UDC: 347.4/.5(=411.16)

CERIF: S130, H190, H210, H300

DOI: 10.51204/HLH_21205A

Agata W. NAWACKA*

BETWEEN FREEDOM AND DUTY: HOW JEWISH LAW OF OBLIGATIONS MERGED BOTH

In traditional Judaism, duties precede rights. This way of thinking about the law is deeply rooted in Judaism, both legally and religiously. Its origins can be traced back to the Sinaitic Covenant and the rise of debt-based Jewish identity. Jewish law of obligations is not contract, but obligation driven and derived from a unique understanding of freedom innately bound to its divine origin.

The theological origin of Jewish law influenced a specific understanding of freedom in Judaism. It was considered to be given by God and, thus, inalienable. In Judaism, vowing was burdened with the risk of committing a sin. Because Jewish law of obligations can be traced back to halakhic norms governing taking and releasing from oaths and vows, contracting away one's future choices by promising was thought to threaten personal freedom.

Rabbinic disdain towards granting every agreement with legal protection resulted as well from fear of the debtor's falling into servitude. Nonetheless, legally binding obligations were made possible by extending the meaning of monetary debt on other kinds of legal agreements in the process of creative rabbinic interpretation. The moment of becoming bound by a contract was also delayed as much as possible to avoid limiting one's future freedom. The Talmudists must have changed their interpretation of some halakhic norms to make them applicable to the lives and commerce in greatly varied legal systems of countries in which Jews lived.

Key words: *Jewish law of obligations. – Duty. – Debt. – Obligation. – Sinaitic Covenant.*

---

* Student of III year graduate studies (masters studies) in law and philosophy at Interdisciplinary Individual Studies in Humanities and Social Sciences (MISH UW) at the College of Interdisciplinary Individual Studies in Humanities and Social Sciences, University of Warsaw, *a.nawacka@student.uw.edu.pl*.

This paper was presented at the second international student conference 'Iustoria 2021: Law & Religion' on the 26th of March, 2021.

1. INTRODUCTION

Judaism is a legal system as well as a religious one. In contrast to Christianity, which distinguishes between *sacrum* and *profanum*, Jewish law is inseparable from Judaism. The Jewish law of obligations is characterized by the prevalence of heteronomous norms over the autonomous ones, duties over rights, and what Professor Rabbi Michael Broyde accurately names „freedom from contract" in opposition to freedom of contract. It is not contract, but obligation driven and derived from a unique understanding of freedom innately bound to its divine origin. These unique characteristics make the Jewish law of obligations a worthy, yet sometimes neglected area of research in countries in which other religions have historically proven to have the most influence on private law. In this article, I will argue that the Jewish law of obligations can be traced back to the Talmudic regulations of oaths. Therefore, it has been burdened with ethical and religious norms governing oaths, which explains why rabbis were skeptical of granting every agreement with legal enforcement. Moreover, I will try to demonstrate how the Jewish law of obligations protects the freedom of individuals and why debt is the central legal and religious category of Judaism.

In this article, I will use the phrase „Jewish law" and *halakha* interchangeably. It is not my intention to prove the influence of the legal norms of Torah on Israel's civil law. I am aware of the multiplicity and sophistication of rabbinic interpretations of *halakha*, not to mention the division between Orthodox and Reform Judaism. My goal is only to draw attention to the common characteristics of Jewish law as a unique system of both religious and legal norms in contrast to what I called the „Western" approach.

Terms such as „Western law" and „Christian-based legal systems" refer to a variety of European and American legal systems. Despite differences between national laws, even a modern, laic legal system established in the Western world is based on a few fundamental ethical assumptions derived from either Christian ethics and ontology or developed in the process of laicisation of the state in the Enlightenment. Examples from both continental and common law will be given to illustrate the traits commonly found in legal systems in contrast to Judaism. Therefore, some legal institutions may be simplified.[1]

1 The author would like to thank Professor Rabbi Michael Broyde, the Chief Rabbi of Poland Michael Schudrich, Rabbi Ichak Rapoport and Rabbi Itamar Rosenzweig for the best possible introduction to Jewish law and valuable insight during research and writing. Understanding the influence of Christianity on modern law of contracts would not be possible without Professor Wim Decock.

2. SOCIAL CONTRACT THEORIES: WHY „WESTERNERS" GET JEWISH LAW WRONG

On the grounds of the theory of natural law, all people are born with the possibility to bind themselves with contracts. The ability to shape the reality with words precedes the formation of the state, which is thought to be a result of a social contract. According to the fictitious emergence of a social contract, free and equal individuals gather and decide to hand over some of their natural powers to a more powerful entity which becomes a legitimate ruler. Therefore, the ability to contract away one's future choices as an innate capability is prior to the development of the state and its legislation. It also serves as an explanation for the duty to obey the law. Moreover, the ruler can be held accountable for his actions on the basis of being bound by social contract. Social contract closely resembles ordinary agreements which are of interest to private law. First of all, in the state of nature all people are believed to be equal. The choice of the future ruler is made from individuals of the same status. This corresponds to the widely adopted assumption that parties of a contract are equal. Moreover, the public sphere does not exist prior to the social contract. Public law is thus secondary to private law.

Israel is also believed to be a result of a contract, but of a totally different kind. Despite being thought to be modeled on the Sinaitic Covenant, social contracts of Locke and Hobbes differ significantly from their biblical predecessor.[2] Judaism does not need a social contract theory to explain the origin of law. In fact, it would be incompatible with one of its main assumptions about the law: its divine origin.

3. THEOLOGICAL ORIGIN OF LAW (OR LEGAL ORIGIN OF THEOLOGY)?

A dramatic inequality of the parties of the Sinaitic Covenant cannot be compared to any type of inequality prevalent on Earth; however, numerous studies proved that the wording of the Covenant expressed in the Torah was based on a treaty pattern prevalent in the ancient Middle East.[3] The Sinaitic Covenant as well as a treaty between a vassal and his master constituted an obligation of the vassal to his master, the suzerain.[4] Ancient

2 Louis E. Newman, „Covenant and Contract: A Framework for the Analysis of Jewish Ethics", *Journal of Law & Religion* 9/1991, 89–112.

3 Moshe Weinfeld, „The Covenant of Grant in the Old Testament and in Ancient Middle East", *Journal of the American Oriental Society* 90/1970, 184–203.

4 *Ibid.*, 185. etc.

treaties usually contained a curse towards the one who broke the contractual ties. In the case of a treaty between the vassal and his master, the curse was directed towards the vassal who would violate the rights of his king. The same pattern can be observed in the Sinaitic Covenant: it is Israel who would be held responsible for breaking the contract.[5] The shape of the curse clause securing the treaty was a result of inequality of the contract parties, which is obvious in the case of an agreement with God.

What's interesting, in M. Weinfeld's opinion, this type of treaty should be considered to be an inducement for future loyalty rather than a reward for loyalty and good deeds already performed.[6] Israelites entered the Covenant as a nation which had already been morally bound to Yahweh. God's acts of benevolence and, more importantly, deliverance from slavery, created a debt of gratitude. Rejecting the Covenant or even bargaining its terms would be an unthinkable act of ingratitude towards the nation's savior. Thus, the Covenant might also be considered as an act of gratitude for God's past actions, just like a „grant", and not the vassal type of a treaty.

4. LIMITATIONS OF FREEDOM RESULTING FROM THE COVENANT

There are two main ways of understanding Israel's role in shaping the Covenant in modern literature. According to the legalistic or contractual model of God's relationship with Israel, God's promise had to be accepted by the Israelites. This vision of the Covenant resembles the formation of an actual contract: presenting an offer and its acceptance by the second party. The Israelites entered this Covenant freely and of their own accord.[7]

Other sources may, however, support a different interpretation of the Covenant.[8] According to this point of view, the Covenant cannot be understood in terms of contract because there was no bargain between God and the Israelites. The Israelites did not have freedom to decide whether to accept God's offer or not. God's acts of benevolence and Israel's experience of deliverance from slavery established a relationship between Him and Israel long before the Covenant. Thus, Israelites were in moral debt to Yahweh before entering into the Covenant. God was in a privileged position to impose his rulings upon Israel, who had a moral obligation to accept divine norms.[9]

5 *Ibid.*

6 *Ibid.*

7 L. Newman, 94–95.

8 Deuteronomy 4:35–40.

9 L. Newman, 95–96.

No matter which interpretation of the Covenant is chosen, a member of the Jewish community never pays off the debt. Freedom to accept or decline the Covenant is never a result of autonomy because men have always been dependent on God and, thus, their freedom cannot be interpreted in a liberal or Kantian sense. If that was not enough, it can be traced back to God's decision to grant men with free will; it is a case of an absolute dependency of one party on another. It is important to remember that the Covenant was not shaped by individuals, but God and the nation of Israel. The Covenant binds not only present, but future generations of Israelites as well. Whilst men are mortal, God is eternal and thus able to enter into a contractual relationship with yet unborn generations. Louis E. Newman noted that a personal relationship with God always precedes communal obligations towards Him.[10] Nonetheless, the researcher also stressed that it is not possible to develop an adequate religious attitude without obeying moral and legal norms which have been imposed on the community of Israel by God. A moral society is necessary for the religious growth of an individual; by analogy, a society cannot reach the desired level of ethical development without moral members. The role of the community in shaping the religious identity and morality of an individual is therefore fundamental. According to L. E. Newman, Jewish ethics are directed towards members of the covenanted community, rather than autonomous individuals.[11] This view, however, does not exclude a more liberal interpretation of the Covenant, as long as the term „liberal" refers to the ability to act upon one's will without violating divine law. If Israel freely bound itself with the contract and had the option to bargain its terms, then the duties resulting from the Covenant arose autonomously. Therefore, the basis of contractual obligations rested in Israel's own will.

Non-contractual interpretation does not allow such wide freedom in relation to God. It is limited to the choice whether to fulfill a moral duty or not. It's clear that even the choice between those actions (or the lack thereof) is heavily burdened with a deep, personal relation with God established by His actions in the past. Thus, it would be unthinkable to reject God's offer; freedom of choice is therefore limited even further. Covenantal obligations are imposed on Israel by God, which leads to the conclusion that the religious norms of *halakha*, including the whole Jewish law and morality, are heteronomous in nature. Jews are not in the position to shape religious and legal norms on their own, because their origins are divine.[12] This way of thinking about the morality of contract, personal freedom and duties has heavily influenced the Jewish law of obligations.

10 *Ibid.*

11 *Ibid.*, 89, fn. 3.

12 Elliott Dorff, „Judaism as a Religious Legal System", *Hastings Law Journal* 29/1978, 1331–1360.

5. THE ORIGINS OF THE DEBT-BASED IDEA OF LAW

The law in the words of Torah is believed to be given by God. All law can be interpreted as a debt which cannot be paid off. It is a debt which gives back: if Jews obey religious norms, God remains their God. In this way of thinking, debt is not considered to be negative and potentially destructive; it is not even meant to be paid off. It is a debt which enables one's spiritual and moral growth, in which acquisition of new responsibilities is the reason to celebrate.

Moreover, it is the sacral debt of the Covenant which establishes the continuity of religion, including moral and legal norms in generations to come. The Hebrew term *Mitzvah* translating as „an incumbent obligation" plays a central role in Jewish law and ethics. It is worth noting that debt is prior to the commandment (*mitzvah*). Therefore, the idea of being bound by the Covenant precedes both communal and personal identity. Transitions between stages of life such as infantry, adolescence, and adulthood are also marked by the acquisition of new responsibilities, the most widely recognizable being *bar mitzvah*. *Bar mitzvah* translates as „son of the commandments" and plays a significant role in the life of a Jew because it marks coming into adulthood. Children are not considered to be able to obey all moral and legal norms and take part in all religious rituals. It is important to remember that in traditional Judaism, the ability to do so is thought to be a duty in itself.[13]

6. DUTIES TOWARDS GOD AND OTHER PEOPLE

Despite the divine origin of 613 halakhic *mitzvot*, some of them are nowadays viewed impossible to fulfill outside Jerusalem. Nonetheless, the majority of religious duties remain binding and cannot be derogated by men. If God imposed religious restrictions on Jews, only God can change and derogate them. Such a drastic exclusion of men in shaping the law has proven to be impractical when Jewish communities dispersed between different nations and no longer formed a community governed by the same authority.[14] They lived in states ruled by different laws, with varied social structures and possibilities of growth. The socio-economic changes required the adaptation of trade-oriented commandments to the new realities of Abraham's descendants. Thus, rabbis invented a clever way of changing halakhic norms without violating God's authority as the lawgiver. It was the

13 Robert M. Cover, "Obligation: A Jewish Jurisprudence of the Social Order", *Journal of Law & Religion* 5/1987, 65–74.

14 Clement Fatovic, Benjamin A. Kleinerman, *Extra-Legal Power and Legitimacy: Perspectives on Prerogative*, Oxford University Press, Oxford 2013, 54 etc.

invention of rabbinic interpretation, similar to praetoric legislation in the late Roman Republic and Empire, which made the change of the understanding of religious norms possible while preserving their original sound. The Talmudists' adaptation of halakhic norms concerning interpersonal relations so as to cover rulings about promises and agreements was the first step towards creating a coherent system of Jewish private law.[15]

The 613 commandments can be divided into obligations towards God (*mitzvot bein adam la-Makom*) and obligations towards other people (*mitzvot bein adam le-chavero*).[16] All of them are considered to be of equal importance. The Talmud repeatedly reminds believers that fulfilling their duties towards their fellow men is at least as important as a thorough study of the Torah. The Holy Book itself is sometimes divided into the written Torah, consisting of the 613 commandments, and the oral Torah which in Orthodox Judaism serves the purpose of mastering ethical excellence and preserving the essence of Judaism throughout the ages.

Interpersonal relations are also believed to be given by God. *Halakha* is a complex legal and moral system; it is perfect because it is a creation of God. Thus, it must consider all spheres of human life, interpersonal relations included. Moreover, a truly ethical society is essential for the religious growth of any Jew and its improvement should therefore be the goal of human endeavor on Earth. It could not have been stated clearer than by Rabbenu Ashee ben Yechiel (the Rosh) at the beginning of his commentary to the tractate *Pea*: „For the Holy one, blessed be He, has greater desire for hose *mitzvot* by which one also pleases other people than for the *mitzvot* between man and his Maker".[17]

All halakhic duties can be further divided into three categories: *mitzvot* focused on the achievement of the result the Torah desires through the mitvah's performance, *mitzvot* focused on the outward action (the *maaseh*) – the action required by the Torah and *mitzvot* combining it (*maaseh*) with a long-term aim or purpose.[18] *Mitzvot bein adam la-Makom* seem to be the model in which the intention (the heart – *libba*) outweights the performance

15 E. Dorff, 1334–1342.

16 *Bein Adam Le-Chavero*: Ethics of Interpersonal Conduct by Rev Binyamin Zimmerman, Difference in Obligation of *Bein Adam Le-chavero* and *Bein Adam La-Makom*, *https://www.etzion.org.il/en/philosophy/issues-jewish-thought/issues-mussar-and-faith/difference-obligation-between-bein-adam-le*, last visited on 8.9.2021.

17 *Bein Adam Le-Chavero*: Ethics of Interpersonal Conduct by Rev Binyamin Zimmerman, The Centrality of *Mitzvot Bein Adam Le-chavero*, *https://www.etzion.org.il/en/philosophy/issues-jewish-thought/issues-mussar-and-faith/centrality-mitzvot-bein-adam-le-chavero*, last visited on 8.9.2021.

18 B. A. Le-Chavero: Ethics of Interpersonal Conduct by Rev Binyamin Zimmerman, Difference in Obligation of B. A. Le-chavero and B. A. La-Makom, *https://www.etzion.org.il/en/philosophy/issues-jewish-thought/issues-mussar-and-faith/difference-obligation-between-bein-adam-le*, last visited on 8.9.2021.

(*maaseh*). Sometimes the mere intent to perform a *mitzvah* is sufficient; for example Kuldushin (40a): „God joins the good thought to the unrealized act".[19] *Mitzvot bein adam le-chavero*, on the other hand, seem to be focused on the result. God is omniscient and, thus, knows the thoughts and real intentions of mortals. On the contrary, men do not have access to each other's thoughts and their good intentions must be proven by acts. Stress on the performance instead of words is also visible in the Jewish law of obligations, which will be discussed in more detail in the next chapters. To understand how the duty to keep one's word and the rabbinic condemnation of promising could coexist in the Jewish law of obligations, we must first examine the basic predecessors of all agreements: oaths and vows.

The breach of one's word is a lie: if someone promised to do something and didn't do it, he lied about what he was going to do in the future. The duty to distance oneself from falsehood is understood rigorously and extends to all promises and agreements, including oaths and vows. The Hebrew word for a vow is *neder*, which is used for both a promise made to God to perform some deed and for a prohibition which a person imposes upon himself to abstain from something which is otherwise permitted.[20] An oath (*shevu'ah*), on the other hand, means a promise to do or not do something or a claim that a statement is true or false. In contrast to a vow, an oath does not necessarily involve any mention of God and may be sworn in any language.[21] Because vowing creates an obligation between a man and God, it is what the Talmud largely concerns itself with.

The following passage from Nedarim 20a:10 makes it clear: „never be accustomed to taking vows, because ultimately you will disregard them, and you will even abuse oaths, which are more grave".[22] Avoiding taking oaths instead of actual action may be understood as a halakhic duty towards other people, *mitzvah bein adam le-chavero*. Because God as an omniscient entity knows the real thoughts of a man, He cannot be confused about the man's intentions by lies. Moreover, it can be argued that because of Him being beyond time, He already knows whether the promiser lied in the moment of taking a vow. The situation differs drastically between mortals – therefore, only oaths governing interpersonal relations are of interest to the Earthly judiciary. This thesis is supported by M. Broyde's observation that rabbis did not concern themselves with oaths unless they created obligations between mortals.[23] In Judaism, restrictions and moral

19 *Ibid.*

20 Vows & Vowing, *https://www.jewishvirtuallibrary.org/vows-vowing*, last visited on 8.9.2021.

21 *Ibid.*

22 The William Davidson Talmud, Nedarim 20a:10.

23 Michael J. Broyde, Steven S. Weiner, „Understanding Rights in Context: Freedom of Contract or Freedom from Contract? A Comparison of the Various Jewish and American Traditions", *Journal of the Beth Din of America* 1/2012, 48–65.

duties imposed on taking and breaking oaths largely passed to norms concerning the creation and breach of contracts. What's more, Harold Berman argued that the foundations of contract law can be traced back to certain biblical norms about taking oaths.[24] Although his study focused on the development of general contract law in legal systems heavily influenced by canon law, the most fundamental ethical norms concerning oaths are rooted in the same passages of Pentateuch which were the basis for halakhic regulations of this matter.

7. FROM DEBT TO SLAVERY

Fear of falling into servitude by binding oneself with words was shared in the whole sphere of Jewish private law. Establishing boundaries for freedom of future choice was deemed unacceptable by the rabbis. Rabbis argued that contract bounds deprive an individual of freedom of choice in the future, which was considered to be a far-reaching restriction. Such a fierce opposition may be explained by an adoption of a broad definition of slavery and worries about the indenturing of one human being to another.[25] According to the Jewish Virtual Library: „the Hebrew term for slave, *eved*, is a direct derivation from the Hebrew verb *la'avöd* ('to work'), thus, the slave in Jewish law is really only a worker or servant. The *eved* differs from the hired worker (*sakhir*) in three respects: he receives no wages for his work; he is a member of his master's household; and, his master exercises *patria potestas* over him – for example, the master may choose a wife for the slave and retains ownership of her and he has proprietary rights in him".[26]

In ancient Middle East becoming a slave due to unpaid debt was not unusual. In most legal systems of that time debtors who could not pay off their debts were deprived of their personal freedom and became slaves of their creditors. The remnants of this rule could be observed in Roman Twelve Tables as well. Talmudists strongly condemned such practices, believing that no monetary obligation can affect personal freedom. The latter was thought to be given by God and, therefore, inalienable by mortals. It is best illustrated by the Talmudic reading of Leviticus 25:42: „for they are My servants, whom I freed from the land of Egypt; they may not give themselves over into servitude".[27] Nevertheless, exceptions were made when the obligation came about through some criminal wrongdoing and

24 Harold J. Berman, „The Religious Sources of General Contract Law: An Historical Perspective", *Journal of Law & Religion* 4/1986, 103–124.

25 M. Broyde, S. Weiner, 63.

26 Jewish Concepts: Slavery, *https://www.jewishvirtuallibrary.org/slavery-in-judaism*, last visited on 8.9.2021.

27 Miqra according to the Masorah, Leviticus 25:42.

if the resulting debt could not be paid by the perpetrator.[28] Selling a thief as a slave was the only exception to the general rule that deprivation of liberty could not result solely from contractual obligation. This way of thinking about monetary debts was reflected in rabbis' rejection of permission to limit one's future choices as a result of an agreement.

Rabbinic reluctance to promissory enforcement of contracts also had a lasting impact on halakhic regulations of labor. If an employee worked for the same employer for a longer period of time, he was at risk of becoming dependent of him too much, which might have led to slavery. Because of that, the late Talmudic commentaries introduced maximum durations for labor contracts.[29] It can also be understood on assumption that giving one's word about the future is always uncertain and, thus, can easily become a lie when the promisor fails to keep his word. This way of thinking is prevalent in the Torah and can be nicely illustrated by the biblical condemnation of taking vows discussed in more detail in the previous chapter.[30]

8. ...AND FROM DEBT TO CONTRACTS

In light of all that has been said about the condemnation of enforcing agreements, it is important to remember that trade would not have been possible if no promises were legally protected. After all, rabbis could not have imposed restrictions on agreements without taking market practice into consideration. The main difference between the „Western" and halakhic view of the law of obligations is whether a person may bind themselves with words. As such, it is a different perspective on the same matter. In Jewish law, monetary debt was the primary form of contract. The development of Jewish contract law consisted of broadening the definition of a debt to new types of obligations. This way, the uncomfortable notion of one person or entity being empowered under civil law to compel another individual to perform a particular service or conduct a future transaction could be avoided.[31] A promise in Jewish law is not enforceable; debt is. Talmudists cleverly broadened the definition of debt so any obligation is considered to be a debt and, therefore, must be paid off or else is an automatic lien. Thus, fulfillment of contract lien is thought to be the payment of expectancy in cash.[32]

An action-based way of thinking about the creation of contractual ties may be seen to be derived from the result-focused duties towards their fellow men in Jewish law. If promises, even well-evidenced and written, are

28 M. Broyde, S. Weiner, 52, fn. 13.

29 *Ibid.*, 62, fn. 43.

30 The William Davidson Talmud, Eruvin 64b:18.

31 *Ibid.*, 61.

32 *Ibid.*

not legally enforceable, an action must create debt. Consider the following scenario as an example: A wants to sell a car for 10,000 $ and B agrees to buy it on Wednesday. They agree on the price, the fact that A will sell the car and that B will buy it. When they sign the contract, it is Monday. However, the title is not transmitted unless B gives 10,000 $ to A as a price for the car. After the money is transmitted, the debt of A to give B the car arises. Notice that obligations are created in the last moment possible – it is a result of the rabbinic disdain for „bargaining one's free will". When a person binds themselves as late as possible, they limit their freedom for a shorter period of time, which was preferred by Talmudists. Every kind of a legally valid obligation had a formal act of acquisition called *kinyan* which enabled such a sophisticated solution, making contracts possible without admitting that someone's future choices are limited by words.[33] Therefore, a legally enforceable obligation is made when the ownership is transferred from the seller to the buyer, when an employee finishes his work for an employer and when a tenant pays the rent to the landlord. Moreover, an obligation has a deep personal meaning because of its close link to personal, religious responsibility for keeping it. A claim against a debtor is thought to be of secondary importance due to it being another man's fault. However, from the 13th century onward any legal transaction undertaken by the public has been valid even in the absence of a formal *kinyan*.[34]

The lack of legal enforcement for bare promises, of course, did not mean that they could be freely broken, though. Not keeping one's word was also a lie that came with religious and moral sanctions. The severity of rabbinic judgement of failing to „distance oneself from falsehood" has been examined in more detail in the previous chapter. In spite of not being legally punishable, the breach of promise is regarded as subject to the disapproval of „Heaven" and looked on askance by mortals. This sphere of religious norms concerning trade practices resembles modern business ethics, as opposed to business law which can be legally enforced.[35]

9. CONCLUSIONS

It is not possible to approach the complex system of Jewish law without the awareness of its unique characteristics and in separation from the religious and cultural aspects of Judaism. The law, the religion and the morality are interlinked in a way that renders understanding them in separation hard, if not impossible. *Halakha* is considered to be a divine set of norms which

33 Acquisition, *https://www.encyclopedia.com/religion/encyclopedias-almanacs-transcripts-and-maps/acquisition*, last visited on 8.9.2021.

34 *Ibid.*

35 Ronald M. Green, „Guiding Principles of Jewish Business Ethics", *Business Ethics Quaterly* 7/1997, 21–30.

influence most aspects of Jewish life, including entering into legal obligations. It is worth noting that halakhic *mitzvot* that govern taking and releasing from oaths are in main points similar to analogous rabbinic regulations of obligations. Reluctance to take oaths and the focus on the actual performance instead of promises heavily influenced Talmudic limitations imposed on granting agreements legal protection. Their guiding principle was the belief that freedom is inalienable – therefore, the goal of the Jewish law of obligations was not to expand the legal protection to include all agreements, as in the civil and common law systems, but to secure the freedom of contract parties whilst protecting legally binding obligations. In these conditions, Judaism could not have developed the concept of freedom of contract in its modern meaning. Despite religion-based limitations imposed on the laws that govern entering into obligations, rabbis were able to develop a well-functioning legal system without consenting to bind persons, binding monetary assets belonging to them instead. The Jewish law of obligations may serve as a lens through which one may see how religious dogmas, Jewish anthropology and ethics shape the legal system at its finest. What's more, the Jewish way of thinking about obligations provides valuable insight into the universally important debate about the codependency between obligation and freedom, and the resulting, often far-reaching, limitations to the latter.

BIBLIOGRAPHY

PRIMARY SOURCES:

Deuteronomy 4:35–40.

Miqra according to the Masorah, Leviticus 25:42.

The William Davidson Talmud, Eruvin 64b:18.

The William Davidson Talmud, Nedarim 20a:10.

SECONDARY SOURCES:

Acquisition, *https://www.encyclopedia.com/religion/encyclopedias-almanacs-transcripts-and-maps/acquisition*, last visited on 8.9.2021.

Bein Adam Le-Chavero: Ethics of Interpersonal Conduct by Rev Binyamin Zimmerman, The Centrality of *Mitzvot Bein Adam Le-chavero*, *https://www.etzion.org.il/en/philosophy/issues-jewish-thought/issues-mussar-and-faith/centrality-mitzvot-bein-adam-le-chavero*, last visited on 8.9.2021.

Bein Adam Le-Chavero: Ethics of Interpersonal Conduct by Rev Binyamin Zimmerman, Difference in Obligation of *Bein Adam Le-chavero* and *Bein Adam La-Makom*, *https://www.etzion.org.il/en/philosophy/issues-jewish-thought/issues-mussar-and-faith/difference-obligation-between-bein-adam-le*, last visited on 8.9.2021.

Jewish Concepts: Slavery, *https://www.jewishvirtuallibrary.org/slavery-in-judaism*, last visited on 8.9.2021.

Vows & Vowing, *https://www.jewishvirtuallibrary.org/vows-vowing*, last visited on 8.9.2021.

Harold J. Berman, „The Religious Sources of General Contract Law: An Historical Perspective", *Journal of Law & Religion* 4/1986, 103–124.

Michael J. Broyde, Steven S. Weiner, „Understanding Rights in Context: Freedom of Contract or Freedom from Contract? A Comparison of the Various Jewish and American Traditions", *Journal of the Beth Din of America* 1/2012, 48–65.

Robert M. Cover, „Obligation: A Jewish Jurisprudence of the Social Order", *Journal of Law & Religion*, 5/1987, 65–74.

Elliott Dorff, „Judaism as a Religious Legal System", *Hastings Law Journal* 29/1978, 1331–1360.

Clement Fatovic, Benjamin A. Kleinerman, *Extra-Legal Power and Legitimacy: Perspectives on Prerogative*, Oxford University Press, Oxford 2013.

Ronald M. Green, „Guiding Principles of Jewish Business Ethics", *Business Ethics Quaterly* 7/1997, 21–30.

Louis E. Newman, „Covenant and Contract: A Framework for the Analysis of Jewish Ethics", *Journal of Law & Religion* 9/1991, 89–112.

Moshe Weinfeld, „The Covenant of Grant in the Old Testament and in Ancient Middle East", *Journal of the American Oriental Society* 90/1970, 184–203.

Агата В. НАВАЦКА*

ИЗМЕЂУ СЛОБОДЕ И ДУЖНОСТИ: КАКО ЈЕ ЈЕВРЕЈСКО ОБЛИГАЦИОНО ПРАВО СПОЈИЛО ОБА

Сажетак

Јудаизам је истовремено правни систем и религијски систем. За разлику од хришћанства, које прави разлику између појмова *sacrum* и *profanum*, јеврејско право је нераздвојиво од јудаизма. Јеврејско облигационо право одликује претежност хетерономних норми наспрам аутономних, и претежност обавеза на-

* Студенткиња треће године постдипломских студија (мастер студија) права и филозофије на студијском програму Интердисциплинарних индивидуалних студија хуманистике и друштвених наука (MISH UW) на Факултету за интердисциплинарне индивидуалне студије хуманистике и друштвених наука Универзитета у Варшави, *a.nawacka@student.uw.edu.pl*.

Овај рад је представљен на другој међународној студентској конференцији „*Iustoria* 2021: Право и религија", 26.3.2021.

спрам права. Није реч о уговору, већ о облигацији која се развила и потекла из јединственог разумевања слободе, изворно везане за њено божанско порекло.

Теолошко порекло јеврејског права утицало је на специфично разумевање слободе у јудаизму. Сматрано је да је она дата од Бога, и да је, стога, неотуђива. Уговарање будућих избора појединца обећавањем, сматрано је претњом за личну слободу. Из тог разлога, јеврејско облигационо право може се пратити уназад до халаха (*halakha*) норми које су регулисале полагање и ослобађање од заклетви и завета. Заветовање је увек носило ризик од чињења греха.

Рабински презир према давању правне заштите сваком уговору, такође је потицао из страха од тога да дужник не падне у ропство. Ипак, правно обавезујуће облигације су омогућене проширивањем значења новчаног дуга на друге врсте правних уговора, у процесу креативног рабинског тумачења. Тренутак када уговор постаје правно обавезујући је, такође, одложен колико је то било могуће, са циљем да се избегне ограничавање будуће слободе појединца. Мора да су талмудисти променили своје тумачење неких халаха норми, како би их учинили применљивим на животе и трговину у веома различитим правним системима земаља у којима су Јевреји живели. Право, религија и морал јудаизма су међусобно повезани тако да их је тешко, ако не и немогуће, разумети одвојено. Халаха се сматра божанским скупом норми које утичу на већину аспеката јеврејског живота, укључујући и ступање у облигационе односе. Јеврејско облигационо право може служити као призма кроз коју појединац може видети како религијске догме, јеврејска антропологија и етика обликују правни систем на најбољи могући начин.

Кључне речи: *Јеврејско облиīационо īраво. – Дужносш. – Дуī. – Обавеза. – Синајски савез.*

Рад приспео / Paper received: 30.10.2021.
Прихваћен за објављивање / Accepted for publication: 28.12.2021.