

MISHPATIM (EXODUS 21:1-24:18)

A Capital Idea

2005 · Rabbi Yerachmiel Sepowitz

Regardless of your position on capital punishment, it seems possible to find support from the Torah.

This week's Torah Portion is replete with prohibitions for which the death penalty applies. Those who engage in murder, (Exodus, 21:14) kidnapping, (Ibid, verse 16) injuring (verse 15) or cursing (verse 17) one's parents, witchcraft, (22:17) bestiality (verse 18) or idolatry (verse 19) can anticipate an appointment with the Executioners. The Torah makes it abundantly clear that a person who chooses to ignore its guidelines for life runs the risk of forfeiting that life.

On the other hand, we find in the Talmud that the Sages went to great pains to avoid carrying out the death penalty. In fact, the Talmud (Makkos, Chapter 1, Mishnah 10 reports that a court that carried out a death sentence more than once in seven years is considered destructive. Rabbi Tarfon, quoted in the same Mishnah, disagrees, and says that that rule applies to a court that kills more than once in SEVENTY years! Rabbi Tarfon and Rabbi Akiva stated that had they been members of a court ruling capital cases, no one would ever have been executed. They would have been so exhaustive in their cross-examination of witnesses, that they would eventually find a flaw.

If that is the case, what is the point of capital punishment being mentioned in the Torah? Is this a Mitzvah that is totally theoretical in nature?!

Igros Moshe, (literally, "Letters of Moses") a collection of responsa from Rabbi Moshe Feinstein, of Blessed Memory, contains a letter (Choshen Mishpat 2:68) that Rabbi Feinstein wrote in 1981 to "*Sar Hamedina*" – Literally translated, "The Prince of the State." (I assume that refers to President Reagan or New York Governor Hugh Carey). Rabbi Feinstein was responding to a question as to the Torah's view on capital punishment.

Rabbi Feinstein writes:

"Firstly, let me offer my feelings of love and reverence to the Prince of the State in the matter that he wants to know the view of the Torah that was given by G-d, may He be blessed, through our teacher Moses, explained through the Oral Torah, that was handed down from the Sages of each generation to the Sages of the next generation, until it was transcribed in the Talmud and the *Poskim* (Deciders of Law), Maimonides and the *Shulchan Aruch* and elsewhere, which is the True Knowledge; and also that the Prince of the State has faith in me that I am able to respond accurately and properly..."

(What an opening! We could skip the rest of the letter and learn so much about how a Torah Sage addresses a secular political leader.)

Rabbi Feinstein goes on to explain that the Torah provides capital punishment for sins such as murder, kidnapping, certain types of sexual promiscuity, and the worship of the sun, the moon, trees, and rocks, etc., because such behavior leads to a general breakdown of morality. The reason for capital punishment, explains Rabbi Feinstein, is neither out of hatred for the sinner nor as a way to "save the world." The reason, quite simply, that the Torah prescribes the death penalty for certain sins is in order to emphasize the gravity of the crime.

Capital punishment per se is not a great deterrent. How could a dust-and-cobweb-covered electric chair be a deterrent?! Reality is that in the overwhelming majority of cases the perpetrator was not executed. The Torah is describing these violations as being so totally beyond acceptability that the sinner deserves, at least in theory, to die. The Torah wants us to understand what terrible crimes murder and kidnapping are. When one bows to a tree or desecrates the Sabbath (yes, Shabbos violation is on the list as well! – Exodus 35:2) he is negating the role of G-d in the world. That is totally unacceptable.

Rabbi Feinstein also described the various hurdles that stood in the way of a prosecutor with execution in mind. He makes it very clear that in practice, capital punishment was almost never carried out. He writes that our People refrained from carrying out capital punishment even in those countries that might have allowed us to do it.

[It is important to point out that Rabbi Feinstein added a disclaimer that all this applies only when murder, etc. isn't rampant. However, when there is an epidemic of these types of behavior, society must take more drastic measures to set an example. So, in the end, it is not totally clear from this letter whether or not Rabbi Feinstein would support capital punishment in the U.S. today. I assume that he probably would.]

It seems pretty clear, in my humble opinion, that G-d never meant for people to be executed when violating these Commandments. In fact, the Talmud tells us that when non-observance became rampant, the Sages voluntarily disqualified themselves from adjudicating capital cases. They feared that they would be forced to start killing people, an option that was unthinkable. The idea was to send a message to those who considered taking liberties with Jewish Law.

The message is that G-d takes His Torah very seriously, and expects us to do the same.

Have a great Shabbos. Rabbi Yerachmiel Seplovitz