BEYOND REASONABLE DOUBT: IN SEARCH OF A JUST JUSTICE

Reuven Livingstone

In the 1995 Corob Lecture reproduced below, Rabbi Reuven Livingstone compares and contrasts principles of Jewish law with their secular counterpart. Quoting numerous contemporary examples, he finds that many of the abuses and faults of the English legal system are absent in Jewish law, which provides safeguards that would have prevented several recent and widely publicised miscarriages of justice.

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Justice is not so much an objective concept as a word used subjectively to reflect a particular set of values – indeed, one man's justice is often another man's injustice, depending on perspective and self-interest. When the Torah commands us *tzedek tzedek tirdof*[1] we are charged with the eternal search for a higher, more just interpretation of justice. We are thus bound to somehow put our subjectivity aside and attempt an assimilation of God's law. This is patently no small task – and one that many secular legal systems have long despaired of.

Flaws in the system

In the popular mind the embodiment of justice is to be found in the right to a fair trial under the due process of law. This appreciation is further dependent upon a so-called 'presumption of innocence' by which a man is said to be innocent until proven guilty. In common law (Anglo-American) jurisdictions the criminal standard of proof required to convict is, ostensibly, very high indeed. Guilt must be proven by the prosecution to a level no lower than 'beyond reasonable doubt'. But beneath this lofty banner lies a more complex reality. The actual assessment as to whether the standard has been reached is largely the province of the tribunal of fact – a lay jury in whom an occasionally mystical, if not magical, power of discernment is invested. Furthermore, 'beyond reasonable doubt' does not, in fact, mean beyond any doubt – simply beyond that level of doubt which one would consider to be unacceptable risk in important life decisions – and this must by definition vary profoundly from individual to individual.

Perhaps most important, however, is the fact that any judicial system relies crucially on the discretion and integrity of those tiers charged with the duty of investigating crime and instigating prosecutions. The potential contamination of evidence through police intimidation, incompetence, or systemic bias producing an effective presumption of guilt may have a devastating effect on what happens at higher levels of the criminal process. Paradoxically, the very same system whose jurisprudence is firmly founded on the interests of justice may possess at any one, or all, of its levels a working culture which denies due process rights and seriously undermines the rule of law.

While the pragmatist would argue that this man-made system, nevertheless, seems on the whole to get the job done in a reasonably satisfactory, if not perfect, manner, the problem is that, at the level of rhetoric, all systems invariably make claim to a higher justice. They deign from time to time to invent glib and self-presumptive slogans such as 'innocent until proven guilty' in the perpetuation of the central myth of an exalted, even infallible justice. There is alas – as we have become all too painfully aware in this era of O. J. Simpson and post-modern cynicism – invariably much distance between aspiration and reality.

In the Jewish context, the criminal jurisdiction of Sanhedrin effectively ceased to exist after the demise of the second commonwealth nearly two millenia ago.[2] Many have thus made the unfortunate mistake of deeming it of practical irrelevance. Nevertheless, in terms of its procedure and jurisprudence, *mishpat sanhedrin* remains an extraordinary and perhaps unique example of a 'just' justice. It was, contrary to popular misconception, vastly ahead of its time – and arguably remains, in many crucial senses, vastly ahead of our own. In terms of procedural integrity, multiple safeguards for the accused, and effective due process provisions, it remains an enduring source of juridicial enlightenment and inspiration from which even the venerable Common Law of England – and many other jurisdictions – have much to learn.

The Jewish angle – powers of the King

Before moving on to an examination of *mishpat sanhedrin* it is crucial to note that there existed a second concurrent jurisdiction in ancient Israel – *mishpat hammelekh* or the King's Law.[3] This was, in all but name, a secular jurisdiction which derived its powers from the royal prerogative. As a discretionary, exigency jurisdiction it was designed to uphold societal cohesion and the broad public interest – these being functionally synonymous with the interests of the crown. Its ambit was wide indeed – ranging from the creation of wartime emergency laws to the regulation of taxes and tithes.[4] The prophet Samuel vehemently warned the children of Israel of the immense dangers to individual rights inherent in the adoption of any King's Law.[5] But his words were summarily rejected and the rest is history. Based on these origins, some attempt to define *mishpat hammelekh* as part of a grand social contract with the monarch[6] under which the benefits, in terms of national security and stability, are invariably offset against the considerable detriments in the domain of individual freedoms and rights.

As we shall see, the resulting contrast with *mishpat sanhedrin* is nothing short of astounding. There were no procedural or evidential restrictions, nor any strict limitations as to sentences or penalties in any given area – these could conceivably range from pecuniary sanction to decapitation.[7] There is, equally, no indication that the rules of natural justice had any mandatory application in this type of system. In short, this was a situational, utilitarian jurisdiction based on the notion that the greatest good for the greatest number is invariably linked to the security and survival of the monarchy. On a pragmatic level this does undoubtably have a certain resonance. It is an established fact that many later Jewish communities, when given the appropriate warrant, have practised a version of *mishpat hammelekh* in the form of occasionally brutal and summary self-policing (note the powers of the *Resh Galuta* – the Babylonian Exilarch; not to mention the communal courts of 14th century North Africa, 15th century Spain, and 16th century Poland).[8] Rav Kook was of the view that the modern authority of the King's Law resides in the Jewish community and ultimately reverts to, and vests in, the Jewish nation state.[9] It is, thus, very much a man-made law of survival.

It is not, however, in any way indicative of the higher moral or jurisprudential values of the Torah. In reality, it is utterly plain from the legislation regarding the king that Torah law was always to be pre-eminent.[10] Both the king and his law would be morally subservient to the Divine will – with *mishpat sanhedrin* being a central plank of that revealed will. Hence, R. Nissim Gerondi points out that 'since the king envisions that he is not bound by the laws of the Torah in the same way as a judge of Sanhedrin, a very strong admonition is necessary that he should not depart from the commandments'.[11] The existence of an overarching, higher justice as expressed via the law of Sanhedrin means nothing less than the ultimate negation of any enduring moral persuasion on the part of *mishpat hammelekh*. *Mishpat sanhedrin* functions as a form of constitutional constraint or bill of moral rights vis a vis the discretionary king's law. Therefore, any discussion of the Jewish concept of justice must focus not on the temporal, discretionary, and *hora'at sha'ah* jurisdiction of the monarch, but on the mandatory black letter jurisprudence of Sanhedrin, the jurisprudence of God.

The Sanhedrin

With the above in mind, it is noteworthy that in the criminal procedure of Sanhedrin, unlike the common law jurisdictions already mentioned, there was no enunciated standard of proof or formal presumption of innocence. In this regard there was an unusual absence of sloganism and rhetoric. At the very same time, however, the procedure itself ensured virtual certainty regarding the proof of *actus reus* (the guilty act) and *mens rea* (criminal intent or 'guilty mind'). *Actus reus* had to be proved by two eye-witnesses who were subject to separate public examination, cross-examination, and confutation; no indirect (hearsay), circumstantial, presumptive, or even forensic evidence was admissible.[12] The witnesses' testimony had to be given orally, *viva voce*, in the presence of the entire court of 71 (or 23) and the accused.[13] To anyone familiar with English evidential rules and trial procedure this level of proof, by any name, represents an extraordinary safeguard for the defendant. In England, following the recent Criminal Justice and Public Order Act 1994, and in many other jurisdictions, no corroboration from a second witness is necessarily required in order to secure a conviction. Even in those systems like Scotland and various US states where corroboration of a single witness or a confession is mandatory, such is, for the most part, observed as a mere formality by producing evidence which is not highly probative in itself.

If the testimony of witnesses before Sanhedrin was in any way disproved, the entire proceedings were nullified.[14] Moreover, if the pair of witnesses was confuted by other witnesses after the verdict had been pronounced, but before sentence had been carried out, they then became subject to the same penalty which their false testimony would have inflicted upon the alleged criminal.[15] This underscores the high premium placed by the Torah on absolute truthfulness. It is often said, in contrast, that court trials in adversarial English and common law jurisdictions are really more about set piece theatre than about any objective search for the truth. Cross-examination exists to allow the other side to undermine the credibility of a witness – but if he appears to be lying then, while this may well influence the weight of his evidence, it will not disqualify him *per se*, nor (normally) subject

him to any punishment. The witnesses in an English trial are never rigorously examined by the court as they would have been in the chamber of Sanhedrin (and as they still are in inquisitorial jurisdictions). Common lawyers manipulate the adduction of evidence to suit their own briefs and may, or may not, choose to question any given witness. In many of the recent and notorious miscarriage of justice cases in the UK – such as those of Judith Ward or Stefan Kiszko – vital evidence which was available at the time of trial was, for a variety of reasons, not even introduced. If the court had been in charge of the gathering of evidence and examination of the witnesses in accordance with the practice of Sanhedrin, the outcomes would almost certainly have been very different.

Proof of criminal intent

What is even more incredible, however, and having no equivalent in any other system of law, is the mechanism required under *mishpat sanhedrin* for proof of *mens rea*. Here it was necessary to ensure that the witnesses had provided the accused with a previous warning, prior to the actual commission of the offence, explaining its prohibition and penalty – and this had to be immediately acknowledged verbally by the offender.[16] This effectively meant that the normal presumption of acquaintance with the law giving rise to the rule *ignorantia juris non excusa* (ignorance of the law is no excuse or defence) was reversed. Thus, even a scholar could not be liable except after warning. No imputation or inference of intention (or proof of recklessness) was permitted as it commonly is in English law.

Both *sanhedrin haggadol* in Jerusalem, consisting of 71 expert judges, and the lesser *sanhedrei ketannah* located in major population centres and comprising 23 judges had, unusually, original and appellate jurisdiction in criminal, civil, and certain ritual matters.[17] No less that a two-thirds majority was required to convict in capital cases.[18] But a conviction was debarred if the court came to an immediate unanimous verdict – because of the presumption that there must always be some aspect in which to find initially in the accused's favour.[19] On the other hand, in a related provision that would induce apoplexy in most modern-day prosecutors, an immediate acquittal always disposed finally and absolutely of the case on the day of examination.[20]

Except for extraordinary circumstances no criminal court in ancient Israel could hear more than one case in any one day – even if the cases were unrelated and could easily be disposed of consecutively.[21] By modern-day standards, given the enormous fiscal and time constraints upon any criminal justice system, this type of provision would be unthinkable – yet it does uniquely reassure any accused that his case will not be compromised because of the long list of cases still to be heard. The recent Royal Commission on Criminal Justice noted critically in its report that, at the level of the Court of Appeal, numerous cases could be heard in a single day's sitting with very little time for each. At Crown Court level, on the other hand, the listing arrangements whereby cases are scheduled, seem to be geared solely toward keeping judges and court rooms occupied for the maximum time possible. The very big cases which attract much publicity and often monopolise court time for long periods (and also tend to shape, by their very accessibility, our thinking regarding the judicial system) are invariably atypical and unrepresentative. 'Hard cases make for bad law' goes the legal saying and this can be seen in the instance of the never-ending O. J. Simpson trial which contrasts starkly with the average eleven days spent on a murder trial in California (and the even lesser period often expended in the UK).

Capital punishment

The humane quality of the law of Sanhedrin was not only exceptional in the context of the ancient world but continues to exceed, in many senses, even the highest current standards. Blackstone, writing in late 18th century England, records that 160 felonies were, by Act of Parliament, worthy of instant death. In contrast, according to Rambam, in Torah law there were thirty-six capital crimes in all, which in practice fell under but twelve headings, and can be reduced to eight if one subtracts ritual sins such as idolatry.[22] The Mishnah declares, moreover, that a court which condemned one person to death in seven (and some say in seventy) years, was deemed a murderous tribunal.[23] It is justifiable therefore to infer that if convictions were relatively infrequent, capital sentences were, in the formulation of the Mishnah, virtually non-existent.

In the UK there is no longer capital punishment – save perhaps for the unlikely crimes of treason and piracy – but in the largest common law jurisdiction of the USA it is gaining increased currency and popularity. The Sanhedrin however was clearly exceedingly reluctant to impose such harsh sentences, whereas American judges and juries are not. One of America's greatest modern-day jurists, Justice Thurgood Marshall, stated in 1990 that

> when the Supreme Court gave its seal of approval to capital punishment (in 1976), this endorsement was premised on the promise that capital punishment would be administered with fairness and justice. Instead the promise has become a cruel and empty mockery. If not remedied, the scandalous state of our present system of capital punishment will cast a pall of shame over our society for years to come. We cannot let it continue.

One law for the rich

The cost of *mishpat sanhedrin* was absorbed by the community as opposed to the individual. There was no need for expensive advocates when each case had the attention of so many expert and professionally impartial *dayyanim* who would inquire methodically into the evidence – in the presence of a defendant who was free throughout, to speak in his own defence.[24] This is palpably not the case today. The laudable English criminal legal aid system, while affording high quality representation, is being incrementally

whittled down by cost-driven reforms at the hand of the Lord Chancellor's Department. The situation in the USA is incomparably worse. Due process, as required by the Fourteenth Amendment to the United States Constitution, is missing the rider 'only applicable if the defendant has funds'. Money is the defining element of the American criminal justice system. Indigent defendants are represented by inadequate counsel who are poorly paid, and these inadequacies reverberate throughout the appeals process. Unless one can afford counsel – and they do not come cheap – and other general expenses, one effectively enters a different justice system to the one entered by the likes of O. J. Simpson; one in which the sheer financial advantages of the state will overpower the defence and defendant.

Frighteningly, the overwhelming majority of defendants facing capital murder charges in the USA are without funds. The result? In Texas, according to the Texas District and County Attorneys Association the acquittal rate in death penalty cases is 'almost nil' – precisely the inverse statistic of Sanhedrin. In the recent case of Burdine the Texas Court of Criminal Appeals held (in April 1995) that, although Burdine's court-appointed counsel was either absent or asleep during significant parts of his capital murder trial, this did not prejudice the defendant's case. Remuneration for court appointed counsel is low, even by legal aid standards in England and Wales. In a recent study, it was found that in Texas, court-appointed counsel in capital cases were paid an average of $35 per hour.[25] In one very recent Texas case, Martinez-Cacias, counsel was paid $11. 64 per hour and completely failed to investigate an alibi raised by the defendant which would have led to an acquittal.[26] From a Torah perspective this scenario is intolerable and only serves to reinforce the higher ethical quality, egalitarian nature, and inherent respect for individual human rights of *mishpat sanhedrin*.

The appeal process

In Jewish law, if sufficient new evidence in the convict's favour comes to light, or if the verdict rests upon a mistake of law, or even if the convict merely avers that he has something else to say in his own favour, the court is bound to re-open the case.[27] Once acquitted, however (similar to English common law), the defendant shall not be put in jeopardy again (the 'double jeopardy' rule).[28] These rules are in stark contrast to the picture of the English appeal process as described by the Royal Commission on Criminal Justice. The only automatic right of appeal exists on a point of law. If the basis of appeal is new evidence, then leave must be obtained from a single divisional judge or the Court of Appeal. The Commission criticised the great reluctance of the Court of Appeal to exercise its power to hear new evidence under section 23 of the Criminal Appeals Act 1968 – very few appeals indeed succeed on this basis. Once an appeal has been refused, it is exceedingly difficult to get the Home Secretary to refer the matter to the Court of Appeal again, on fresh evidence, under section 17 of the above Act.

Trial by jury

The much venerated common law institution of trial by jury is anathema to *mishpat sanhedrin*.[29] The Royal Commission strongly supported the continued use of the jury system despite its weaknesses as evidenced by the series of egregious miscarriages of justice which came to light in England during the late 1980s and early 1990s. One of its important witnesses, Sir Louis Blom-Cooper QC, argued for abolition of the jury on the grounds that its judgements are not subject to appropriate (or any) reasons being given and are, therefore, objectionable in principle. It is noteworthy in this context that members of the *sanhedrin* voted orally and always stated their reasons.[30] The court sat in a semi-circle to provide a clear view of the judges by one another and by all those present, in order further to facilitate an open and transparent deliberation.[31] Moreover, in Jewish law a lay assembly, even as a tribunal of fact, had no place in criminal procedure. Indeed the requisite expertise in this area of the law ought logically to be of the highest order – if only because the overturning of an individual's presumption of innocence by way of conviction (with the attendant loss of liberty or life) is a matter of the most extreme gravity. The O. J. Simpson case, although untypical, again provides a useful catalogue of some of the pitfalls of the jury system. In Los Angeles no one rises for the judge – only for the jury (thus, arguably, seriously undermining the role and dignity of the expert judge). The jury and the alternates are escorted to and from the court by armed sheriff's deputies – kept apart from the rest of the world. While the first Amendment guarantees the unfettered freedom of the media to report and comment on the case, the jury has been tightly sequestered for months (with all the obvious risks to their mental acuity and decision-making capacity) in an unknown hotel. Despite these extreme precautions, there is still a very substantial danger of a mistrial. Issues of race and gender often seem to have outweighed other more important variables in terms of juror selection and maintenance. In European civil jurisdictions the interests of justice are upheld by an expert judiciary without discernible detriment, despite the general lack of lay juries. How much more so in the case of Sanhedrin, where the nature of the court, the sheer number of judges, and the high level of expertise ensured that a true range of studied views could be openly considered and debated before any ruling was made.

False confessions

Self-incrimination and the admissibility of confession was, arguably, the central issue in many of the miscarriages of justice, often involving IRA bombings, which occurred in England in the 1970s

and 1980s. These only came to light in recent years and led directly to the setting up of the Royal Commission to examine and recommend changes to the criminal justice system. At the very same time, this is one of the areas in which *mishpat sanhedrin* contrasts most starkly with virtually every secular law. It is clear that self-incrimination in any form was not admissible in Sanhedrin.[32] The Talmud rationalises this rule by asserting that just as a near relative is disqualified from giving evidence because of bias, so too a person is biased in relation to himself.[33] This rationale logically extends only to situations requiring legal witness and not to ritual or family law matters. Rambam provides the intriguing additional explanation that it is possible that such a person is suffering from an abnormality of the mind which drives his wish for self-punishment or death.[34] As a result, all confessions which carry this possibility are to be viewed with suspicion. This reasoning is strikingly in accordance with modern experience. The forensic psychiatrist/psychologist team of McKeith and Gudjonsson found a clear incidence of false confessions both by individuals suffering psychotic personality disorders and those with mild neurosis.[35] Many confess without particular pressure. McKeith suggests that this may even have religious undertones, with confession being viewed as a means of atonement.

In the well-known American case of Miranda v Arizona it was observed that custody is inherently oppressive and, of itself, creates a high risk of false confessions without the need for any conspiracy theory regarding police motives. 'Proven innocent' cases include that of Stefan Kiszko, a schizophrenic who confessed falsely to a brutal murder simply because he wanted to leave the interview and go home to his mother. Judith Ward was suffering from a personality disorder that led her to internalise her own guilt. Carole Richardson, one of the 'Guildford Four', was a frightened seventeen-year old addicted to barbiturates, such that she hastily complied with police suggestions. In the 1920s when aviator Charles Lindbergh's child was kidnapped, over 200 people, most, if not all, of them obviously innocent, came forward to the authorities confessing to the crime. The Jewish position totally avoids these dangers, as well as negating the possibility that torture will be used to extract a confession forcibly – as such would patently be of no legal purpose or benefit.

Influence of Jewish law

Historically, in Roman criminal procedure – under both the Republic and the Empire – forced interrogation was the norm. Later, in 1614 Alonso Salazar de Frias, who was charged with investigating the methods of the Spanish Inquisition, observed critically that the ecclesiastical courts were coercing utterly false confessions. Interrogation on mere suspicion known as *infamia* had become the norm in Christian ecclesiastical courts from Spain to England. The Earl of Clarendon records that the confession of one Hubert, the 26 year old son of a French watchmaker, that he had started the infamous fire of London was not in the least bit credible – but this did not stop his execution.[36] The early puritans suffered persecution under the jurisdiction of the brutal Star Chamber court and the High Commission for Ecclesiastical Causes under compulsory oath leading to spurious self-incrimination. It was not until the 17th century that a privilege against self-incrimination began to emerge in reaction. Some are of the intriguing opinion that this was very much under the influence of the teachings of the Torah.[37] The early protestants derived their political principles from the Bible under the influence of professional scholars who had studied it in the original Hebrew. Certainly John Selden had a relatively wide knowledge of Jewish law, as reflected in his writings, while John Milton was fluent in Hebrew. At all events, the Jewish position as to self-incrimination was formally enshrined by members of the same movement in the Fifth Amendment to the US Constitution by the words 'No person shall be compelled in any criminal case to be a witness against himself.'

In Britain, the Judges Rules of 1912 effectively created a 'right to silence' in the face of police interrogation. The recent Criminal Justice and Public Order Act of 1994 recoils from this original position and creates a certain level of coercion by allowing adverse comment at trial regarding the accused's silence or lack of explanation in respect of a certain range of circumstances. The current trend is retrograde and has deeply alarmed a wide range of criminal justice professionals. It is certainly far from the elevated law of Sanhedrin.

In comparison to modern legal systems, it must now be clear that *mishpat sanhedrin* provided an astounding array of due process rights for the accused. In practice, of course, any lacunae in the powers of Sanhedrin might be filled by *hora'at sha'ah* under the powers of *mishpat hammelekh* – although according to R. Nissim Gerondi such exigency jurisdiction was not normally the prerogative of Sanhedrin – particularly when there was a king or ruler.[38] (The biblical examples of exigency rulings such as those in the cases of the blasphemer (Vayyikra 24:14), the stick-gatherer (Bamidbar 15:32), and Achan (Yehoshua 7:19), are clearly exceptional and appear to have taken place in the absence of a king and without the sanction of Sanhedrin.) This is not to say that alongside the Sanhedrin there were not perhaps other concurrent legal structures which may have existed either directly or indirectly under the mandate of *mishpat hammelekh*. These may be historically, as well as factually, relevant but cannot, as above, form the basis of a genuine discernment of the judicial values of the Torah.

An interesting picture has arguably begun to emerge – one of profound value differences between the Jewish concept of justice as expressed through *mishpat sanhedrin*, and that of secular systems. Perhaps, as observed above, any secular legal system – designed in many instances to reach the lowest acceptable levels within the continuum of justice - cannot, in all fairness, aspire to the heights of a divine Torah. Indeed, as the discussion of *mishpat hammelekh* has shown, *mishpat sanhedrin* represents a

level of justice to which not only other nations, but also the Jewish people who are its true heirs and guardians, can and must constantly strive. Meanwhile, although we have a duty to support the criminal justice system in our country, if only because without it there would be anarchy (as Rabbi Chaninah the deputy High Priest stresses in Pirkei Avot 3:2), we must not ally ourselves to values or moral traditions which may fall far short of our own – a constant striving for the ideal blend of justice and righteousness demanded by the Torah.

Notes

1 Devarim 20:16.
2 See Meiri, Sanhedrin 52b; Yerushalmi Sanhedrin I:1; Shabbat 15a.
3 Rambam, *Mishneh Torah, Hilkhot Melakhim* 3:10; see also *Hilkhot Mamrim* 1:1.
4 Rambam, *Mishneh Torah, Hilkhot Melakhim* 4:13.
5 Shemuel I 8:9-19.
6 R. Tsvi Hirsch Chayes, *Torat Nevi'im* 7.
7 Rambam *ibid.*; see also *Tur Choshen Mishpat* 2.
8 See Meiri, Sanhedrin 52b; Rivash: Responsa 234; see also Encyclopaedia Judaica.
9 *Mishpat Kohen* 144.
10 Rambam, *Mishneh Torah Hilkhot Sanhedrin* 5:1, *Hilkhot Mamrim* 1:1, *Hilkhot Melakhim* 2:5 and 3:5.
11 *Derashot Haran* 11:76.
12 Rambam, *Mishneh Torah, Hilkhot Eidut* 4.
13 See Yevamot 31b, Sanhedrin 80, Ketubbot 20a.
14 Makkot 5a.
15 Rambam, *Mishneh Torah, Hilkhot Eidut* 18.
16 See Makkot 16a, Sanhedrin 8b; Rambam *Mishneh Torah, Hilkhot Sanhedrin* 12:2.
17 Rambam *ibid.*, 9:1.
18 *Ibid.*, 8:1.
19 *Idem.*
20 *Ibid.* 10:7.
21 See Sanhedrin 46a.
22 Rambam *ibid.* 15:10.
23 *Ibid.* 14:10; Makkot 7a.
24 See Sanhedrin 26a-b, 30a, 32a, 36b; Rambam, *Mishneh Torah, Hilkhot Eidut* 1:4.
25 See David Marshall, *Counsel*, June 1995.
26 *Idem.*
27 Sanhedrin 32a; Rambam, *Mishneh Torah, Hilkhot Sanhedrin* 10:8, 13:1.
28 Rambam *ibid.* 10:9; Sanhedrin 34a.
29 *Ibid.*, Chapter 1.
30 Sanhedrin 34a, 40a; Rambam *ibid.* 10:5, 12:3.
31 Sanhedrin 36b.
32 *Ibid.* 9b; Rambam *Mishneh Torah, Hilkhot Eidut* 12:2, *Hilkhot Sanhedrin* 18:6.
33 *Idem.*
34 Rambam *Mishneh Torah, Hilkhot Sanhedrin* 18:6.
35 *The Psychology of Interrogations, Confessions, and Testimony*, RCCJ Research Study No. 12, (1992).
36 *Idem.*
37 Isaac Braz, *The Privilege Against Self-Incrimination In Anglo-American Law*, Lecture, 1976.
38 See *Derashot Haran*, 11:75.

SE'UDAT HAVRA'AH

THE MOURNER'S MEAL OF CONDOLENCE AND GRACE AFTER MEALS FOR MOURNERS

Leonard Tann

The observance of the Jewish laws of mourning is widespread even among those who are not meticulously observant in other areas of Jewish law. The obligation for mourners to eat a special meal at the start of *shiva* represents the beginning of their adjustment to the loss they have sustained. Over the years, particular foods and customs have become associated with this meal and Rabbi Leonard Tann analyses for us their origins and development. He also deals with the special form of *birkat hammazon* for mourners which, although referred to in the Talmud, seems to have fallen into disuse.

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These notes focus on the two chapters of the Shulchan Arukh that deal with the 'Meal of Condolence' and 'Grace after Meals for Mourners'.[1]

Meal of Condolence (Shulchan Arukh *Yoreh Deah* 378)

The translation that I have given here is a very loose interpretation of the Hebrew *seudat havra'ah*. The word *havra'ah* is related to the word *bari* meaning healthy or well. We are much more restrained today in our grief than in the past, although in eastern countries, people still express grief more emotionally than we do. It is quite conceivable that the entire concept of the 'Meal of