4] This legal maxim, when considered in the light of its setting more than three millenia ago, is testimony to the high-minded nature of Jewish law, though at times it may have been observed in the breach only.

Ancient Israel, though practicing slavery in line with the standards of the times, did not exclude the slaves from the benefits of the law, as did other nations of antiquity. Among the latter, slaves possessed no rights whatsoever. Among the Romans, for instance, they were subjected to the whims of their masters and were entirely helpless in the face of their sadism and cruelty. Significantly enough, a liberal-minded lawyer like Cicero apologizes in his writings for the fact that he was deeply moved by the death of one of his slaves.

In ancient Judaea, however, both the body and life of the slave were protected by law. The Israelite slave who was compelled to sell himself into bondage on account of poverty or inability to pay his debts had to be freed in the seventh year.[5] The non-Israelite slave could be kept for life but he was regarded as a member of the family.[6] He was allowed to rest on the Sabbath[7] and the holidays. It is interesting to note that he could even become his master's heir. Abraham sent his slave, "the elder of his house that ruled over all that he had,"[8] to select a wife for his son Isaac. The master could likewise take a slave-girl as his concubine or give her to his son as a wife, but as such she had to be treated with special consideration.[9]

After the above general remarks concerning some characteristics of Mosaic

[3] Deut. 13.12.
[4] Ex. 12.48.
[5] Cf. Ex. 21.2.
[6] Cf. Lev. 25.44-46.
[7] Cf. Ex. 20.10.
[8] Gen. 24.2.
[9] Ex. 21.10 f.

legislation, we would like to elaborate upon several specific regulations. First, however, we ought to discuss the term "offender." It is axiomatic for us today that only a person who can be held responsibile for his actions is regarded as an offender. The people of antiquity, however, considered animals also as being gifted with will and reason and hence responsible for illegal acts. Jewish law accordingly declared that the ox which kills a man should be sentenced to death. A distinction was, however, drawn between the ox that was an habitual offender and the one that gored a human being on one or two occasions only. The owner of the first type of offender had to pay damages in full.[10]

Incidentally, Jewish law proscribed cruelty toward animals. The Talmud threatened the offender with flogging. The Biblical injunction: "Thou shalt not muzzle the ox when he threadeth out the corn"[11] is likewise evidence of this humanitarian attitude.

In regard to the theory of guilt, we find the following modern concepts: Intention, Negligence and Accident. If, for instance, a person who is chopping wood accidentally drops his axe and harms or kills some one, his act is regarded as an accident. We also find the concepts of self-defense and superannuation. Thus if an offender fled before sentence was pronounced and did not return before his beard had grown, he was not punished. The problem of whether the mere intention and not the deed *per se* is punishable served as a bone of contention in ancient Jewish law. Thus Shammai argued in its favor, coining the phrase: "The thought is as the deed." The concept of causality, of the relationship between cause and effect, was limited in its scope. Thus if a person made a fire which was spread by the wind, he was not held responsible for the damage. The wind was regarded as the cause. The same principle held true in the case of a person inciting a serpent or a dog to harm some one else. The direct guilt was attributed to the serpent or to the dog. In both cases we see that the immediate cause alone was considered in the ancient theory of guilt.

Penal System.

As to the penal system, we notice that fines, corporal and capital punishment were the penalties usually inflicted. In addition to this, the Rabbis developed a particular form of punishment: the ban. It could be inflicted for different offenses and in different gradations. A person might be ordered not to leave his home, prohibited from cutting his hair and beard or from wearing shoes or sandals. The most stringent ban consisted, however, of excommunication and was imposed in cases of heresy and the like. (Spinoza)

Imprisonment was scarcely practiced, although flight of the manslaughterer to one of the five cities of asylum, to escape the avenging kin, involved to some extent restriction of his freedom. Though the "Kippah" was used, its precise meaning is still debatable. Was it a substitute for capital punishment which was meted out only reluctantly? Or was it the beginning of the modern concept of indeterminate sentence? The

[10] Mishna Baba Karma, 1.4.

[11] Deut. 25.4.

Mishna [12] states two instances of such incarceration. One was the case of homicide in which no witnesses were procurable to bring about the execution of the offender. The offender was therefore interned and subjected to a diet of bread and water until he had noticeably changed for the better. The second concerned an offender who, having twice committed a transgression, had repeated his crime. He was also imprisoned and given the same diet which resulted in his death.

The center of the penal system was corporal punishment. The Jewish criminal code did not tolerate maiming the offender, tearing out his limbs or eyes, or pinching with hot tweezers and similar forms of torture as were prevalent in the Middle Ages.

Flogging became the most common form of punishment. It was inflicted on various grounds, for violating the Dietary and Sabbath laws, for incest with distantly related persons, for the marriage of a Priest with a divorcee, etc. Maimonides thus counted more than 200 commandments, the infraction of which incurred this penalty. The instrument used was made of calf-skin and had two knots tied at its end. The offender was chained to a pole and received the lashes on his back and shoulders. The flogging was administered by a committee of four persons who divided their duties as follows: the beadle of the Synagogue did the flogging, while of the three attending judges, the first read Biblical verses dealing with repentance and atonement, the second counted the lashes; while the third watched to determine whether the offender was able to receive all the lashes. Although the maximum was forty lashes, but thirty-nine were administered, in order to avoid an error in counting.

The recipient of this penalty was not thereby disgraced. Even a High-priest could remain in office though flogged. For the following principle obtained: "As soon as the offender has received his punishment he is again as your brother."[13] The desire to rehabilitate the punished offender went so far as to place under ban any one who reproached the former for his deed. This is worthy of notice today when rehabilitation of prisoners is still meeting with considerable resistance.

There were four types of capital punishment: stoning, burning, decapitation and strangling.[14] In the case of stoning, the convict was taken to the place of execution, where he was undressed and then flung from the scaffold. If he did not die from the fall, he was then stoned to death. Burning did not take place at the stake although one Talmud scholar claims to have seen in his youth a woman sentenced to death in this fashion.[15] Punishment by fire took the form of pouring hot molten lead into the mouth, so that death was effected through internal burns. Decapitation was done by the sword. In the case of strangling, a scarf or rope was placed around the convict's neck and then tightened. Crucifixion, however, was never practiced by the Jewish courts.[16]

[12] Sanh. 9.5.
[13] Mishna Makkot 3.15.
[14] Mishna Sanh. 7.1.
[15] Mishna Sanh. 7.2.

[16] In the case of Jesus, the Sanhedrin had pronounced the death sentence but its approval and execution was in the hands of the Romans who had at that time power of jurisdiction.

That purity of morals in ancient Israel was maintained on a high level is shown by the type of crimes which were punishable by death,[17] such as the mistreatment of parents, incest with very near relatives, the seduction of a betrothed woman, etc. In the case of the latter, the woman was likewise put to death. There was a distinction drawn between a married man and woman who committed adultery; the latter was at once put to death, while the former, having legal right to a concubine, was only liable to punishment for seduction. For we find in the Bible that Sarah urged Abraham and that Rachel caused Jacob to marry concubines.[18] The reason for such a practice is self-evident, since it led to increase in population.

Deliberate murder as well as the transgression of certain religious laws brought the death penalty upon the offender. Idolatry, blasphemy and witchcraft were capital crimes. Incidentally, witchcraft, though considered as an abomination punishable by death, was practiced in Israel. Despite the injunction of Moses: "Thou shalt not suffer a sorceress to live"[19] women particularly practiced the art of witchcraft, especially that which induced the spell of love. Simon b. Shetach is said to have sentenced eighty sorceresses to death in the first century B. C. E.[20] The Talmud also contains the statement: "He who has many wives increases sorcery." This bears out the prevailing opinion that women often attempted to secure the love of men through use of magic charms.

Criminal statistics of all nations show that theft and robbery represent the main category of all crimes committed. Since times immemorial, severe penalties were deemed necessary to prevent such offenses. Thus, beginning with Hammurabbi until the last century in England, theft was regarded as a capital offense. This, however, is not the case with the Mosaic law. In the ancient Jewish legislation, theft was placed within the realm of civil rather than criminal law. The stolen object had to be returned; if lost, it had to be replaced. The payment in some cases was as high as five times the value of the object. Whether or not it was to be returned when the criminal was apprehended formed the topic of frequent discussions by the Talmudic jurists. The opinion prevailed that the object should be restored publicly and in the presence of its original owner in order that the element of atonement might thereby be emphasized.

A rather sharp distinction was drawn between theft and robbery. The former, because it took place under conditions of secrecy, was punished much more severely, although violence played a role in the latter. Here, however, a theological idea was involved, for it seemed that the thief committing his crime in secret believed himself not to be watched by God and hence should be reprimanded all the more. As regards theft and robbery, we find some very interesting statements in the Talmud. Here are several of them: "The robber who steals at night and escapes is not expected to return the goods because

[17] Mishna Sanh. 7.4.
[18] Gen. 16.1 ff; ibid. 30.1 ff.
[19] Ex. 22.17.
[20] Sanh. 45 b, 46 a.

he risked his life to obtain them." (The owner has the right to self-defense and may kill the robber in the process of forestalling the crime.) As the Talmud says: "If a man is so eager to possess a certain thing that he even risks his life for it, he may keep it."[21] Another rather strange and unexpected view is the following: the thief who repents need not return the stolen object. This attitude can best be explained by the theory of criminal intent discussed above. According to it, the will to steal, the wicked intention itself, was considered sinful and open to punishment. Hence, if an offender regretted his evil intent and repented, he need not return the stolen object. The original owner was even thought to be unfair if he accepted his goods under such circumstances. This reminds us of St. Francis of Assisi, who sent back a stolen thing to the thief, because the act of robbery was to him sufficient evidence of the dire need in which the former found himself.

These examples reveal the extent of humanitarianism which pervades the Talmud, but they also show that the Talmud was in many ways the playground of keen and brilliant minds. Casuistry and argumentation were the elixir of life to many of the Talmud scholars, for all vied with each other for intellectual and argumentative superiority. Possibly the aphorism, that the main function of a jurist is to prove another jurist wrong, can be applied to some Talmudic jurists.

Legal Procedure.

We shall now attempt to present a picture of the legal procedure. Criminal courts did not exist before the time of Moses, for, in the period of the Patriarchs, the head of the family and eventually the head of the tribe served in the capacity of judge. It was Moses who first appointed judges for less important cases, while he retained jurisdiction over the more difficult ones.[22] Gradually there developed three different kinds of courts: 1) the local courts consisting of three persons, frequently the elders of the community, decided only matters of small import; 2) the small Synhedrion, composed of 23 judges, was considered competent enough to dispose of most of the capital offenses; 3) the great Synhedrion, consisting of 71 judges, which was presided over by the High-priest, formed the highest court of the land.

The judges were elected but were not remunerated for their services, though they could be reimbursed for losses incurred as a result of fulfilling their judicial functions. Requirements for such an office were very high indeed. Only the most prominent members of the community were considered good enough for such positions. Maimonides wrote that the judicial office required wisdom, humility, piety, truthfulness and altruism. Furthermore, the judge must have a good reputation and be well-liked by his fellowmen. Certain persons were disqualified from acting as judges,[23] such as those who were in any way connected with the case, persons who made money by games of chance, persons without vocations (they were supposed

[21] Sanh. 72a. The Bible says just the reverse in one of the Ten Commandments.

[22] Cf. Ex. 18.25 f.

[23] Mishna Sanh. 3.3-5.

to have no consideration for people exposed to the hardships of life)[24] and, in the cases of capital punishment, aged people or men who had no children of their own (both were supposed to be hard-hearted and severe.[25]

Attempts to bribe the judges were considered major offenses. As a result of the use of bribery, the sentence could be declared null and void. The story is told about a famous judge who was assisted while on his way to court by one of the litigants. As a result of the favor which he had received, he refused to serve as a member of the court in the case in which the particular litigant was involved.

Substitute judges were often of help in important cases. Young students were likewise present in court in order to learn legal procedure. There was no need of prosecutors appointed by the government, since the indictment was usually presented by the victim or a witness. It is a question whether there were any professional advocates. Jewish philologists have found no word describing such a function.

The clerks of the court were seated at the left and right of the judges, recording their arguments and votes. The judges did not don official robes. Likewise the parties involved were, in cases dealing with serious crimes, prohibited from wearing gaudy clothing. They were not allowed to appear in extravagant attire nor in shabby dress in order to impress the court with their wealth or to arouse sympathy with their poverty. This was in striking contrast to the custom of ancient Rome, where the litigants at times appeared in very elegant attire, accompanied by numerous attendants, or in mourners' dress to influence the judges in their favor.

Mondays and Thursdays were usually set aside as the days on which court was held, for then the villagers passed through the city gates on their way to market. Thus we may understand the law: "Judges and officers shalt thou make thee in all thy gates."[26]

Ancient Jewish legal procedure adumbrated a number of modern principles: it was public, oral and direct. If we bear in mind the great struggle that was required to achieve such a procedure, we will be in a position to appreciate all the more the exceptional character of Jewish law. Let us select for discussion two such maxims:

The first reads to the effect that no one shall be considered guilty until his guilt has been established. This, like all great truths, appears to be a simple and matter-of-fact statement. Yet it was disregarded for centuries under the pressure of despotism and tyranny. Yet how can guilt be established? History has produced many strange and terrifying answers, such as ordeals, the torture chamber and the inquisition. The answer of Mosaic legislation, on the other hand, is that a person's guilt can be proven only on the basis of a conscientious investigation of the facts in the case.

What kind of evidence is recognized by Jewish law? Confession of guilt is not accepted as sufficient proof, for

[24] Ph. B. Benny, the Criminal Code of the Jews, p. 35.

[25] Ibid. p. 27.

[26] Deut. 16.18.

fear that such a plea might be the result of suggestive questioning or compulsion. Similarly the suspicion of the jurists was aroused in the case of a voluntary confession, because they could not imagine any one presenting himself as an evil-doer and sinner.[27] Such a plea was thought to be caused by a mental illness, melancholy or sheer madness. Jewish law was wary also of circumstantial evidence.[28]

There was only one thing that bore weight: the testimony of the witnesses. The law required the appearance of two witnesses, in order thus to check the testimony of one against that of the other. They had to be present at the scene of the crime and at the time when it was committed, for their testimony could not be based on hearsay. It is told that Simon b. Shetach (second century B. C. E.) met a murderer hurrying from the scene of the crime with a bloody sword in his hand. Simon said to him: "Either you or I have killed this man, but what can I do? Your blood is not given into my hand, for it is written: 'according to the testimony of two witnesses, shall the guilty person be killed.' May God, who knows the thoughts of man, punish you!"[29] Simon b. Shetach could not testify in this matter because he was not present when the crime was committed and even then he was the only witness. If we are inclined to look askance at this strictness, let us recall the murder trial which took place in England in 1830, in the course of which the policeman, relying on circumstantial evidence, used almost the same words in speaking to the defendant as follows: "Either you or I have committed this murder." Because of his testimony the defendant was executed. Later on his innocence was established.

Jewish law went even further in securing its primary objective of safeguarding judicial processes against error, especially from the error of convicting an innocent person. It was therefore not sufficient to merely present two eye-witnesses; they had to agree in their testimony concerning major and minor details. This was a foolproof method, for each witness was examined alone and thus any opportunity for a conspiracy was removed thereby. Thus the more questions the judges asked, the more were they praised. One judge, for instance, wanted to know the characteristics of a fig tree under which the crime was allegedly committed. When the answers of the witnesses did not correspond to each other, their testimony was entirely invalidated. This, however, applied chiefly to crimes involving capital punishment. In other cases, the examination was not so severe.

No oath was administered to witnesses in a Jewish court, for Talmudic scholars did not invest the oath with as much importance as we do today. Careful, unbiased examination of the witnesses was regarded as the best way of ascertaining the facts in the case. Time and again Jewish jurists admonished the courts: "Investigate the circumstances carefully—carefully and calmly."[30] The questioning of witnesses was likewise preceded by an impres-

[27] Sanh. 9 b.
[28] Sanh. 37 a.
[29] Sanh. 37 b.
[30] Deut. 13.15.

sive admonition, the formula commonly used being: "Be aware that capital crimes are not like civil cases. In the latter, a man pays money and he is forgiven. In the former, on the other hand, the blood of the innocent and that of his offspring is upon the head of the false witness forever. In the beginning, only one man was created; he who kills one man is regarded as though he had destroyed the world.[31]

After discussion, the youngest judge voted first in order not to be subjected to the influence of older ones. A majority of votes sufficed to convict the defendant. But one vote above a majority was required to pronounce the death sentence. In case all the judges rendered such a verdict, the defendant had to be acquitted, because then the former were considered to be biased.

Each vote had to be supported by strong argument. It was not enough for a judge to refer merely to the argument presented by another colleague. A judgment without sufficient grounds was never accepted since the votes were not merely counted but also measured as to the weight adduced to the various arguments.

The court was not permitted to render a verdict until the day following the close of the trial. The purpose of this was to make it possible for a judge to change his mind, since he could declare the accused innocent after some further reflection. But in no case whatsoever could a judge who had voted for acquittal reverse his opinion.

No appeal against a sentence was provided for in Jewish law. This is not surprising in the least, for even today it is questionable whether the method of appeal to the higher courts is advantageous to the administration of justice. Certainly, the feeling of responsibility on the part of the judge is somewhat impaired if he knows that his decision is not final. Nor is the higher court always the wiser one. Be that as it may, the Jewish law deemed it better to have one responsible court and attached to it as many guarantees as possible for finding out the truth and rendering a just verdict.

Though the sentence was executed at once, precaution was taken to prevent a judicial error up to the last moment. The court therefore remained in session after a death sentence was pronounced. The convict was accompanied by two court members and a herald on the way to the place of execution. The herald proclaimed the verdict and invited those who had information to speak up in behalf of the defendant. If new evidence was thus introduced or if the convict himself wished to speak again in his defense, he was brought back to the court and a new trial was begun. This could take place only two times. In order to prevent the abuse of this privilege, the convict was granted a third re-trial only if the two jurists accompanying him agreed that his request was sufficiently substantiated by new evidence. Immediately before the execution, the convict was given a goblet of intoxicating wine in order to lessen the pain of death.[32] Interest-

[31] Sanh. 37 a.

[32] An English custom in the Middle-Ages may be derived from this Jewish law. According to W. L. Burdick's "Bench and Bar of other lands" public executions in London were performed on Tyburn Hill (today Hyde Park) from 1487-1783; on the way the procession passed the Crown Inn in St. Giles where the condemned received a bowl of ale.

ingly enough, the judges had to fast on the day of the execution.

As this study has shown, Jewish law abounds in many instances of mild treatment of criminals. Some may therefore arrive at the conclusion that the numerous precautionary measures taken against a too-severe sentence might have provided ample opportunity for offenders to find loopholes of escape in the law. However, it should not be forgotten that Jewish law was sacred law and that it was consequently determined by religious concepts. Thus the earthly court was regarded as only a substitute for the heavenly one, and the belief was prevalent that the sinner could not escape Divine punishment. "A sinner not punished by man will be sentenced by God," through the penalty of extinction so frequently mentioned in the Bible.[33]

Conclusion.

In conclusion, we may ask what influence did a criminal code such as we have outlined exert on the contemporary world and on posterity? The science of comparative law has not attempted to deal with this question until the nineteenth century. For a long time Jewish law has been regarded as the step-child of scholarly investigation. Today we know that provisions of the Mosaic code were definitely incorporated in medieval French and German law (through the Canon law) and were also incorporated in early colonial American law especially in the colony of Massachusetts. The influence of Jewish law has been furthered through the world-wide perusal of the Bible and through the commercial contacts made by Jews with other nations.

Of particular interest was the clash between Jewish and Roman law. Jewish law strongly resisted Roman law. We may call attention to an interesting controversy in this respect. The well known German philosopher Spengler was of the opinion that the Oriental character of Roman law could not be denied. He holds that the classical Roman jurists such as Papinian and Ulpian were Aramaeans and came from the same strata of the population as did the Tannaim, the authors of the Mishna. Another German scholar, on the other hand, Professor Schulze, maintained that Spengler stated the truth upside down: the reverse is the case, for Jewish law was influenced by that of the Romans. Be that as it may, it is beyond the shadow of doubt that the basic principles of Jewish jurisprudence exerted a decisive influence on all the civilized nations of the world. I do not know how to conclude this study more effectively than with the words of the famous jurist and scholar, the late Professor von Holtzendorff: "The most universal and most popular moral law of humanity is found in the Bible. The Ten Commandments represent the constitution of the civilized world. The supplementary criminal law in Scriptures has dominated the penal legislation of the secular and ecclesiastical powers."

[33] Cf. Lev. 17.4.