

The Halakhic Process

Part 1: Introduction / What is Law?

A. The Problem of Jewish Sources

<p>1. Rambam Megilah/Chanukah 3:7 In those places where they keep two days of Yom Tov (i.e. outside of Israel), they complete the Hallel 21 days (as opposed to 18): On the 9 days of the Holiday (Sukkot + Shemini Atzeret), 8 days of Channukah, 2 days of Passover, and 2 days of Shavuot. But on the New Moon the reading of Hallel is a custom and not a commandment. And this custom is only in public and only done while omitting portions [of the Hallel], <u>and we do not make a blessing for we do not make blessings on customs, and individuals (i.e. not a minan) do not read Hallel at all.</u> And if he began reciting it alone, he completes with the omissions as he would in a minyan, and so too for the remaining days of Passover it is read with omissions like the New Moon.</p>	<p>רמב"ם מגילה וחנוכה ג הלכה ז מקומות שעושים ימים טובים שני ימים גומרים את ההלל באחד ועשרים יום, בתשעת ימי החג, ושמונת ימי חנוכה, ושני ימים של פסח, ושני ימים של עצרת, אבל בראשי חודשים קריאת ההלל מנהג ואינה מצוה, ומנהג זה בצבור לפיכך קוראין בדילוג, ואין מברכין עליו שאין מברכין על המנהג ויחיד לא יקרא כלל, ואם התחיל ישלים ויקרא בדילוג כדרך שקוראין הצבור, וכן בשאר ימי הפסח קוראין בדילוג כראשי חודשים.</p>
<p>2. Shulhan Aruch O.C. 339:3 One does not clap [on Shabbat or Yom Tov], one does not slap one's thighs, and one does not dance, lest one come to fix a musical instrument. And even banging one's finger against the ground or a board, or snapping, or to rattle nuts for a baby or to play with two of them to silence him, all these and similar actions are forbidden lest one come to fix a musical instrument, but to clap on the back of your hand is permitted. Ramo: And some say that today it is all permitted because we are not experts in making musical instruments and there is no reason for this enactment lest one come to fix a musical instrument for it is uncommon. And it is possible because of this reason that the custom is to act permissively (Tosafot Beitza 30a)</p>	<p>שו"ע אורח חיים שלט סעיף ג אין מטפחין להכות כף אל כף, ולא מספקין להכות כף על ירך, ולא מרקדין, גזירה שמא יתקן כלי שיר. ואפ"י להכות באצבע על הקרקע, או על הלוח, או אחת כנגד אחת כדרך המשוררים, או לקשקש באגוז לתינוק, או לשחק בו בזוג כדי שישתוק, כל זה וכיוצא בו אסור, גזירה שמא יתקן כלי שיר; ולספק כלאחר יד, מותר. הגה...וי"א דבזמן הזה הכל שרי, דאין אנו בקיאים בעשיית כלי שיר וליכא למגור שמא יתקן כלי שיר דמלתא דלא שכיח הוא ואפשר שעל זה נהגו להקל בכל (תוספות סוף פרק המביא כדי יין).</p>
<p>3. Shulhan Aruch O.C. 31:2 On Chol Hamoed it is also forbidden to put on tefillin for this reason, for Chol Hamoed is considered an "ot" (a sign). Ramo: <u>And some say that on Chol Hamoed one is obligated in tefillin. And this is the practice in all these regions to put on tefillin on Chol Hamoed and to recited a blessing over them, but not to make a blessing over them loudly in shul as is normally done during the rest of the year.</u></p>	<p>שו"ע אורח חיים לא סעיף ב בחוה"מ גם כן אסור להניח תפילין מהטעם הזה בעצמו, שימי חול המועד גם הם אות. הגה: וי"א שח"ה חייב בתפילין (ב"י בשם הרא"ש). וכן נוהגין בכל גלילות אלו להניח במועד ולברך עליהם, אלא שאין מברכים עליהם בקול רם בבחכ"ס כמו שאר ימות השנה.</p>
<p>4. Mishna Berurah O.C.233:6 This means that one should not follow one time as one and another time as another for these are two mutually contradictory opinions. For what is written that one should not pray Minha after Plag Minha in the afternoon (as per the opinion of the sages) and Ma'ariv before halakhic nightfall (as per the opinion of R. Yehuda)</p>	<p>משנה ברורה סימן רלג (ו) לעולם כחד - פי שלא ינהוג פעם כך ופעם כך משום דהוה תרתי דסתרי אפילו למחר ומכ"ש שלא יתפלל ביום אחד מנחה אחר פלג כרבנן וערבית קודם צה"כ:</p>

B. Where Does Law Come From?

Kelsen, Hans. *Pure Theory of Law*. Berkeley: University of California, 1967 p. 3-9

4. THE NORM

a) The Norm As a Scheme of Interpretation

The external fact whose objective meaning is a legal or-illegal act is always an event that can be perceived by the senses (because it occurs in time and space), and therefore a natural phenomenon determined by causality. However, this event as such, as an element of nature, is not an object of legal cognition. What turns this event into a legal or illegal act is not its physical existence, determined by the laws of causality prevailing in nature, but the objective meaning resulting from its interpretation. The specifically legal meaning of this act is derived from a "norm" whose content refers to the act; this norm confers legal meaning to the act, so that it may be interpreted according to this norm. The norm functions as a scheme of interpretation. To put it differently: The judgment that an act of human behavior, performed in time and space, is "legal" (or "illegal") is the result of a specific, namely normative, interpretation. And even the view that this act has the character of a natural phenomenon is only a specific interpretation, different from the normative, namely a causal interpretation. The norm which confers upon an act the meaning of legality or illegality is itself created by an act, which, in turn receives its legal character from yet another norm. The qualification of a certain 'act as the execution of the death penalty rather than as a murder—a qualification that cannot be perceived by the senses---results from a thinking process: from the confrontation of this act with the criminal code and the code of criminal procedure. That the mentioned exchange of letters between merchants constitutes legally a contract, results exclusively from the fact that such an exchange conforms with conditions defined in the civil code. That a document is objectively as well as subjectively a valid testament results from the fact that it conforms to conditions stipulated by this code. That an assembly of people is a parliament, and that the meaning of their act is a statute, results from the conformity of all these facts with the norms laid down in the constitution. That means, that the contents of actual happenings agree with a norm accepted as valid.

b) Norm and Norm Creation

Those norms, then, which have the character of legal norms and which make certain acts legal or illegal are the objects of the science of law. The legal order which is the object of this cognition is a normative order of human behavior—a system of norms regulating human behavior. By "norm" we mean that something ought to be or ought to happen, especially that a human being ought to behave in a specific way. This is the meaning of certain human acts directed toward the behavior of others. They are so directed, if they, according to their content, command such behavior, but if they permit it, and—particularly—if they authorize it. "Authorize" means to confer upon someone else a certain power, the power to enact norms himself. In this sense the acts whose meaning is a norm are acts of will. If an individual by his acts expresses a will directed at a certain behavior of another, that is to say, if he commands, permits, or authorizes such behavior—then the meaning of his acts cannot be described by the statement that the other individual will (future tense) behave in that way, but only that he ought to behave in that way. The individual who commands, permits, or authorizes wills; the man to whom the command, permission, or authorization is directed ought to. The word "ought" is used here in a broader than the usual sense. According to customary usage, "ought" corresponds only to a command, while "may" corresponds to a permission, and "can" to an authorization. But in the present work the word "ought" is used to express the normative meaning of an act directed toward the behavior of others; this 'ought' includes "may" and "can". If a man who is commanded, permitted, or

authorized to behave in a certain way asks for the reason of such command, permission, or authorization, he can only do so by saying: Why "ought" I behave in this way? Or, in customary usage: Why may I or why can I behave in this way?

"Norm" is the meaning of an act by which a certain behavior is commanded, permitted, or authorized. The norm, as the specific meaning of an act directed toward the behavior of someone else, is to be carefully differentiated from the act of will whose meaning the norm is: the norm is an ought, but the act of will is an is. Hence the situation constituted by such an act must be described by the statement: The one individual wills that the other individual ought to behave in a certain way. The first part of this sentence refers to an is, the existing fact of the first individual's act of volition; the second part to an ought, to a norm as the meaning of that act. Therefore it is incorrect to assert—as is often done—that the statement: "An individual ought" merely means that another individual wills something; that the ought can be reduced to an is.

The difference between is and ought cannot be explained further. We are immediately aware of the difference. Nobody can deny that the statement: "something is"—that is, the statement by which an existent fact is described—is fundamentally different from the statement: "something ought to be"—which is the statement by which a norm is described. Nobody can assert that from the statement that something is, follows a statement that something ought to be, or vice versa.

This dualism of is and ought does not mean, however, that there is no relationship between is and ought. One says: an is conforms to an ought, which means that something is as it ought to be; and one says: an ought is "directed" toward an is—in other words: something ought to be. The expression: "an is conforms to an ought" is not entirely correct, because it is not the is that conforms to the ought, but the "something" that one time is and the other time ought to be—it is the "something" which figuratively can be designated as the content of the is or as the content of the ought.

Put in different words, one can also say: a certain something—specifically a certain behavior—can have the quality of is or of ought. For example: In the two statements, "the door is being closed" and "the door ought to be closed," the closing of the door in the former statement is pronounced as something that is, in the latter as something that ought to be. The behavior that is and the behavior that ought to be are not identical, but they differ only so far as the one is and the other ought to be. Is and ought are two different modi. One and the same behavior may be presented in the one or the other of the two modi. Therefore it is necessary to differentiate the behavior stipulated by a norm as a behavior that ought to be from the actual behavior that corresponds to it. We may compare the behavior stipulated by the norm (as content of the norm) with the actual behavior; and we can, therefore, judge whether the actual behavior conforms to the norm, that is, to the content of the norm.

The behavior as it actually takes place may or may not be equal to the behavior as it ought to be. But equality is not identity. The behavior that is the content of the norm (that is, the behavior that Ought to be) and the actual behavior (that is, the behavior that is) are not identical, though the one may be equal to the other. Therefore, the usual way to describe the relation between an actual behavior and a norm to which the behavior corresponds: "the actual behavior is the behavior that—according to the norm—ought to be," is not correct. The behavior that is cannot be the behavior that ought to be. They differ with respect to the modus which is in one case the is, in the other the ought.

Acts whose meaning is a norm can be performed in various ways. For example, by a gesture: The traffic policeman, by a motion of his arms, orders the pedestrian to stop or to continue; or by a symbol: a red light

constitutes a command for the driver to halt, it green light, to proceed; or by spoken or written words, either in the imperative form—be quiet!—or in the form of an indicative statement—I order you to be silent. In this way also permissions or authorizations may be formulated. They are statements about the act whose meaning is a command, a permission, an authorization....

If a man in need asks another man for help, the subjective meaning of this request is that the other ought to help him. But in an objective sense he ought to help (that is to say, he is morally obliged to help) only if a general norm—established, for instance, by the founder of a religion—is valid that commands, "Love your neighbor." And this latter norm is objectively valid only if it is presupposed that one ought to behave as the religious founder has commanded. Such a presupposition, establishing the objective validity of the norms of a moral or legal order, will here be called a basic norm (Grundnorm).¹ Therefore, the objective validity of a norm which is the subjective meaning of an act of will that men to behave in a certain way, does not follow from the factual act, that is to say, from an *is*, but again from a norm authorizing that is to say, from an *ought*.

Norms according to which men ought to behave in a certain way can also be created by custom. If men who socially live to-behave for some time and under the same circumstances in the same way, then a tendency—that is, psychologically, a will—comes into an existence within the men to behave as the members group habitually do. At first the subjective meaning of the acts that constitute the custom is not an ought. But later, when these acts have existed for some time, the idea arises in the individual member that he ought to behave in the manner in which the members customarily behave, and at the same time the will arises that the other members ought to behave in that same way. If one member of the group does not behave in the manner in which the other members customarily behave, then his behavior will be disapproved by the others, as contrary to their will. In this way the custom becomes the expression of a collective will whose subjective meaning is an ought. However, the subjective meaning of the acts that constitute the custom can be interpreted as an objectively norm only, if the custom has been instituted by a higher as a norm-creating fact. Since custom is constituted by human acts, even norms created by custom are created by acts of human behavior, and are therefore – like the norms which are the subjective meaning of legislative acts – "posited" or "positive" norms. Custom may create moral or legal norms. Legal norms are created by custom, if the constitution of the social group institutes custom – a specifically define custom – as norm-creating fact.