Rabbi Dr. Ezriel Hildesheimer Memorial Lecture

Humboldt University Berlin, 11th December 2013

Religious law vs. the law of the land
A clash of civilizations?

a Historic Halachic Perspective

This first memorial lecture is dedicated to Rabbi Dr Ezriel Hildesheimer, the leading rabbi of German's Orthodoxy in the 19th century, who believed as I do, and so do millions of Jews today that traditional Judaism is compatible with the modern emancipated Jew in the countries of Europe as loyal citizens with equal rights and obligations.

Die erste Vorlesung im Rahmen der Hildesheimer Vortragsreihe ist Rabbiner Dr. Ezriel Hildesheimer gewidmet, dem führenden Rabbi der deutschen Orthodoxie im 19ten Jahrhundert. Er glaubte, so wie ich und Millionen von Juden heute, dass traditionelles Judentum vereinbar ist mit dem modernen emanzipierten Juden in den europäischen Staaten, die als loyale/ gesetzestreue Bürger mit gleichen Rechten und Pflichten leben.

In the middle ages, Jews were not subject to the laws of the land as citizens of the country they lived in, because of the very simple fact that they were not considered citizens, and their stay in a certain city or country was subject to a special decree of the king or prince, allowing the existence of a group of Jews or of a Jewish community of limited size, in a certain place, subject to special taxes, limitation of residence and profession, dealing with the community as an entity instead of as individuals, and maintaining law and order through the communal structures, giving the rabbinate the power to judge and punish members of the Jewish community. There were different variations to this rule, but this was the general law applied to Jews in the middle ages.

With emancipation, Jews in Europe gradually became citizens and subject to the law of the land, giving them the same rights and obligations as other citizens. Membership in a Jewish community became a voluntary endeavor, and the subjection to the Jewish religious laws became also a voluntary vocation of every individual. The position of the communal rabbi as *av beth din*, head of the religious court, became of secondary importance, since the communal Jewish court or also known as the rabbinical court had very limited, if any means to enforce its decisions, limiting its functions to purely religious ones, such as the supervision of kosher products and administering of a religious divorce, or in case two litigants agreed to use the

rabbinical court as a court of arbitration, also being the arbiter in monetary disputes between members of a community.

This duality, of living as a Jew subject to the laws of the Torah and to the laws of the land brought with it, its share of problems. We are all familiar with the talmudic idiom “dina d'malchuta dina” which means, that the law of the land is binding and is considered to be the law. However, the caveat of this rule is that it only applies to monetary issues, such as commerce, taxes and questions of ownership, but does not supercede any religious obligation of a Jewish person and has not the power to force a Jew to do anything which is contrary to Jewish law[1].

Therefore, for example, Napoleon Bonaparte after creating the Consistory, which remains the communal structure up until today in all french speaking nations of Europe, limited first of all the power of the clergy. In order to integrate further the French Jews into civil society and wanting to do away with subjugation of Jews to a dual law system, he implored the newly created Sanhedrin of France to let secular law affect religious law also in matters of personal status such as marriage and divorce.

Of course, such a proposal was a non starter, even considering the great influence of Napoleon over France, and the traditional Jewish approach not to fight the State Power. The reason for it was very simple, there was no basis for it in Jewish law and therefore contrary to Jewish law and therefore totally impossible.

The same would hold water today, If a broad based regulation or law would be passed in Germany or elsewhere in Europe, outlawing major parts of Jewish ritual, such as Brith Milah, circumcision, definitely, the law of the country has no status of Dina D’malchuta because:

> «Es steht nicht in der Macht des Königs (bzw. des Staates), einem Menschen zu befehlen, die Gebote seiner Religion zu übertreten, denn es gibt kein staatliches Interesse daran, einen Menschen seine Religion verletzen zu lassen oder ihn zu zwingen, etwas gegen seine Religion zu tun.» Dies will heissen: Eine Bestimmung, deren unmittelbares Ziel es ist, ein jüdisches (oder anderes) Religionsgesetz auszuhebeln, steht nach Rakover nicht nur dem inneren Sinn des jüdischen, sondern einem generellen Verständnis von Staatsrecht entgegen[2].

Jewish tradition demands the loyalty of the Jewish subject to its country and its rulers, explaining historically, why almost all Jewish revolutionaries, such as Jacobi in Germany,

[1] Sdei Chemed Vo. 2 Page 70

[2] Nachum Rakover

Trotsky in Russia and Bela Kun in Hungary were only marginally tied to the Jewish community. The tradition of political loyalty is based on a verse in Jeremiah[3],

> *This is what the LORD Almighty, the God of Israel, says to all those I carried into exile from Jerusalem to Babylon: 5 "Build houses and settle down; plant gardens and eat what they produce. 6 Marry and have sons and daughters; find wives for your sons and give your daughters in marriage, so that they too may have sons and daughters. Increase in number there; do not decrease. 7 Also, seek the peace and prosperity of the city to which I have carried you into exile. Pray to the LORD for it, because if it prospers, you too will prosper."*

This was later expounded in the chapters of the fathers[4], to pray for the peace of their Kingdom, creating the long historical tradition of Jewish religious leaders of the diaspora to refrain from the criticism of their countries and political systems.

On the other hand, once the government of a country has been declared as *Memshelet Hashemad*, a government advocating to destroy the Jewish community and its customs, the community and the individual Jew is commanded to leave his country of residence as soon as possible and search for greener pastures, as Maimonides writes in his letter to the Jews of North Africa and Spain[5].

So the question is, how flexible is halacha if at all, in order to accommodate the law and the culture of the land. Are there any rules in this domain, or is it as the famous orthodox feminist Blue Greenberg once said: Where there is a rabbinic will, there is a halachic way?

Alfred Bodenheimer in a recent article called Halacha writes the following[6]:

> *Das Judentum ist eine Religion, deren Gesetz stark auf die Diaspora ausgerichtet ist. Das verleiht ihr einen starken Pragmatismus – aber auch ein Bewusstsein für Grenzen der Flexibilität. Die Thora ist nicht im Himmel Das Judentum ist insgesamt eine Kultur des religiösen Arrangements. Es war an unterschiedlichen Orten im Laufe seiner Geschichte immer wieder unterschiedlichen Restriktionen ausgesetzt. Diese änderten sich oft – ob aus Willkür oder Wechsel der Herrschaft oder als der Umsetzung der letzten wissenschaftlichen Erkenntnisse, war unter dieser Perspektive zweitrangig. Die Juden haben entsprechende Strategien entwickelt, ihre Autonomie so zu interpretieren, dass sie selbst entschieden, welche Gesetze das Leben in einem Gebiet verunmöglichten und wo sie Kompromisse eingingen, solange dies Bedingung einer*

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3 29:4

4 Avot (3:2)

5 Igeret Hashemad -The Epistle on Martyrdom, conveys Maimonides' reaction to the harsh religious persecutions undergone by the Jews of Morocco and North Africa during the twelfth century.

6 Tachles *25. Oktober 2013*

Weiterexistenz an einem Ort war. Die Gesetzgebung aktiv unterlaufen haben jüdische Gemeinden in der Regel aber nur dann, wenn diese Gesetzgebung gezielt gegen die Ausübung jüdischer Praxis, sprich gegen das Judentum an sich gerichtet war. Zu Zeiten der Sowjetunion etwa sahen es die westlichen jüdischen Gemeinschaften geradezu als Pflicht an, die dortigen Juden entgegen den Restriktionen der Regierung beim Ausüben ihrer Religion zu unterstützen.

Bodenheimer senses that there is some flexibility, but warns us that there are limits to that flexibility and also maintains this to be the main difference between Sharia and Halacha. I would like today to dwell on the question of, if Bodenheimer is right, is there flexibility in Halacha and if there are limits, define who and how they are determined.

Rabbi Naftalie Zvi Yehuda Berlin of Volozhin[7] in his bible commentary to Exodus[8] refers to the difference between the divine first tablets and the second human tablets:

Ibn Ezra quotes the view of a Gaon[9] that the second tablets were more exalted than the first ones, a view opposed by Ibn Ezra, since the first tablets were divine. Rabbi Berlin defends the view of the Gaon and continues to explain that the second tablets, or the second coming of the Torah allowed for flexibility of human interpretation according to the rules set by Sinai, a flexibility allowing for novel interpretations, necessary for the survival of the Jewish people.

Having said that, it should be clear that there exists a major difference between our tradiitonal outlook on the development of halacha and the way reformed movements in Judaism have interpreted or rejected halacha totally or partly in order to conform to the latest trends and isms. Our basic belief, and by the way, theologically we are closer to Catholicism in this aspect than to Reform Judaism, is in the divinity and eternity of the Torah. We are the people of the book, and if there is no book, there is no people of the book. Halacha like other sciences and systems of law has rules of its own and cannot be changed by external pressure, or by disregarding the rules of halacha. It is my true belief, and I will quote now Heinrich Heine, that it is the myriad little rules and laws, based in the talmud, which built the cathedral of what is now known as Rabbinic or Orthodox judaism. This is what kept Judaism alive in the most adverse circumstances and this also is the future of Judaism. There are quite a few theories about the decline of religion in our Western hemisphere, the book by a Christian author Mary Eberstadt “How the West really lost God” or by Callum Brown “The death of Christian Britain”. In the Jewish sphere we were just presented with the findings of the new Pew poll in the United States, which shows a great increase in Orthodox observance and a steep decline of the liberal movement during the last twenty years. The findings of all these books and polls show the same pattern, that liberal denominations, fail in the long run to hold on to their believers.

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[7] 1816- 1893 - Halachic authority, Bible and Talmudic commentator. Volozhin was the first modern Yeshivah in Russia

[8] Ha’amek Davar, Exodus 34:1

[9] rabbi of the Gaonic period 5-9th century

As it is the custom in many disciplines and sciences I will touch on the subject of religious law versus the law of the land, with an extreme borderline case, which will help illustrate and understand the issues and the problems.

> *In the Mishna of Ketubot it says that a Virgin should get married on the fourth day of the week and from [the time of] danger and onwards the people made it a custom to marry on the third day of the week and the Sages did not interfere with them. The Talmud asks: What [was the] danger? If because of a government decree that, 'a maiden that gets married on the fourth day [of the week] shall be killed (because she followed a Jewish custom)', then we should abolish this rabbinic decree entirely! Said Rabbah: the government decreed that , 'a maiden that gets married on the fourth day [of the week] shall have the first sexual intercourse with the governor.' The talmud then asks: [You call] this danger? [Surely] this [is a case of] constraint!. The Talmud answers: Because there are chaste women who would rather surrender themselves to death and [thus] come to danger. But [then] let one abolish it? A decree is likely to cease, and [therefore] we do not abolish an ordinance of the Rabbis on account of a decree. If so, on the third day he [the prefect] would also come and have intercourse [with the bride]? — Out of doubt he does not move himself*[10].

We have indeed a talmudic source, which is tantamount to the fact that in face of adversity and the law of the land, the rabbis agreed to a temporary dispensation of a rabbinic decree, but were against a change in legislation, because of the temporary character of a governmental decree, versus the eternal character of a religious law. We see in fact in the same case and in the same law a certain limited flexibility. It should be noted that according to certain sources this decree, which gave the governor of Judea the right of the first night with the bride, started the revolt of the Maccabees against the Hellenist power, culminating with the victory of Hanukkah and the reestablishment of Jewish sovereignty in the Holy land. So if we can paraphrase Blue Greenberg's statement: in this case as in many others there was no rabbinic will to accommodate the State power.

Another example can be brought from more recent history with the last rector of the Hildesheimer rabbiner seminar Dr Yehiel Yaakov Weinberg, who had to rule on

> *the controversy of 1933 surrounding Jewish ritual slaughter, or shehita. In April of that year, the Nazi regime banned ritual slaughter, unless certain "humanitarian reforms" were introduced, including the prior stunning of the animals. These demands were tantamount to banning shehita altogether, since they would have rendered the animal ritually unfit for eating, regardless of how it was killed. The existing halachic material seemed to offer little hope for a way out—and yet, there was serious concern that if some halachic solution did not materialize, German Jews would simply eat non-kosher*

[10] Babylonian Talmud Ketubot 3b

meat. Painfully aware of this pressing state of affairs, Weinberg penned a series of detailed responsa which argued that animals slaughtered in the manner demanded by the government might be eaten, but made this leniency conditional on the agreement of other major halachic scholars[11].

The Orthodox rabbis of the Einheits Gemeinden, headed by Rabbi Unna were in favour of a lenient ruling, since they feared that their membership and the official institutions of their communities will start using non kosher food altogether, while the rabbis of the Orthodox Austritts gemeinden, were of the opinion that there is no Halachic way to allow stunned meat. Weinberg went to Poland to consult with the great Halachic authorities such as Chaim Ozer Grodzhensky the spiritual rabbi of Vilna and dozen others, and the broad consensus was not to allow the use of meat of animals, which were electrocuted before the Shechita. As a result Dr Weinberg came back and ruled negatively on the use of meat from such animals, in effect pushing the Einheits gemeinden to use regular non kosher meat, since the import of Kosher meat was forbidden by the Nazis. There is disagreement in academic circles if the decisions of the Polish halachic authorities were only halachic, or also meta-halachic, meaning if the decision was made only on the basis of the textual proofs and precedents or if they were founded on a more general *weltanschauung* of the rabbi, and the spirit of the law[12]. It is obvious from Weinberg's writing in his magnus opus[13] that he as well saw the attempt of the Nazis to forbid the traditional way of kosher slaughter on the basis of humanitarian grounds of non-humane slaughter a grave demonization of Jewish ritual and the Torah itself and therefore was not inclined to make a dispensation, even though as a result most Jewish communal kitchens in Germany, which were kosher up until this time, ceased to be so.

I am sure that quite a few rabbis and lay leaders of the Jewish community at that time were highly critical of the approach of halacha of "let the law move the mountain" meaning that Jewish Halachic law was not flexible and lenient enough and as a result of the rabbis' lack of support, German Jewry as a whole ceased to be kosher. However, if we are looking now back with historical hindsight, which is not always fair, but always more accurate than our views of current events, we can definitely state that this halachic decision of Dr Weinberg brought with it the message to Orthodox German Jewry, which was estimated at that time to around be around 15% of the half million Jews living Jews in pre war Germany, that it is impossible to continue to

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[11] see note 8

Azure no. 12, Winter 5762 / 2002 The Legacy of Yehiel Jacob Weinberg Reviewed by Jeffrey R. Woolf

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13

live as an observant Jew in Nazi Germany, pushing the observant minority to emigrate, much earlier and much faster, than the majority of German Jews, and by this saving their lives.

As i said earlier, I took an extreme case of a hostile government using anti-semitic legislation to make life difficult for Jews and I showed two examples from two totally different periods of history, of the response of halacha to this challenge.

Many times Halacha conflicts with secular law, not because this is the intention of the legislator, but just circumstances put a person in a position of conflict between halacha and secular law. My favorite example is the case discussed by Rabbi Yair Bacharach a major 17th century halachic authority from Koblenz and Worms who had to answer the following question. A Jewish group was travelling from one German city to another passing a border control, where the border police had to be convinced that the woman travelling with the man was actually his wife, which was necessary for residency requirement. In order to establish this fact, the police demanded that the man kisses the woman. Now the question Bacharach was asked, divided itself into two parts. First, is a husband allowed to kiss his wife during her menstruation period when it is forbidden to do so according to halacha, second, in case the woman is actually someone else's wife, if he is allowed to kiss her for the sake of passing the border. I wish that today the imigration police would use this kind of proof for of proving relationships. Interesting enough, Bacharach allows the first case, but forbids the second one, in effect relaxing the law in order to prove the truth but not doing so in order to prove a lie. Another responsa of Bacharach[14] deals with a recurring theme during the middle ages, of Jews in a court case against non Jews, with the Judge known to be a real anti-Semite, and the Jew asking rabbi Bachrach, if he is allowed to bribe the judge, not in order to be favoured by the judge, but only in order to restore the equilibrium in order to receive a fair trial. Without going into the ensuing discussion among later rabbinical authorities, it seems that the natural bias of gentile judges of a city and country, which professed state anti-Semitism, where the rulers and the citizens were convinced of the basic immorality of any Jew, guilty until proven innocent, was a recurring problem during the middle ages up until emancipation up when Lessing mounted of the play of *Nathan the Wise*. The interesting point I would like to raise, is that the supplicant was not interested to know, what secular law thought of the issue of bribing the judge, and the possible punishment was also not of great interest to the questioner, but the only question there was, how does halacha view this issue. Further it should be noted, that even though the life of Jews in the middle ages hung on a string and was dependent on the goodwill of the local prince, which allowed the hated Jews to continue to reside in his lands for a healthy bribe, the Jews of the middle ages still had moral qualms of offering a bribe in an actual court case.

[14] Havot Tair Question 136

The question, which I believe many of you would like to ask now, but have not asked yet, what is the position of Halacha, to laws of a country, which is not hostile to its Jewish minority, but restrains its minority from fulfilling their religious commandments, would this situation also entail a similar response from the halacha.

We can think of many different situations when Jews who are observant are being pushed into situations, where Jewish observance is being hampered by the regulations and the laws of the state, just for example, the service in the army. What makes this situation special that it is mandatory and not voluntary such as students who choose to study in universities and have also to attend classes during the Sabbath.

I would like to mention as a rule that in the world of Halacha there is great distinction in such instances between, accepted norms of observance and minimal necessary observance. In other words, even though Jewish schools are in general closed during the Shabbath, and the Shabbath is consecrated for spiritual and religious endeavors, since halacha does not forbid the study of sciences during the shabbath, communities made special arrangements for students who have to show up in classes during the shabbath, to have special early morning services. In terms of army service, Halacha has also found dispensations based on this extremal situations, understanding that Jewish citizens are expected to serve their countries as soldiers. It should be noted however that the army as a rule does not affect the whole population, but only the conscripted, and that situations of war in general, were an exception to the rule and when they happened, the general dispensation of Pikuach Nefesh, saving one's life or the one of other's offers a general dispensation from all religious obligations, in fact, obliging a person to desecrate the Shabbath, in order to save somebody's life.

In this context, I would like to mention an issue, which is related to our topic of discussion, but merits a dedicated frame, is the field of medical ethics. The great innovator of the field of medicine and Halacha is my predecessor, Lord Immanuel Jakobovits, of blessed memory, chief rabbi of Great Britain, who was the first to touch on this issue. The question of, when life begins and when life ends, in which cases, can terminally ill patients refuse further medical help and many other related issues, are being today discussed in Halacha as in the secular world, and I believe that since Halacha is based on biblical and talmudic sources, it can definitely influence the decisions of secular law and ethics.

I would like also to mention a case, which has happened a few month ago in the United States. CNN reported:

> *Two rabbis face kidnapping charges after allegedly arranging assaults of Orthodox Jewish husbands to persuade them to grant divorces to their wives, authorities said*

Thursday. FBI raids led to the arrest of the men. A criminal complaint alleges that the rabbis charged Jewish wives tens of thousands of dollars to orchestrate kidnappings and accepted $20,000 for such an operation from undercover FBI agents.Their goal? To obtain a "Get," a document that Jewish law requires a husband to present to his wife in order to be issued a divorce, the complaint says. In the Orthodox Jewish world, a get is more important than any sort of document drawn up in civil courts. The derivation of this law is found in Deuteronomy 24:1-2:

"When a man marries a woman or possesses her, if she is displeasing to him..., he shall write her a bill of divorce and place it in her hand, thus releasing her from his household. When she thus leaves his household, she may go and marry another man."

Without it, a woman is considered an "agunah" - a chained woman bound to a man no matter how over their marriage might be. The implications of not having a get are serious[15].

Unfortunately, this predicament has intensified in the modern era. In some cases, husbands demand exorbitant payments from their wives in exchange for granting a religious divorce. These women will not remarry without the proper religious divorce proceedings; however, unlike in the Middle Ages, their lives — and the lives of their husbands — are no longer governed by the edicts of a rabbinical court, removing the authority that imposed violent sanctions aimed at freeing these chained women. In this way, while Jewish law is seen as the law of these communities, it lacks the enforcement power that, while brutally violent, could protect some of the community's most vulnerable members.

In the face of this uniquely modern dilemma, two responses have emerged. The first has further embraced violence. But using such deception and torture not only violates United States law, but also may violate Jewish law. Any rabbinical court decree secured with bribery is wholly invalid; violence visited on a husband pursuant to such a tainted decree would only induce him to grant an invalid divorce. In this way, the use of violence all too frequently entails the extortion of money from those it was meant to protect, leading not only to illegal brutality, but also to potential religious invalidity.

But other sectors of the Jewish community have offered a second solution — one that embraces contract instead of coercion. In the early 1990s, the Beth Din of America — one of America's most prominent rabbinical courts — drafted a prenuptial agreement for use within the Jewish community. The prenuptial agreement requires a husband to provide his wife with a daily support payment, typically $150, for each day the two no longer live together and the husband still refuses to grant his wife a religious divorce.

In so doing, this prenup successfully navigates a variety of legal complexities. Because the daily payment simply continues the husband's obligation to support his wife, it cannot be seen as financial coercion. And the prenuptial agreement does not require the husband to grant a religious divorce — only to make payments if he fails to — thereby enabling courts in the United States to enforce the agreement without violating constitutional prohibitions. Indeed, this past January, a Connecticut court enforced this so-called "Jewish prenup" above constitutional objections, noting that the terms of the agreement did not undermine the separation of church and state.

15

The success of the Jewish prenuptial agreement holds an important lesson for the future of religious communities in the United States. Like many religious traditions and doctrines, Jewish divorce law must overcome important challenges posed by modernity. Some have chosen to simply circumvent these challenges through the use of subterfuge, deceit and even violence. But such approaches often exacerbate the problems, leaving women subject to extortion at the hands of not only their husband, but also their would-be rescuers.

By contrast, religion can also view modernity not as an obstacle to overcome, but as providing new opportunities. Indeed, by joining forces with America's legal system, Jewish communities have found the resources necessary to protect otherwise vulnerable women. Instead of trying to circumvent the law, the Jewish prenup serves as an example of how embracing modernity can enhance religious life in the United States[16]*.*

During the last convention of the CER in Berlin, the Conference of European Rabbis adopted the pre-nuptial agreement of the RCA, but also is spearheading legislative initiatives in Europe, similar to those already in force in the UK and in Amsterdam, making civil divorce contingent on ending religious marriage ties, if there was one, and in Israel to legislate stiff sanctions and criminal proceedings against such reluctant husbands.

The two legal systems, the Halacha and the secular law of the land don't have to necessarily collide with each other, but in many instances we see that actually secular law influences halacha in a very profound way.

The final example I would like to use today, is the landmark decision of Rabbi Moses Feinstein, the prime Halachic decisor of the second half of last century in the United States of America. Milk according to halacha has to be supervised by a Jew in order to be considered kosher, because of the possibility of mixing cow milk with milk of other non kosher species. Rabbi Feinstein decided that since the law of the country also forbids the mixing of cow milks with the milk of other species, unless specified so on the product, and the state power has implemented a supervisory system to check and punish violators of the law, in this case then, state supervision is parallel to rabbinical supervision, making milk and myriad different milk products available across the world to observant Jews, based on the view that halacha can rely on secular law and secular supervision. This case as well as the case of the prenuptial agreements shows to what extent for modern Judaism, the concert of Jewish religious religious law with the

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16

law of the land is of great importance for the benefit of the Jewish community and their respective countries.

It should be mentioned that Rabbi Feinstein, a refugee from communist Russia to the United States in the first half of last century, was very eager in his responsas to highlight the new position the Jews found themselves in the United States, whereas they were not exposed to discriminatory laws and judges who were known to be anti-Semites, demanding that Jews follow scrupulously the letter of the law of the land of residence, an idea which understandably was not too popular with Holocaust survivors.

On the other side of the spectrum, we might even see the great influence of Jewish law on the system of law in Europe, where laws to preserve mass graves of Nazi victims in some European countries, are drawn from the sources of Halacha.

I started the this lecture with the credo of the Hildesheimer School of integrating Judaism in the modern European culture, creating a modern Jewish community, which can be integrated in a modern Europe and be true and loyal to Judaism. After the Holocaust, there are some voices, which state that such a symbiosis is impossible and that the Holocaust destroyed any hope for any Jewish future of such a co-existence. Of course Jews can continue to live in Europe in spiritual ghettos of their own making, divorced of European culture, but the question is, if we can again educate a whole community with the belief of the co-existence of those two cultures. I was raised in the spirit of *Torah im Derech Eretz,* of the obligation of any Jewish community to live in communion with the culture and the laws of the land, enriching our Jewish tradition by the vernacular culture on one hand, and by adding our Judean voice to the European heritage. For any partnership there is always a need to have two willing partners, my hope is, that Europe will not again prove to be the unwilling partner for this unique experiment in history of man.

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