

**Fundamental Issues in the Study of *Tanakh***  
**By Rav Amnon Bazak**

**Shiur #08b: *Tanakh* and Literature of the Ancient Near East**

**b. The Torah and Legal Systems of the Ancient Near East (continued)**

That systems of justice existed among other nations prior to the giving of the Torah is a fact incorporated into the Torah's own narrative, and should thus entail no theological difficulty. The existence of such laws, which attempt to organize society, has nothing to do with the question of whether parts of the Torah that parallel ancient legal systems are the product of revelation, or are to be considered as human documents influenced by their surroundings. If these other ancient laws indeed represent a valid articulation of justice which those societies had arrived at of their own accord, there is no reason why the Torah should seek to change them or to ignore them. This conclusion is set forth by Rav Kook:

"And, similarly, when Assyriology entered the world, it raised doubts in people's hearts through the similarities that it found, according to its baseless conjectures, between our holy Torah and what is found in the cuneiform inscriptions, with respect to doctrines, morals, and practices. Do these doubts have even the slightest rational basis? Is it not well known that among the ancients there were those who recognized God, prophets and spiritual giants, such as Metushelach, Chanokh, Shem and Ever, and the like? Is it possible that they had no effect on the members of their generations? Even though their achievements do not compare with those of Avraham Avinu, how could their influence have left no impression whatsoever upon their generations? Surely [their teachings] must have resembled those that are found in the Torah!

As for the similarity regarding practices, surely already in the days of Rambam, and before him in the words of *Chazal*, it was well-known that prophecy operates upon man's nature. For man's natural inclinations must be raised through Divine guidance, for the *mitzvot* were only given for the purpose of refining man. Therefore, anything that through the teaching that preceded the giving of the Torah found a place in the nation and the world, as long as it had a moral foundation, and it was possible to elevate it to an eternal moral height, was retained in God's Torah...

It is fitting that these and similar ideas should enter the hearts of all those who immediately understand things. Then there would be no room whatsoever for fraudulent heresy to spread in the world and grow strong through such events. (Rabbi Avraham Yitzchak Kook, *Eder ha-Yakar*, pp. 42-43)<sup>1</sup>

Rav Kook regards it as self-evident that among the ancients who lived prior to the giving of the Torah there were individuals of exceptional moral character who influenced

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<sup>1</sup> Translation by Rav David Strauss

the society in which they lived, and created a moral system of laws. If those laws correspond with the Torah's view of morality and justice then there is no reason, argues Rav Kook, for the Torah to reject such laws. Therefore it should come as no surprise that the study of the Ancient Near East and its legal systems has discovered some similarities with certain laws in the Torah.<sup>2</sup>

Even had the commandments of the Torah and the laws of the Hammurabi Code been extensively and substantially similar to one another, Rav Kook's words above would seem to offer a sufficient explanation. However, the parallels between the two systems are far outweighed by the fundamental contrasts, indicating a tremendous philosophical and spiritual distance between the Torah and the Hammurabi code. These differences recall Moshe's words from *Sefer Devarim*, asserting the superiority of the Torah over other systems of laws that existed at the time. We shall examine some of the substantial differences between the commandments of the Torah and the laws of the Hammurabi Code, in particular, and the laws of the Ancient Near East, in general.<sup>3</sup>

First and foremost, it should be noted that the laws of the Ancient Near East are of human creation, and presented explicitly as such. For instance, although Hammurabi introduces his Code with a description of how the gods entrusted him with the role of legislating laws and bringing justice to the world, the laws themselves are of his own creation. The laws of the Torah, in contrast, are God's word; their source is God's command exclusively. Transgressing these laws is therefore perceived not merely as an affront to human conventions of truth and justice, but also a violation of God's will. While in the Ancient Near East it was the king who issued laws in order to ensure justice in the land, in the Torah the only connection between the king and the law is the king's obligation to write for himself a copy of God's commandments, and to obey them (*Devarim* 17:18-19). The sole Legislator for Israel is God, their true King. This fundamental difference has many ramifications:

- a. The Torah is unique in that it includes, within the same chapters and within the same collections of laws both social legislation (pertaining to relations between man and his fellow) and religious legislation (pertaining to rituals specifically and the relationship between man and God more broadly). In fact, the division between these types of laws is irrelevant, since they belong to the same harmonious framework of performing God's will in the world. Only in the Torah do we find a phenomenon such as *parashat Mishpatim*, where social laws similar to those comprising the Hammurabi Code - concerning thieves and robbers, monetary damages, pledges, and hiring - appear alongside laws such as Shabbat, the three pilgrim festivals, and the laws of sacrifices.

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<sup>2</sup> Obviously, this sits well with Rav Kook's overall approach concerning the importance of natural morality, as expressed in many places in his writings. We discussed his view of the integration of scholarly research and Torah in an earlier chapter.

<sup>3</sup> These differences have been treated in different forums. We might note, inter alia, Soloveitchik and Rubashov, p. 108; M. Korngren, "Hashva'at Chukkei ha-Avdut she-be-Torat Moshe Im Chukkei ha-Bavlim, ha-Ashurim ve-ha-Chittim", in: A. Weizer and B.Z. Luria (eds.), *Sefer Karl – Pirsumei ha-Chevre le-Cheker ha-Mikra be-Yisrael* 10, Jerusalem 5720, pp. 9-26; M. Zer-Kavod, "Ma Bein Mishpetei ha-Torah le-Vein Chukkei Hammurabi?" in: A. Elinar et al. (eds.), *Sefer Zaidel – Pirsumei ha-Chevre le-Cheker ha-Mikra be-Yisrael* 11, Jerusalem 5722, pp. 18-22; M. Greenberg, "Hanachot Yesod shel ha-Chok ha-Pelili ba-Mikra", in: A. Schapira (ed.), *Torah Nidreshet*, Tel Aviv 1984, pp. 13-37; M. Sabbato, "Yesodot Hagutiim be-Parashat Mishpatim", *Alon Shevut Bogrim* 11, 5758, pp. 37-53.

Moreover, even the social laws of the Torah contain a religious dimension, with many of them being set forth under the general heading, "You shall be holy, for I, the Lord your God, am holy" (*Vayikra* 19:2). In Mesopotamian literature, collections of laws and narrative texts are found in separate works. The Torah is the only ancient work in which the two spheres coexist.

b. Another difference concerns the way in which the laws are formulated. The laws of the Ancient Near East are not formulated in absolute terms, instructing a person what he must do and what he must not do. Instead, they are almost always set forth in casuistic fashion – i.e., in the form of a case in relation to which a law is set down: if someone does X, then the law would be Y. This stems from the fundamental view of the law as addressing problems, and setting down solutions for instances of conflict between people. In the Torah, alongside casuistic formulations, there are apodictic laws – i.e., absolute "dos" and "don'ts," such as the Ten Commandments: "Remember the Shabbat day to sanctify it..."; "Honor your father and your mother..."; "You shall not kill"; "You shall not commit adultery"; "You shall not steal" (*Shemot* 20:7-12). There is no parallel phenomenon in the laws of the Ancient Near East.<sup>4</sup> In *parashat Mishpatim* these two models coexist. On the one hand, we find casuistic formulations such as, "If you acquire a Hebrew slave..."; "If a man sells his daughter as a maidservant..."; "If a man plots against his neighbor, to kill him with cunning..." (*Shemot* 21:2-14); on the other hand, we have apodictic commands such as, "You shall not suffer a witch to live..."; "You shall not vex a stranger..."; "You shall not afflict any widow..."; "You shall not revile the judges, nor curse the ruler of your people. You shall not delay to offer the first of your ripe fruits and of your liquors; the first-born of your sons shall you give to Me..."; "And you shall be holy men unto Me, and you shall not eat any meat that is torn by beasts in the field; you shall cast it to the dogs" (*ibid.* 22:17-30). This difference is a function of the fact that the Torah intends not merely to set forth rules and regulations concerning various situations, but rather aims to guide man as to how he should behave. Even if a person's behavior does not give rise to any offense or complaint on the part of his fellow, what he is doing may nevertheless be prohibited since it is not proper in the eyes of God.

c. According to the laws of the Ancient Near East, if a man's wife commits adultery, he may choose to waive punishment, and in this case the man with whom she shared intimate relations is also exempt from punishment: "If a man's wife is caught with another man, both shall be tied and thrown into the water; if

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<sup>4</sup> See M. D. Cassuto, *Perush al Sefer Shemot*, Jerusalem 5712, especially on *parashat Mishpatim*, pp. 178-209; M. Weinfeld, "Li-Mekoro shel ha-Degem ha-Apodikti be-Chok ha-Mikra", *Tarbiz* 41, 5732, pp. 349-360; S. Leonstamm, "Mishpat, Mishpat ha-Mikra" in *Encyclopedia Mikra'it* 5, Jerusalem 5738, columns 625-628. Weinfeld and Leonstamm point out that the laws of the Ancient Near East include some apodictic commands or prohibitions formulated in the third person, pertaining to the status of and procedures concerning inferior categories (such as, for example, in the Laws of Eshnunna 51 – "A slave or slave-girl of Eshnunna... shall not leave the gate of Eshnunna without its owner's permission" – Albrecht Goetze, "The Laws of Eshnunna," in *The Ancient Near East*, James B. Pritchard (ed.), Princeton University Press, 2011, pp. 150-154.) However, these are not universal positive and negative commandments directed towards the entire nation, as we find in the Torah.

the king pardons his wife – the king shall pardon his servant (the other man)."<sup>5</sup> In the Torah, no such possibility exists (see *Vayikra* 20:10; *Devarim* 22:22-23). Once again, this arises from the fundamental difference between the two systems of laws: while the specific law in question is formulated, in its Ancient Near Eastern versions, with a view to protecting the husband (such that if he is willing to forego his rights and prefers to ignore the offense, there is no need for compensation), the Torah regards adultery as not only an injustice towards the husband, but also as a sin against God. This idea is reflected not only in the laws pertaining to adultery, but also in narratives relating to this issue: God prevents Avimelekh from touching Sara because it is a sin against God: "... I also withheld you from **sinning against Me**; therefore I did not permit you to touch her" (*Bereishit* 20:6), and Yosef refuses to accede to Potifar's wife, who tries to seduce him, stating: "How can I perform this great evil, for **I would be sinning to God**" (ibid. 39:9).

d. According to some Ancient Near Eastern law systems, a family that has had one of its members killed may choose monetary payment instead of the death penalty for the killer. For example, the Middle Assyrian laws state, "If either a man or a woman has entered someone's house and killed either man or woman, they shall turn over the murderer to the next-of-kin; he may have them executed, or he may choose to accept compensation in property" (section 10).<sup>6</sup> It is the next of kin who is considered the injured party – inter alia owing to the monetary damage entailed in this loss to the family's work force, and therefore it is his choice whether to have the murderer put to death, or to take his property. In the Laws of the Hittites (1-4) we find different rates for ransoms in accordance with the circumstances of the murder. The approach of the Torah is quite different: "You shall not take a ransom for the life of a murderer who is guilty of death; for he shall surely be put to death" (*Bamidbar* 35:31).<sup>7</sup> Once again, the reason is because the murder is not only an offense against the victim and his family, but also against the Creator of men, as the Torah tells us immediately after the description of the Flood: "One who sheds the blood of man shall have his own blood shed by man, for God created man in His image" (*Bereishit* 9:6).

The difference between the two systems also finds expression in the treatment of animals that have caused loss of human life. Owing to the great value that the Torah attaches to human life, it is emphasized that an animal that kills a person must be put to death. This appears along with the law of a murderer: "But the blood of your lives shall I require; at the hand of every beast shall I require it" (ibid. 5). For this reason, the law regarding an ox that has killed someone is, "If an ox gores a man or a woman, that they die, then the ox shall surely be stoned, and its flesh shall not be eaten" (*Shemot* 21:28). According to

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<sup>5</sup> The translation by L. W. King renders the second part of this verse as follows: "but the husband may pardon his wife and the king his slaves." Similar clauses are to be found in the Assyrian Laws (14) and the Laws of the Hittites (197).

<sup>6</sup> <http://jewishchristianlit.com/Texts/ANELaws/midAssyrLaws.html>

<sup>7</sup> A ransom is possible, in Torah law, only in a situation where it was not a person who directly performed the act of killing. For example, in the case of an ox that is known to gore, and that killed someone, the law is that "the ox shall be stoned and its owner, too, shall be put to death" (*Shemot* 21:29), but there is also another possibility: "But if a sum of money is laid on him, he shall give for the ransom of his life whatever is laid upon him" (ibid. 30).

the Torah, whoever or whatever has cut short human life shall not itself be left alive. In the laws of the Ancient Near East, by contrast, the focus is on the monetary compensation that the owner of the ox must pay, but the ox is left alive.

"If a bull, when passing through the street, gores a man and brings about his death, this case has no penalty.

If a man's bull has been wont to gore and they have made known to him his habit of goring, and he has not protected his horns or has not tied him up, and that ox gores the son of a man and brings about his death, he shall pay one-half *mana* of silver." (250-251)<sup>8</sup>

e. The Torah maintains a stricter standard when it comes to loss of human life, which is viewed in a different light than the monetary loss entailed by damage to property. The laws of the Ancient Near East blur this difference, from both directions. On the one hand, the laws are more lenient in certain instances of murder, adopting a financial perspective. On the other hand, they are sometimes stricter in the realm of property, imposing the death sentence. Thus, for example, the Code of Hammurabi states:

"If anyone buys from the son or the slave of another man, without witnesses or a contract, silver or gold, a male or female slave, an ox or a sheep, an ass or anything, or if he take it in charge, he is considered a thief and shall be put to death." (7)

"If fire breaks out in a house, and one who comes to put it out casts his eye upon the property of the owner of the house, and takes the property of the master of the house, he shall be thrown into that self-same fire." (25)

This contrasts sharply with Torah law, which does not impose the death penalty for theft or monetary damage of any sort. The Torah draws a clear distinction between loss of life, which justifies the death penalty, and loss of or damage to property, which is not serious enough to warrant the taking of human life.

The contrast between the Torah and the Hammurabi Code is most prominent in the law of a thief who lacks the means to repay what he has stolen. The Hammurabi Code states:

"If any one steals cattle or sheep, or an ass... if the thief has nothing with which to pay he shall be put to death." (8)

It would seem that this is precisely the practice that the Torah seeks to avoid:

"He shall make full restitution; if he has nothing, then he shall be sold for his theft." (*Shemot* 22:2)

The Torah proposes indenture as a way of dealing with a thief who lacks the wherewithal to pay what he owes, in contrast to the idea of a thief paying for his theft with his life.

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<sup>8</sup> Harper translation, [http://en.wikisource.org/wiki/The\\_Code\\_of\\_Hammurabi\\_\(Harper\\_translation\)](http://en.wikisource.org/wiki/The_Code_of_Hammurabi_(Harper_translation))

Likewise concerning a robber, or a thief who comes stealthily:

"If any one breaks a hole into a house (i.e. with intent to steal), he shall be put to death before that hole and hanged.

If any one is committing a robbery and is caught, then he shall be put to death." (Hammurabi Code 21-22)

Here, too, the Torah rules out the death penalty for one who comes stealthily or who is caught in an attempted burglary, owing to the importance of human life – unless the life of the owner of the house is in danger: "If a thief be found breaking in (stealthily), and be smitten that he die, there shall be no blood shed on his account. If the sun was shining upon him, then blood shall be shed on his account." (*Shemot* 22:1-2)<sup>9</sup>

f. In the commandments of the Torah there is emphasis not only on the technical law, but also on the plight of the weaker sectors of society, who must be treated with consideration that goes beyond the letter of the law. For example, the Torah is very strict concerning the laws of a pledge, out of concern for the situation of a poor person who is in need of the loan, and therefore prohibits the taking of an object as a guarantee if it is needed by the borrower: "If you take your neighbor's garment for a pledge, you shall deliver it to him by sundown. For that is his only covering; it is his garment for his skin; in what shall he sleep? And it shall be, when he cries out to Me, that I shall hear, for I am gracious" (*Shemot* 22:25-26). The Torah emphasizes that harm to the elementary needs of the borrower represents a violation of God's will. The same message arises from the command, "No one shall take either an upper or a lower millstone for a pledge; for he [who does so] takes a life for a pledge" (*Devarim* 24:6). In the Hammurabi Code, in contrast, even the debtor himself may be taken, in person, as a pledge: "If a man hold a [debt of] grain or money against a man, and he seize him for debt, and the one seized die in the house of the one who seized him, that case has no penalty." (115)

Another example concerns a slave who escapes from his master's house. The Torah warns: "You shall not deliver to his master a slave who has fled to you from his master" (*Devarim* 23:16). The plain reason for this prohibition would seem to be a moral one: if the slave has fled from his master, he must have suffered acutely – and therefore the Torah prohibits handing him over to his master.<sup>10</sup> The Hammurabi Code, in contrast, views the returning of the slave to his master as a positive obligation: "If a man harbors in his house a male or

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<sup>9</sup> The distinction between a situation of "stealth" and one of "the sun shining upon him" concerns the question of whether the burglar comes with the knowledge that the homeowner is likely to be present and to defend his property, and thus presents a threat to the life of the homeowner, such that it is permissible to kill him, or whether he comes with the presumption that the homeowner will not be encountered, such that the burglar comes unarmed and presents no threat (see *Sanhedrin* 72a).

<sup>10</sup> Chazal admittedly mitigate this law, applying it only to a non-Jewish slave who has fled from a different country to Eretz Yisrael: he is not returned so that he will not have to return to idolatry (*Gittin* 45a).

female slave who has fled from the palace or from a freeman, and does not bring him (the slave) forth at the call of the commandment, the owner of that house shall be put to death" (16). In the Hammurabi code, formal ownership trumps the value of compassion.

g. The last point that we shall address here is the prevalent view, in the laws of the Ancient Near East, of the family as a single legal unit, such that sons may pay for the misdeeds of their fathers. For example, in the Hammurabi Code, we find the possible scenario where a person is seized (for labor) in lieu of money that he owes, if he is unable to pay (a situation which is legally possible, according to these laws): "If the one seized die of abuse or neglect in the house of him who seized him, the owner of the one seized shall call the merchant to account; and if it be a man's son [that he seized], they shall put his son to death...." (116). Elsewhere we find:

"If a man strike a man's daughter and bring about a miscarriage, he shall pay ten shekels of silver for her miscarriage. If that woman dies, they shall put his daughter to death." (209-210)<sup>11</sup>

Against this background, the Torah's prohibition stands out in stark contrast: "Fathers shall not be put to death for sons, and sons shall not be put to death for fathers; every one shall be put to death for his own sin" (Devarim 24:16).<sup>12</sup> Every individual is judged for his own conduct, and a child is not considered a parent's property such that the parent might be punished through the child.

This also explains why the Torah emphasizes, after stating the law pertaining to an ox that kills a person, that "whether it has gored a son, or gored a daughter, according to its judgment shall it be done to it" (*Shemot* 21:31).<sup>13</sup> The Torah would seem to be seeking to teach that, in contrast to the perceptions of justice prevalent in the ancient world, according to which children may pay for the sins of their parents, according to the Torah even in this case it is the owner of the ox himself, rather than one of his children, who is punished.

We have looked at some of the major features distinguish the law of the Torah from the laws of the Ancient Near East. On this basis we may conclude that the Torah

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<sup>11</sup> Another example: "If a builder builds a house for a man and does not make its construction firm, and the house which he has built collapses and causes the death of the owner of the house, that builder shall be put to death. If it causes the death of a son of the owner of the house, they shall put to death a son of that builder" (229-230).

<sup>12</sup> One might be prompted to point out that the Torah also states that God "visits the transgressions of fathers on sons, and on sons of sons, upon the third and the fourth generation" (*Shemot* 34:7), but the distinction between the two statements is clear, as pointed out by Ibn Ezra in his commentary on the verse in *Devarim*: there, the command is directed to the *beit din*, which may not punish a person for the sins of others. In the heavenly accounting, however, the possibility exists. *Chazal* teach (*Berakhot* 7a) that sons receive punishment for the sins of their fathers only when they "maintain their forefathers' deeds in their own actions."

<sup>13</sup> The commentators explain that the Torah's intention here is to rule out the possibility of a complete exemption in the case of the goring of a child. Such a thought might arise either (as Rashi suggests) on the basis of the claim that a child is not defined as a legal entity, or (as Ramban posits) because the goring of a child manifests a lesser level of fierce violence on the part of the ox.

does indeed display awareness of the existence of other ancient codes of law, and perhaps even specific laws such as those discussed above. However, even in instances where there is a clear connection between the two systems, the Torah is not a replica of existing laws. On the contrary, the Torah adopts those laws that conform with the dictates of morality and uprightness, while altering radically some of the basic principles upon which those laws are based and their foundation in limited human perceptions of justice. From the Divine point of view of the Torah, there is an emphasis on the value of life, on individual responsibility, etc., in contrast to the principles arising from the other systems of laws.<sup>14</sup> The Torah represents, even in the social sphere, a wondrous legal structure based on social justice, supporting and illustrating Moshe's declaration, "What nation is there so great, that has statutes and judgments so righteous as all this Torah, which I set before you today?" (*Devarim* 4:8)

All of this serves to indicate the value to the *Tanakh* scholar of comparing and contrasting the laws of the Torah with those found in legal codes of the Ancient Near East: familiarity with these latter laws can sometimes help us to understand which reality or possibility the Torah is protesting against and where the innovation in the Torah law actually lies. As the Rambam writes:

"I say that my knowledge of the belief, practice, and worship of the Sabians [i.e., an ancient idolatrous nation] has given me an insight into many of the divine precepts, and has led me to know their reason... I will mention to you the works from which you may learn all that I know of the religion and the opinions of the Sabians; you will thereby obtain a true knowledge of my theory as regards the purpose of the divine precepts... All these books which I have mentioned are works on idolatry translated into Arabic; there is no doubt that they form a very small portion in comparison to that which has not been translated, and that which is no longer extant, but has been lost in the course of time... They describe how temples are built and... many other things which you can learn from the books mentioned by us. **The knowledge of these theories and practices is of great importance in explaining the reasons of the precepts.** For it is the principal object of the Law and the axis round which it turns, to blot out these opinions from man's heart and make the existence of idolatry impossible." (*Guide of the Perplexed* III:29)

Translated by Kaeren Fish

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<sup>14</sup> Hence, the seeming similarity between the Torah and the Hammurabi Code need not be presented as a dilemma, necessitating a choice between asserting either the moral superiority of the Torah (as reflected in these similarities) or the essence of Torah as Revelation (thus ignoring the similarities), as proposed by Shavit and Eran, p. 177. The similarities exist, but their comparison need not come at the expense of regarding the Torah as Divine Revelation – reflected precisely from within these similarities.