

Talmudic Discourse in the Federal Courts

Circuit Judge Bibas authored an Opinion in *E.O.H.C. vs. Sec'y United States Dep't of Homeland Sec.*, 2020 U.S. App. LEXIS 4628, by a citation to *Mishnah, Pirkei Avot* 1:14, utilizing the highly regarded advice from Hillel Elder. The full quotation is:

If I am not for myself, who will be for me?

If I am only for myself, what am I?

If not now, when?

The Opinion dealt with the Immigration and Nationality Act (INA) stripping the federal courts of jurisdiction over all claims “arising from any action taken or proceeding brought to remove” aliens. A.U.S.C. §1252(b)(9). An alien, according to Judge Bibas’ thoughtful Opinion, must “typically litigate his removal-related claim before an immigration judge. After an order of removal, the alien may appeal to the Board of Immigration Appeals. Only after that may he file a petition for review with a court of appeals. Usually, district courts are not part of this process.” Opinion Pg. 3 of 18.

The Court observed that certain administrative actions would effectively be beyond judicial review. “If ‘later’ is not an option, review is available now.” Id.

Judge Bibas’ resume is enlightening as to the incredible education of this most remarkable jurist. However, the Talmud in American law is not altogether new. See the Supreme Court’s Talmudic Debate on the Meaning of Guilt, Innocence and Finality, *Washington & Lee Law Review*, Vol. 73, Issue. 3, Article 8, September 6-1-2016.

The Talmud, divided into sixty sections, typically called tractates, represents a compendium of laws, rules, observations, debates and even jokes of Jewish thinkers during a period of at least 500 years. The Talmud also incorporates much prior tradition, law, debate and observations. There are those who believe that G-d individually delivered to Moses the Talmud at Mt. Sanai. Moses would therefore have received both the written and the so-called oral law. Others believe that Talmud is an ongoing process. One part of the Talmud is called the Mishnah, the law or Halakha. The second part of the Talmud entitled the Gemara is a summary of debates and observations concerning the Mishnah written in the now very arcane Aramaic-Hebrew language.

The Mishnah was a process of compilation approximately between the years 30 Before the Common Era and 200 Of the Common Era. The Gemara is more recent, having been placed into written form between 200 and 500 Of the Common Era.

Studying and understanding Talmud is a basic requirement for any Jewish scholar.

The encyclopedic work of the Talmud is so full of law and legal process, that it is not surprising that the legal systems which followed borrowed, and sometimes even plagiarize, from the Talmud. Whether it is Roman, Continental or English law, they all have a definite strain of Talmudic reasoning contained within their legal matrix.

No less Titans in the law than Justice William Douglas and Justice Anthony Scalia have quoted from the Talmud. Douglas compared the American legal distinction between coerced versus voluntary confessions with the Talmud's exclusion of all self-incriminatory statements. See, *Garrity vs. New Jersey*, 385 U.S. 493, 497 n.5 (1967) and *Caperton vs. A.T. Massey Coal Co.*, 556 U.S. 868 (2009). In the Capertown case, Justice Scalia, relied upon a Talmudic observation, to turn over and look at a question from all angles.

Jonathan Colan, in his Washington and Lee Law Review article, beginning at Page 1257, addresses some of the citations of the Talmud in the American legal tradition.

A point counterpoint comparison between America law and the Talmud is beyond the scope of this piece, but can be found in a simple Google search. The reason why the Talmud is quoted so often in American legal decisions is because it represents a formulation of religious and societal principles based upon evolving necessity. Someone, perhaps it was me, once commented that Talmud believing Jews could never be fundamentalist because the Talmud itself is both an expansion and a contraction of the Torah (the five books of Moses) depending upon the circumstances. One of my favorites is how the Talmud deals with the Torah which compels the annihilation of Amalek, who attacked the Jews as they left their enslavement in Egypt when the children of Israel were at their weakest. Based upon the admonition in Torah to "remember Amalek," which we say in our prayers every day, the Talmud takes a typical perspective on this rather harsh sounding notion concerning the destruction of one's very evil enemies. Rather, the Talmud admonishes mankind to banish the senseless kind of hatred represented by Amalek which emanate from our own hearts and minds. Banish Amalek from the way you think has become the substitute for the destruction of any entity called Amalek.

The concern over how Amalek is dealt with in the Talmud is no senseless exercise. Rather, one cannot be a Jew of any denomination without appreciating the role of the oral law. Some denominations within Judaism see the Talmudic tradition as permitting them to continue the process of interpretation and reinterpretation, "dumbing down," some would say, the major principles of the Jewish faith. Others, while adhering quite strictly to the Talmudic guidelines, nevertheless *poskin* or interpret the Talmud in a way which enables orthodox observance in a modern world. Still others take a yet more restrictive view of the relationship between the oral versus the written law. In all cases, however, the Talmud is full of wisdom, wit, and legal principles that have survived through the ages and continue to inform us concerning the measure of mankind's humanity towards our fellow creatures.