"Jewish Law and English Law"

A talk to the United Kingdom Association of Jewish Lawyers and Jurists

At the Inner Temple, 24 November 2008

Ladies and Gentlemen

It is a very great pleasure and honour for me to be asked to speak to you this evening. My topic is "Jewish Law and English Law", a very broad topic indeed, and one that gives me broad scope and room to manoeuvre. If you go, for instance, to Westlaw, and enter "Jewish Law" as a search request, you obtain 20 million entries. If you enter both "Jewish Law and English Law", thereby limiting the search, you get only 10 million entries. Well now, how long have you got? (Nervous laughter.) Perhaps I should start by telling you not to worry.

Well, I think I should really start with an apology. Although I have a passing acquaintance with English law, I am not learned in Jewish law *at all*. For those in my audience who *are* learned in the subject, I ask indulgence. But equally there may be some or many in my audience who know nothing whatsoever about Jewish law.

What I propose to do, therefore, is three things. First, to say something about Jewish law, its sources and history. It will be a brief introduction and very broad. But it will give us a foundation to start with. Secondly, I will look at what one might call the small things, that is to say a number of individual decisions in English law concerning matters of interest to Jewish law. The small things will help us to focus. It is in the bite-sized morsels that you may find the proof of the pudding. And thirdly, I will try to look at some bigger things and ask about the relationship and interaction of Jewish law and English law in the modern world.

So, to begin with, an introduction to Jewish law. Well, first, it is very old. In its origins, it is an oral tradition going back to Mosaic times over three thousand years ago, and ascribed ultimately to divine revelation. That raises the problem of divine immutability, a problem to which I will return. Next, it has developed continuously over that period, down to modern times. Thirdly, for most of that period, the Jewish people were in exile from their own nation: they were unable to legislate, they lacked

secular power; their law was essentially an exercise in democratic consent, but in the hands of scholars and rabbis (a word which means teachers) from whom emerged jurists and judges. Fourthly, Jewish law is both national and transnational. It is national, because it is the law of the Jewish people; but it is transnational in that the Jewish people were spread over all the nations of the earth, and were influenced by the societies of the world. And their safety, or lack of it, depended on their host nations.

What are the sources of Jewish law? In historical order: divine revelation, the oral tradition, the scriptural writings, of which first and foremost is the Torah (one of the many Jewish words for Law), which we know as the first five books of the Hebrew Testament, then, but of less importance, other scriptural writings such as the Prophets; then the exegesis and interpretation which starts with the Midrash and continues with the Mishnah, which we might think of as the first Corpus Juris of Jewish law, and then with the Talmud, of which there are two main versions, the Jerusalem and Babylonian Talmuds, which we might think of as commentaries and expositions of Jewish law. We have now arrived at about 500 AD. During the post-Talmudic period down to modern times, you find a development of a vast common law based on individual decisions, known as *responsa*, which derive from the answers given to formal written questions posed to rabbinic scholars. The influence of such *responsa* depends on the reputation of the individual author. Authority depends on reputation and numbers. The majority view prevails, but of course some minorities are more influential than others.

What is the content of Jewish law? What is being referred to by the expression Jewish law? In its broadest form, described as *halakhah*, you find both the laws applicable between man and God and those applicable between man and man. And if you consider the Ten Commandments, you will find there not one, nor two, but three types of normative expression. There are the laws that regulate the relations between man and God, such as the first four commandments, including the commandment in respect of keeping the Sabbath day. There are also the laws that regulate the relations between man and man, such as the laws against murder and theft. But there are also the commandments that are really expressions of normative rules of morality, rather than strictly of law, such as the command to love one's parents and the prohibition on covetousness. As time has passed, however, these three bodies of law or normative rules have been distinguished, so that one may speak of religious and ritual law, or of civil and criminal law, or of guidelines of morality. Despite these distinctions, however, there has also been mutual interaction

between the three, so that one can say that Law has been the life of religion and morality and vice versa. And so, because their religion and ethical precepts as well as ordinary laws have been expressed in legal terms, Jews have learned to think in normative terms and in terms of law.

This interaction is stressed in certain key passages of the Torah: as for instance where God is likened to the judge of all mankind and yet challenged by Abraham to do right; or where in the great chapter of Leviticus 19 we are told: "You shall do no unrighteousness in justice"; or in Deuteronomy 16, where we are told: "Justice, justice shall you pursue"; or in Deuteronomy 10, where justice is linked with two great themes of the Torah, the welfare of the poor and love of the stranger, in these words: "He executes justice for the fatherless and the widow, and loves the stranger, for you were strangers in the land of Egypt."

Law does not of course exist in a vacuum, but in the pages of history. In terms of history, I would refer to 597 BC, when, with the capture of Jerusalem and the destruction of the First Temple, the Jews of ancient Israel were carried into exile in Babylon. At that critical point, which might have been the end of the Jews as a people and the end of Judaism as a religion, two acts of great wisdom occurred. The first, was that the Jewish leaders turned to their scholars to found academies of Jewish learning. Bereft of a home, the Jews turned inwards to their law and their religion, which in a sense was all one. They turned to scholarship, to analysis, to interpretation, and to education. It became an obligation to teach, and to study. The second act of great wisdom was the profound advice of Jeremiah, the prophet of the exile, when he said: "Seek the welfare of the city to which you have been carried and pray to God on its behalf, for if it prospers, you too will prosper".

The exiles in time returned to Israel, but in 70 AD the Second Temple was destroyed by the Romans. By 135AD, with the crushing of the Bar Kochba Revolt, Jerusalem had been ground into the earth and built over, the land had been sown with salt, and the Jews, in what became a millennia long diaspora, turned once again to their academies and their scholars. Those scholars, in different lands all over the world, in different times, and over the passing of century upon century, kept alive the spirit and love of learning, of interpretation, and of rationality itself. Law and life was all one. The law might be God-given, and therefore eternal and immutable: but because it had been given to Man, it was for human reason to interpret it. The law was divine, but man's reason was its instrument. That was a further act of great wisdom: the ancient ruling of the rabbi scholars, that it was for man to interpret the divine In this

connection of the law, I believe that Jews are fortunate, if that is the right word, for a lot of misfortune has been mixed up in it, in not only having been, as they are called, the people of the Book, that of course being a book of law, but in having been propelled into all the nations of the world there to experience, but as subjects not as masters, the various workings of mankind. They enjoy asking questions, they enjoy a good argument, they respect principle but are prepared to test it vigorously, they are idealists but respect pragmatism, they seek solutions for they have often found themselves in need of them. All this helps in the law. And they have always been guided by Jeremiah's great dictum about seeking the welfare of their city. They have also been guided by another great dictum, this time of a third century Babylonian sage, Samuel, who said "The law of the land is the law".

So much for an introduction. Now let us come right forward into modern times. If you look back over the last two decades of decisions in our courts, you can find cases which raise the issue of the interaction of Jewish and English law in subject matters running from birth, through education, employment, marriage and divorce, commercial dealings, to death and burial. Much of human life is here.

Let us consider some of these cases, and see where they take us.

Birth. One of the most famous cases of recent years has been that of the conjoined twins, the so-called Jodie and Mary (*In re A,* [2001] Fam 147). The outlines of the story may well be familiar to you. The twins were born, in Manchester, to Maltese parents, who were devout Roman Catholics. They were joined at the lower abdomen: each had her own brain, heart, lungs, arms and legs. Jodie's brain, heart and lungs functioned properly, but Mary's did not. She had tiny non-functioning lungs, and a large but virtually useless heart. A common artery circulated blood between them. Thus it was Jodie's heart that was keeping them both alive. The medical prognosis was that if they were not separated Jodie's heart would inevitably fail and thus both twins would die. If they separated, Mary would inevitably die, but Jodie stood a more than 90% chance of survival. You may also know the outcome: the twins were separated, Mary died immediately and Jodie has made an excellent recovery, in which her parents have come to realize that they were blessed.

At the time of the operation, however, the parents had been unwilling for any surgery to take place. They wanted nature to take its course, in the main because of their religious beliefs. The hospital however wished to

operate to save Jodie's life. Because of the fatal consequences for Mary, the hospital applied to the court for a declaration that the operation would be lawful. At first instance in the family court, the judge granted the declaration requested. The parents appealed to the court of appeal. The case was heard as a matter of urgency in August 2000, and was argued, with an adjournment for further evidence, over several weeks.

In the court of appeal, the parents' religious beliefs were supported by evidence from the Roman Catholic Archbishop of Westminster. By an extraordinary stroke of fate the identical question had also come up 23 years earlier in Philadelphia. There, conjoined twins were born to an orthodox Jewish couple. The facts were identical save only that the parents there were willing to allow separation to take place: one twin could not survive, the other could, and without separation both twins would die: there was only one heart. These twins were born in a Roman Catholic hospital, where most of the nurses and the surgeons were Roman Catholic. Both the hospital and the parents religious authorities, in the case of the parents they contacted Rabbi Moshe Feinstein, a very famous authority on Jewish law. He ruled that the operation could take proceed: since one twin had no independent ability to survive, it was permissible to sacrifice that twin to save the other. Two analogies were referred to: the lawfulness of sacrificing a foetus incapable of existence independent of the mother in order to save the mother; and the lawfulness of surrendering a man guilty of a capital offence in order to save the inhabitants of a town to which he has fled from his pursuers. It is interesting to note that the hospital also received a response from the Roman Catholic sources saying that the operation to separate the twins was justifiable. As occurred later in England, the operation needed the sanction of the court to proceed; that sanction was given; and the operation was performed with the same result.

The English court decided that although, as an individual human being, Mary was owed a right to life, and that her human personality had equal inherent value with any other life, nevertheless in circumstances where the court was responsible for a decision affecting Jodie as well as Mary, where Mary was doomed in any event, but where Jodie could survive and prosper if separated, and where Mary was killing her sister, a balancing act had to be performed, which came down in favour of saving Jodie's life, if that operation could be lawfully performed.

But was the operation lawful or would it be a criminal offence? That was the question which the English court found hardest of all. [A famous nineteenth century case called *R v. Dudley and Stephens* had decided that

it was not lawful for starving castaway mariners to kill their weakest member so that the stronger could survive by eating him. This is the account of the case given by David Pannick QC in his book entitled "Judges". It is a critical account, given by a Jewish writer, but I would stress that the case has to this day been considered to remain good law and I do not necessarily share the critical flavour of this author:

"["Judges" at pp 48/49, as marked]".

Of course, the case of killing in preservation of one's own life, in circumstances where the selection of the victim is made by those who are stronger and most self-interested, and where the victim has done nothing to threaten the safety of his killers, is quite unlike the case of Jodie and Mary; and in theses circumstances the court of appeal made no secret of their desire to find a way round the earlier authority. But what was the true principle on which the case of twins was to be judged?]

One judge found the solution in a principle of quasi self defence: Mary's literal draining of Jodie's life-blood made it lawful for Jodie to be assisted in defending herself against that fatal assault. Another judge found the solution in the principle of the defence of necessity, namely that the operation was necessary to prevent an inevitable and avoidable evil, was no more than was necessary to prevent that evil, and was proportionate to the evil avoided. The third judge found a defence also in the fact that although the death of Mary was an inevitable consequence of the operation, it was not its purpose or intention.

It is not my intention to delve into the legal complexities and difficulties of this problem or of the judges' solutions. What I wish to emphasis, on this occasion, is that their solution was immeasurably influenced by Jewish teaching, illustrated by the existence and result of the previous decision in Philadelphia. Indeed, given the evidence filed by the parents, supported by the Cardinal Archbishop of Westminster, that Christian teaching asked and required that nature be left to take its course, that God's will as it were be done, the question arose as to what exactly Christian teaching did require. Of course the judges emphasised that they were a court of law, not of ethics or of religion. It is true at any rate that the courts of this country are courts of law. I am less sure that they are not to some degree or other courts of ethics. I am not sure where judges acquire the most basic premises of their thinking other than in a regard for and an unconscious adherence to fundamental values. Where do those values come from? Of course, judges are of all religious persuasions and of none. It is my belief however that Jewish values, transmitted through

Christian doctrine, have played an influential role. It is difficult not to find in the court's reasoning an unstated premise in favour of life, which certainly Jewish law favours. Lord Justice Brooke spoke repeatedly not so much of the Christian tradition, but of the Judaeo-Christian tradition, for example in this remarkable passage:

> "There can, of course, be no doubt that our common law judges were steeped in the Judaeo-Christian tradition and in the moral principles identified by the Archbishop when they were developing our criminal law over the centuries up to the time when Parliament took over the task. There can also be no doubt that it was these principles, shared as they were by the other founder members of the Council of Europe 50 years ago, which underlay the formulation of Article 2 of the European Convention on Human Rights. Although parts of our criminal law, as enacted by Parliament, reflect a shift away from some of the tenets of Judaeo-Christian philosophy (in particular, for example, a shift away from the Catholic Church's teaching on abortion) in favour of the views of the majority of the elected representatives of an increasingly secular (and increasingly multi-cultural) modern state, there is no evidence that this process is at work in that part of our law concerned with the protection of human life between the moment of birth and the moment of death."
> *[at [2000] 4 All ER 961 at 1024j/1025a]*

The case of Jodie and Mary is a recent and poignant example of English law's willingness to find in the Judaeo-Christian ethic a solution to current legal problems. But it is by no means alone. I would merely cite one other very famous example. The whole of English law's modern law of liability in negligence is based on Lord Atkin's famous invocation of love of neighbour in the leading case some 70 years ago of *Donaghue v. Stevenson*. He there said that the duty of care which has to be found to support liability in law for negligence is a duty owed to one's neighbour. That was of course a reference to the command from Leviticus 19:18 that "Thou shalt love thy neighbour as thyself".

Circumcision. After birth, in the Jewish tradition only 7 days, but in the Muslim tradition, possibly deferred for up to 7 or so years later, comes circumcision of the male child. My next case concerns such circumcision in a Muslim context, but there is reference also to Jewish circumcision. In general, English law has been complaisant to the practice of male circumcision, despite some opposition on the ground that it is an unwarranted assault on the child. In *Re J* [1999] 52 BMLR 82, an English

Christian mother and a Turkish Muslim father had married briefly. The mother had promised before marriage to have any boy born to them circumcised. They separated when the boy was 2, and he remained with the mother. Both parents were essentially non-practising members of their respective faiths and neither mixed in Muslim circles. Nevertheless, the father felt passionately that his son should be circumcised so that he would have the opportunity of being given his proper identity as a Muslim and be able better to identify with his father. The court had to decide, on the English law *Children Act* test of what was in the child's best interests, in circumstances where the parents were in dispute, whether the boy should be circumcised. In the exercise of his discretion, taking into account all the factors, including importantly the fact that circumcision was a medically unnecessary operation for the lad, the family court judge decided against ordering circumcision, and the court of appeal agreed. Essentially the case was decided by the first judge's exercise of his discretion. The court of appeal emphasised that it was laying down no general prescription, underlining, as the judge had done, that where, as in the Jewish tradition, circumcision is immediate, there was much less chance of forensic dispute. The decision may tell you little other than that, within the overarching rule of the best interests of the child, everything lies within the individual judge's discretion; and also that, in a difficult dispute, the judge can always opt for the status quo.

Education. There is apparently no Jewish school in Leeds, but there are two in Manchester. Jewish families in Leeds who want to send their children to Jewish schools have to undertake a 45 journey twice a day across the Pennines. In practice, the Leeds families clubbed together to organise a bus routine. But it was expensive, and they thought that the Leeds council should pay, as part of their £3.4 million p.a. budget for school transport, which included taking children to Anglican and Roman Catholic schools, even where those lay outside Leeds, although none was further than 8 miles from the city boundaries. Leeds rejected the families' application, on the ground of distance, cost and the availability of general education within Leeds, including, in one multi-cultural school, some Hebrew classes. The families sought judicial review of that decision, alleging inter alia discrimination and breach of various articles under the Human Rights Convention: *R v. Leeds City Council* [2005] EWHC 2495 (Admin) (Wilkie J). It is an example of how, in the world since 2000 of the Human Rights Act, arguments may be addressed by reference to the European Convention. In this case, however, all the families' arguments failed. It was said that there was no true comparison with the local Christian schools and distant Manchester. Moreover, on the evidence of the Beth Din (that is to say Jewish Court) of Leeds, attendance at a

Jewish school, although desirable, was not a requirement of Jewish law. In any event, the children were in fact attending the Manchester schools. The judge held that Leeds' decision was neither irrational, nor discriminatory, nor in breach of any human rights.

Some of this reasoning might be contrasted with the earlier case of *R (Williamson) v. Secretary of State for Education and Employment* [2005] 2 AC 246, a case which went to the House of Lords, on whether the statute which prevents corporal punishment in all schools was in conflict with the human rights of Christian parents and teachers who believed that education in the enforced absence of loving corporal discipline as previously practised in certain Christian schools was in breach of article 9 of the Human Rights Convention. It was held that there was a breach of article 9, but that it was justified by the national policy against corporal punishment in schools in general. The *Leeds* case indicates how the legal jurisprudence of both judicial review and of the Human Rights Convention may enter into such disputes. However, the practical and undogmatic teaching of Jewish law in this instant left the Leeds families case without firm support.

It may be of interest to observe that in the *Williamson* case in the court of appeal, where I sat with Buxton LJ and Arden LJ, the parents and teachers of the children who brought the judicial review proceedings relied as biblical authority on statements in *Proverbs* such as the well known dictum that "Spare the rod and spoil the child." However, in Jewish law the dicta of *Proverbs* are far less influential than what might be called the real law to be found in the first five books of the Hebrew Testament. Hence, the dominant text in Jewish law is to be found in Leviticus 19.14: "You shall not place a stumbling-block before the blind". This has been interpreted by Maimonides among others to relate to the need for a parent to be cautious in the discipline of children – "lest he cause them to stumble": see *Williamson* [2003] QB 1300 at para 173.

Employment. In the past neither English law nor the Strasbourg jurisprudence of the Human Rights Convention has been very amenable to religious employees who have been asked to work on their Sabbath, whether Christian or Jewish. It is not clear why that should be, save for a general concern to keep employment law clear of such considerations. However, in *Copsey v. WBB Devon Clays* [2005] ICR 1789, the court of appeal held, obiter, by a majority, that it might be unfair to dismiss someone who had first been employed on the basis that he worked Monday to Friday and then later was required to work on his Christian Sabbath Sunday, *unless* the employer had tried to reach a reasonable

accommodation of the various interests involved. On the facts in that case, however, that was what the employer had sought to do. I would have thought that a decent employer would seek to accommodate the religious sensibilities of its work-force, as far as it reasonably could, and that is in effect what still more recent anti-discriminatory legislation has required.

Another employment case is that of *Simon v. Brimham Associates* [1987] IRLR 307 (CA). There a Jewish man applied to a firm of employment consultants for a position. He was asked for his religion, and declined to answer. He was told, in explanation, by the consultants that their principals were Arab and that if he was Jewish, it might preclude his selection. The applicant then withdrew his candidacy and sued for discrimination under the Race Relations Act. He lost, on the basis of a finding by the employment tribunal that there was no discrimination because he was treated in exactly the same way as any other candidate. It is hard to understand the decision, other than on the pragmatic basis that the applicant was not known to be Jewish and had not put the putative employer or its agent to the test. However, the court of appeal did conceive that in theory at any rate words or acts of discouragement could amount to discrimination.

A third employment case is that of a rabbi, who had been dismissed from his position by the late Chief Rabbi on the basis of a commission of inquiry's findings that he was guilty of serious misconduct unbecoming of a rabbi. See *R v. Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, ex parte Wachmann* [1993] 2 All EWR 249. The rabbi sought judicial review of the Chief Rabbi's decision, but it was held that such decisions in his religious and disciplinary capacity were not the decisions of a public body amenable to judicial review. In this context, the judge spoke of the distinction between church and state, perhaps better known in America or France than in England. But that is another subject.

Marriage and divorce. The Marriage Acts recognise marriage according to Jewish law, or in the statutory phrase "according to the usages of the Jews", and this is one of the few long-standing exceptions to solemnisation by approved Christian or secular methods. (Apparently, as I heard at a recent lecture in the Master of the Temple's series on Islam and the Law, the same dispensation is available for marriage by Islamic rites, but very few mosques have registered themselves for it.) English law has also and much more recently, in 2002, and after great difficulty, found a way to legislate in favour of a wife who experiences difficulties

in obtaining a *get*, that is to say a divorce under Jewish law: a decree nisi will be refused until the *get* is granted. In the same context, although pre-nuptial agreements are not at present binding in law (but as you may know the point has within the last few weeks been debated in the House of Lords and judgment is awaited), a pre-nuptial agreement to provide a *get* in the case of divorce was held in *N v N* [1999] 2 FLR 583 to be relevant to the exercise of the court's discretion to delay making a decree nisi absolute until a *get* was provided. On the other hand, a Jewish divorce by way of *get* in England, for instance under the auspices of the London Bet Din, is not recognised as a valid divorce in this country, which can only be obtained in judicial proceedings here under secular law: see *Maples v. Melamud* [1988] Fam 14. And that even applies to a divorce by way of *get* recognised as valid in Israeli law unless the whole proceedings by way of *get* take place in Israel: see *Berkovits v. Grinberg* [1995] Fam 142. That was a case where Dayan Berkovits, as a judge of the Federation Bet Din, himself petitioned the court on behalf of the divorcing couple, and conducted the case in person: and the judge said of the submissions he had heard that "treading the seemingly interminable desert of child abuse, the case was an intellectual oasis and a pleasure to try".

Commercial disputes. These may be litigated by consent before a Bet Din. The current procedure, initiated I think on the advice of Lord Woolf, (and as of last year, as I heard again in that recent lecture in the Islam and the Law series, this procedure has been adopted by the recently formed Muslim Arbitration Tribunal or MAT) is for the litigants to enter into an arbitration agreement. This has at least two advantages: one, is that the arbitration can, by agreement, be conducted under Jewish procedural and substantive law. This can get over the difficulty that an agreement cannot under English law normally be governed by Jewish law, since, outside exceptions such as arbitration and contracts relating to wills or succession, only the system of law of a state can be made the proper law of a contract: see *Halpern v. Halpern (No 2)* [2007] 2 All ER (Comm) 330 (CA). The other advantage is that the Bet Din judgment in the form of an arbitration award can then be enforced in the courts of England (or elsewhere).

A number of difficulties may nevertheless remain. One is that the English courts will not enforce an illegal agreement, that is to say an agreement which has been entered into in order to break the law. Thus where a father in Iran and a son in England entered into an agreement to smuggle carpets illegally out of Iran, the son could not enforce in the English courts his successful claim before the London Bet Din in circumstances

where the Bet Din judgment itself spoke of such illegality: *Soleimany v. Soleimany* [1999] QB 785 (CA). That was so even though Jewish law itself has, it was said in that case, no doctrine of the unenforceability of illegal contracts. On the other hand it is against the public policy of English law to enforce illegal agreements, and public policy is one of a small number of exceptions which may interfere with the enforceability of arbitration awards. It would be different if the arbitration award makes no finding of illegality, or a fortiori rejects a case of illegality, as long at any rate as any alleged illegality is not patent to the English court (see *Westacre v. Jugoimport* [1999] 2 Lloyd's Rep 65 (CA)) or if the attempted illegality was not carried out (*Kohn v. Wagschal* (CA, 2007)).

Incidentally, a propos the *Soleimany v. Soleimany* decision, I have read that a doctrine of the unenforceability of illegal contracts *is* part of Jewish law. Indeed, a distinction is made between illegality under legal law and under ritual law. Thus a contract will not be enforced if its performance is illegal under the former, but it will be enforced if its illegality arises only under the latter: as for instance where a contract is made on a Sabbath. However, anyone who has studied the law of illegality in English law will know that it is a difficult subject: and I certainly do not know what Jewish law would say about a contract which was not only made on the Sabbath but was due to be performed on it. However, if performed on the Sabbath, the seller could, as I understand it, claim for the price and the buyer could claim for misperformance. No questions please; I told you at the beginning that I am walking on thin ice!

Another commercial case which was decided in recent years in the English court was *Kastner v. Jason* [2005] 1 Lloyd's Rep 397 (CA). There the claimant before the London Beth Din made a claim which arose out of an investment which the claimant said had been procured by fraud. The claim was conducted under an arbitration agreement. The claimant obtained from the Beth Din a preliminary, interlocutory, order under Jewish law, called an *ikul*, which was analogous to the English freezing order or *Mareva* injunction as it used to be called. Apparently the Jewish *ikul* is of much older antiquity than the *Mareva*. The order was made in respect inter alia of the defendant's English home. A caution was recorded on the land register. Unfortunately, the rogue sold his home to a buyer whose solicitor did not notice the caution: the rogue decamped to the US. The question arose as to the status of the *ikul*: did it provide security in the home itself (in which case the buyer, innocent but on constructive notice, would have suffered the consequence), or was it just like a freezing order, a matter of personal obligation which did not amount to a charge over the property? Unfortunately for the claimant, it

was only the former. Alternatively, it was argued that if Jewish law failed to give the answer, a solution could be found under English law. It was held that it could not.

Death. Finally, death. In *Ex parte Worch* [1988] QB 513 (CA) a Jewish man died in a car accident involving no other car. The coroner required a post mortem and an inquest. The widow wanted an immediate burial and complained that a post mortem was forbidden by Jewish law. As it was, the post mortem took place promptly the day after death, and the inquest the day after that. The widow later took proceedings by judicial review for declarations that the coroner had acted unlawfully. Those were in the days before the Human Rights Act, so the argument could only be addressed as a matter of English law, viz under section 21(1) of the Coroners (Amendment) Act 1926. The divisional court found in favour of the widow on the question of the post mortem, but the CA disagreed. The litigation proceeded solely on the wording of the statute, the details of which need not detain us. Nowadays, an argument could be raised under article 9 of the Human Rights Convention, but would be met by an argument of justification.

There is law after death, for, after death, unfortunately, come disputes about wills and succession. There are a number of cases here with a Jewish law content. Of particular interest is *Re Berger* [1990] Ch 118 (CA). The deceased made an English will in 1975, which was valid. Two years later, in 1977 he made another English will, which was procedurally invalid, and also a Jewish will or *tsavah*, which was executed in accordance with the Wills Act 1837. The Jewish will was held to incorporate the dispositions of the invalid 1977 English will and was held to be enforceable as the deceased's last will. Thus the deceased's final dispositions were all recognised.

Let me now come to the third and final part of my lecture: and proceed briefly from the small and discrete, from my examination of some recent cases as examples of the incidence of Jewish law in the context of English law, to the broader picture, which requires some perspective and synthesis.

Let me start with Jewish law, of which I remind you I am not a scholar. The remarkable thing about Jewish law, whatever its antiquity, is first, that although it is divine in origin, it is clear doctrine that it is for man to interpret; and secondly, that Jewish law has developed for the most part in exile. The first matter I have already referred to as unpicking the lock of immutability. It has enabled Jewish law to reflect society. The second

matter has given Jewish legal scholars a great advantage in their age-long development in the law. They could neither legislate nor rule. They might try to impose but it was all, fundamentally, a democratic exercise in consent. Exile also meant that Jewish law has long lived in the shadow of another law. That is perhaps good practice.

Thus the legal characteristics of the Jewish people are that they are very ancient, that they have been stateless and powerless and without a legislature, whether king or parliament, for the majority of their existence, that they have exercised their wisdom and understanding in the context of many different cultures and nations, that they have had to balance the principles of a divine code with the pragmatism of human interpretation, and, beyond all, that in doing so they have been guided by very deeply inculcated ethical beliefs which are fundamental to their thinking at its most basic level: beliefs such as that justice and judgment are divine attributes, that man is made in God's image and therefore is worthy of the utmost personal dignity, that for all that Adam and Eve erred, for it is human to err, the pursuit of knowledge, wisdom and understanding is a human duty, and that with the help of such knowledge, wisdom and understanding it may be possible, but in any event, it must be attempted, to find solutions to the problems of mankind in society.

And as for English attitudes to law and justice, what are they? First, it has to be said that the memory of English law traditionally does not go further back than 3 September 1189, the coronation day of Richard I, a long time ago but immeasurably shorter than the memory of Jewish law. That is also the time from which England measures the development of its common law. One may debate whether that comparative absence of longevity is an advantage or a disadvantage or merely a matter of historical comment. Secondly, although English law has had the advantage from time to time to have been influenced by the civil law of Europe, it has on the whole also had the even greater good fortune to develop in a largely homogeneous, insular realm. Thirdly, there has always been a king or a parliament to legislate. The judges and the common law have therefore only exercised their interpretative powers in areas which statutes have left untouched, or within the gaps of legislation. Those areas, however, are large and also fundamental, and there the pragmatism of the common law operates. Fourthly, even long before England became a parliamentary, let alone a modern democracy, the institution of the jury, which goes right back to earliest times, has been a bulwark of democratic intuition at the very heart of the administration of justice. Partly I think for this reason, and also partly because it is in the nature of this phlegmatic island race which loves pragmatism and

suspects theory, a sense of fairness is endemic in its people and their law. Fifthly, the senior judges of England have throughout this time, because they have been small in number and selected from an independent profession, had the power of great prestige, and thus have been reasonably independent in their judgment, and increasingly so. Sixthly, in modern times, possibly under the influence of the United States, the courts have become increasingly an instrument of democratic thought and sensibilities. Seventhly, following the holocaust in Europe and the creation of the European Convention of Human Rights, English law has become increasingly conscious of human rights law, and the enactment of the Human Rights Act 1998 has given a great impetus to this trend by enacting that Convention into English law.

Above and beyond these matters, what is perhaps of particular note for present purposes is that throughout this period England has been a Christian, and latterly, a Protestant Christian country. There are no doubt differences in the Jewish and Christian religions, but ethically speaking they come from common stock. I am sure that this has throughout had a very considerable, unarticulated, influence on English law at the most fundamental level. And as for the interface of law and justice, the bottom-up approach of the English common law means that it shares with what has always been my admittedly rather untutored understanding of Jewish law, which is that it seeks, by a process of reason and human sympathy, to reach the best rules.

What of English law's attitude to Jewish law? I think the cases I have outlined before you demonstrate that English law is supreme and coercive, but that in areas where personal autonomy can be recognised, English law is willing to permit Jews to regulate their affairs according to their own laws and usages, while nevertheless continuing to control and regulate the limits and exercise of that permissiveness. No law proscribes circumcision, but if a dispute arises about its performance, that dispute will have to be resolved by English law. Where discretion has to be exercised, it will be the discretion of the judge acting under English law which will be decisive, but in exercising that discretion he will take into account the importance of established Jewish law. A Jewish marriage is valid, because the English statute recognises it as such. A Jewish will is valid, if it fulfils the forms of the English law as to the validity of wills. However, a Jewish divorce is not valid, because English divorce statutes do not recognise it. It is only valid if it is recognised as a foreign divorce. In such matters, as in the matter of the proper law of contracts, English law is part of the laws of nation states, not of peoples or religions.

Moreover, it is an essential doctrine of English law that what is not forbidden is permitted. Thus there is nothing to prevent Jews seeking to resolve their disputes before a Beth Din, just as there is nothing to stop anyone from resolving their disputes by any recognisable means of alternative dispute resolution. If, however, those litigants want the result to be binding, then they would either have to enter into a compromise settlement, which is the normal outcome of mediation and indeed a very frequent outcome of all disputes, or they would have to enter into an arbitration agreement. English law will enforce arbitration awards, subject to exceptions such as those relating to procedural validity and to public policy.

Thus English law favours personal autonomy, but of course one of the conditions of that favour is true autonomy, and English law as a matter of public policy will not uphold any agreement which has been procured by duress, which is the absence of true consent: see *Kaufman v. Gerson* [1904] 1 KB 591. That case concerned a claim for money payable under a contract made in France by a wife who made that contract in order to deter the claimant, who was threatening to bring a criminal prosecution against her husband, from doing so. Nothing in that case turns on Jewish law, but the litigants, to judge by their names, appear to have been Jewish.

Where then may conflict arise between English and Jewish laws? Disputes may arise, of course, between the state and Jewish people if the state seeks to legislate on a subject-matter of concern to Jews, such for instance as ritual slaughter. In fact, English law permits ritual slaughter. That, however, would be a matter principally for Parliament and democratic accountability. Disputes may arise between public bodies and a Jewish citizen, where any dispute would be mediated in accordance with the underlying law but that law may give to the public body a wide area for its own decision-making. Nevertheless, recent decades have shown the great growth of judicial review, and in the last decade, the advent of the Human Rights Act, both of which assist the citizen to hold public bodies accountable to rationality of process and to democratic and pluralistic values. English law has on the whole shown itself complaisant to taking into account Jewish among other values. And disputes may arise between citizen and citizen. Here again, English law has shown itself complaisant to taking into account Jewish values: for instance as long ago as 1811 in the case of *Lindo v. Unsworth* (1811) 2 Camp 602 it was held that a Jewish indorsee of a bill of exchange who omitted to send notice of dishonour on a Jewish festival when he was unable to attend to secular

business had acted within the special circumstances allowed by the law when he sent notice immediately thereafter.

But perhaps it is not to be forgotten that often the greatest relevance of Jewish law arises in disputes between Jew and Jew: and usually the dispute then is not merely over what Jewish law provides, but between the conflict of English and Jewish law, because it suits one or other litigant to rely on that conflict. It is hard to foresee and provide for such disputes. Like many disputes between neighbours, they can be the most difficult but also the most unreasonable.

Finally, in this brief overview, I would address a note of concern which has been sounded in the press over the last year, since the Archbishop of Canterbury gave his famous lecture over the road in the hall of the Royal Courts of Justice as the first in the Master of the Temple's series on Islam and the Law: and that is a concern that minority values could be imposed on all or some members of society and that distinctive British values will be changed in that process. I think that my brief survey has shown that English law does not, in the Archbishop of Canterbury's phrase, allow for a "supplementary jurisdiction" in the matter of Jewish law, but rather retains supreme and coercive force across all areas of life. In Jewish terms, the law of the land is the law. It is rather that English law is on the whole complaisant about giving room to pluralist values, but within the limits and supervision of the law. This suits Jewish law rather well, because Jewish law, for reasons which I have glanced at, tends to have advanced pragmatically and rationally in response to its context.

In conclusion, I would quote briefly from the epilogue of The History of the Jews which Paul Johnson, a distinguished Roman Catholic journalist and historian, wrote a few years ago, where he said this:

> "To them we owe the idea of equality before the law, both divine and human; of sanctity of life and the dignity of the human person; collective conscience and so of social responsibility; of peace as an abstract ideal and love as the foundation of justice, and many other items which constitute the basic moral furniture of the human mind."

Thank you very much for listening.