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УСНИЙ ЗАКОН В СИСТЕМІ ЄВРЕЙСЬКОГО ПРАВА: ЙОГО ПОХОДЖЕННЯ, СУТЬ ТА ХАРАКТЕР

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THE ORAL LAW IN THE SYSTEM OF JEWISH LAW: ITS ORIGIN, ESSENCE AND CHARACTER

The article is devoted to highlighting the essence and content of the Oral Law in the system of Jewish law. It studies the problem of the Jewish understanding of the term "Oral Law" and its relationship with the Written Law. The author analyzes a number of sources of Talmudic literature on the basis of which the conclusions that the Oral and Written Torah are in close connection and interdependence with each other. Based on the analysis of Torah and Talmud the following two reasons for such connection have been pointed out: the same source of origin and the one that the Oral Law is an explanation of the Written Law. In addition, the author highlights a number of features inherent to the Oral Law, which make possible to make conclusions about its nature, essence and content. Such interdependence of the two parts of Jewish law emphasizes once again its uniqueness as a legal phenomenon.

Key words: the Oral Law, the Written Law, Torah, Talmud, Halacha, Haggadah.

The Oral Law, or, as they call it in the Jewish tradition, the Oral Torah or the Oral Teaching, occupies an important place in the system of Jewish law. While the Written Law includes the five books of Moses, the Oral one covers much more legal material, due to the dynamic nature of its development. Unlike the Torah, which is a static source of law, i.e. one that is not subject to amendment, the Oral Law is on the contrary characterized by dynamic nature. Being the source of law derived from the Written Torah, the Oral Law was formed through interpretations and explanations by the Jewish people in the course of their history.

Prof. Menachem Elon states that the term "Oral Teaching" includes all Jewish Halacha, which is not construed in the Written Teaching. In a broad sense scholar urges to treat the Oral Doctrine not only "as Halacha of the Talmud, i.e. one that is formulated in the Mishna, in the Midrash, in the Tosefta, in the Baraytas and two Talmuds (Jerusalem's and Babylon's), but also as halachic resolutions in all their forms, of all ages"¹. In addition, halachist stresses that "the Jewish concept of "Oral Teaching" includes written laws, including statutes, regulations, etc. and their interpretation"². Taking into consideration the definition given by the scientist, it becomes clear that M. Elon treats the Oral Law as an exclusively halakic legal material.

Another definition of the Oral Law (תּוֹרַת שֵׁבִיעֶל-פֶּה, Torah shebe-'al peh), i.e. of the Oral Torah is given in the Electronic Jewish Encyclopedia (EJE): "all the interpretations and conclusions which the scribes deduced from the written Torah, as well as the regulations instituted by them, and therefore comprises the entire traditional teaching contained in the Mishnah, the Tosefta, and the halakic midrashim, since these were taught only orally and were not committed to writing"³. As we can see, the authors of the Electronic Jewish Encyclopedia treat the Oral Law not only as a set halakic material, but also haggadic. Despite a great respect for scientific views of the Jewish scholar, closer and thus more corresponding to our vision of the Oral Law is the definition given in the EJE. The main reason to prefer this opinion to the another one is that the Oral Law includes not only Halacha, but also Haggadah, which is also the source of the Jewish law.

According to the teachings of Jewish halachists, the Oral Law existed even in the days of Isaac long

¹ Менахем, С. (1989). Еврейское право. *Часть 1*. Иерусалим: Амана, 209.

² Менахем, С. (1989). Еврейское право. *Часть 1*. Иерусалим: Амана, 210.

³ Устный Закон. *Электронная еврейская энциклопедия: том 8, кол. 1302–1305* <<http://www.eleven.co.il/article/14230>> (2015, September, 3).

before the period of Sinai legislation. This idea is based on the words from Bereshit: "Because Abraham obeyed Me and did everything I required of him, keeping My commands, My decrees and My instructions." (Toldot 26:5)¹. The phrase "My instructions" is translated from Hebrew, and the original word used there is "Torotai" which has a plural meaning, i.e. "My Torahs". In comments to Torah Sonchino explains that it literally means "my teachings" and then he refers to the Midrash, which emphasizes that the Torah is divided into written and oral. The author of popular commentary on the Pentateuch directly explains that "the written Torah passes from generation to generation, like a scroll, and the oral one as a doctrine".² There is a large number of stories in Torah, which show that even before the period of Sinai legislation there existed the Oral Teaching that regulated the family, civil, commercial and criminal relationships. Obviously, it was a system of knowledge, norms and customs that were passed on orally and because of repeated use were granted compulsory nature. The period of Sinai law was an important moment in the history of the Jewish people, because then Law obtained a written form. And even after that the need for the Oral Teaching did not disappear, on the contrary, the Jewish people were given a kind of reinforcement in the form of the Written Law, and a more detailed explanation of it. Such a need for the Oral Teachings increased in every period of time.

In the talmudic literature we can find mentions on the written and oral Torah a large number of times. One of the famous stories about the division of the Torah into the written and the oral one is a story recorded in the letter 31-a to Mishnah, Chapter 5 of the second Shabbat treatise. The story told by wise men tells us about "one non-Jew (nohri) who came to Shama and asked: "How many doctrines (torahs) do you have?"

Shama replied to him: "Two: oral teaching and written teaching". Non-Jew said to him: "As to the written Torah, I believe you, and as to the Oral Torah, I do not believe you. Convert me to Judaism so that you teach me only the written Torah". Shama shouted at him and drove him out.

He (the same non-Jew) came to Hillel and he converted him into Judaism. On the first day (of their classes) Hillel said to him, "Alef-Bet, Gimel, Dalet" (alphabet). The next day he turned the letters listed in reverse order. Novice told him: "But yesterday you taught me in a different way!" Hillel told him: "But did not you trust me? (when you were taught written symbols) Just trust me being taught oral teachings (i.e. oral Torah)"³.

The story of the first pair of Tannaim presented in the Gemara, whose approach to the teaching the law differed, shows that the Jewish sages did not even assume the separation of the Written and Oral Torah, and Shema even refused to carry out a giyur for a person who does not accept the oral part of the law⁴. To carry out a giyur (rite of conversion to Judaism), a mandatory condition was the adoption of the commandments of the Torah, both written and oral. Thus, in the Jewish sense they are the two parts of a whole.

The division of the Torah to the written and oral one is given in one of the famous halakic Midrash Sifra, which explains almost the entire book Va-caviar. Here we find the explanation of the rules from Behukotay 26:46: "Behold, the resolutions and the laws and the teachings that God established between himself and the Israelites at Mount Sinai through Moshe"⁵. Sifra explains it as follows: "Resolutions" are the interpretations by sages; "Laws" are the laws of justice; "Teachings are Torah". This shows that two Torahs were given to Israel, one written and one oral"⁶.

It is possible to cite a large number of sayings by sages about the separation of Jewish teachings into oral and written, and all they emphasize the fact that these two are inextricably linked. One of the most respected Russian rabbi, Moshe Pantelyat expresses an interesting idea on this, which reflects the interpretation of the connection between the oral and written Torah by Jewish people. He said: "When transmitting oral information from generation to generation people can forget something or distort it. The Almighty gave us the Torah in the form of oral and written structures, so that each of them covers the drawbacks of the other. The Oral Torah retains the true meaning of words. The Written Torah encodes all

¹ *Тора. Пятикнижие и гафттаротт* (2007). Москва: Мосты культуры; Иерусалим: Гешарим.

² *Тора. Пятикнижие и гафттаротт* (2007). Москва: Мосты культуры; Иерусалим: Гешарим, 128.

³ *Талмуд. Том IX (Гемара: Трактат Шаббат, главы I-VII)* (2012). Москва: Издатель Л. Городецкий, 216-217

⁴ *Талмуд. Том IX (Гемара: Трактат Шаббат, главы I-VII)* (2012). Москва: Издатель Л. Городецкий, 217.

⁵ *Тора. Пятикнижие и гафттаротт* (2007). Москва: Мосты культуры; Иерусалим: Гешарим.

⁶ *Талмуд. Т. VII (Мехильта и Сифра)* (2009). Москва: Издатель Л. Городецкий, 718.

the Oral Torah, to know the decoding "key" , you can always restore forgotten"¹.

It is important to understand that both oral and written laws are interrelated and interdependent. We will try to briefly explain what they depend on and what is the connection between them. The two main reasons for this connection are: the same source of origin and that the Oral Law is the explanation of the Written one. Let us briefly look at each of them.

1. The same source of origin. The source of both, the written Torah and the oral one, including the laws and teachings that existed prior to the Mosaic law, is a divine revelation received at Sinai. Treatise Avot describes, "Moshe received the Torah from Sinai and handed it to Jesus, Jesus to the elders, the elders to the prophets, and the prophets the people of Great Council" (Avot 1: 1). Furthermore, the Talmud emphasizes that "it is not only the writings of the Torah, but also oral tradition, and mainly the latter one"². The fact that the Oral Torah as a written explanation was given at Sinai is also manifested in the Sifra: "At Mount Sinai through Moses", this shows that the Torah, its halacha, details and explanations were given through Moses at Sinai"³. Another example is found in the treatise Pea, where one of the wise men said: "... I have received it from Miashi, who heard it from his father, and latter from the" couples ", who received it from the prophets as halacha given to Moses (orally) at Sinai "(Pea 2:6)⁴. The following Mishna of the Talmud suggests that the oral teaching, i.e. the Oral Torah, were given by God to Moses on Mount Sinai, who in turn gave them to his followers.

In talmudic literature we come across a large number of wise sayings, discussions, stories, which show that both written and oral laws were received by Moses at Sinai. Another well-known interpretation is written in Berahot about the words of Mishpatim 24:12: "... and I will give thee tables of stone, and the Torah and commandments which I have written as guidelines for people"⁵. Gemara in the letter 5 to Mishna of the Berahot treatise explains: "It was interpreted by Levi, the son of Laham, the words of Simon, the son of Lakisha:" Tablets " are the Ten Commandments; "Thora" is the Scripture; "Commandment" is Mishna; "I wrote that" means by Prophets and hagiography; "Guidelines for them" means Gemara. This shows that everything was given to Moses at Sinai"⁶. Thus, Jewish tradition represented by the wise halachists follows the clear position that all Jewish teachings: Written Law and the Oral Law, received at Sinai, are accordingly divine revelation.

2. Oral Law was given for a proper understanding of the Written Law and interpreted it. The system of laws and regulations contained in the Written Torah did not give answers to all the questions that arose in the Jewish community. Many laws given in the Torah contain only a minimal explanation on how to fulfill them, and there are those which partially disclose information, making it practically impossible to fulfill the law in full. For example, let us consider the law given in the written Torah banning work in the Sabbath: "... thou shalt not do any work nor you, nor your son, nor thy daughter, nor thy cattle, nor the stranger yours, which lead thee" (Itro 20: 9)⁷ In the text of the Pentateuch it is not listed, what kinds of work can not be done in the Sabbath. Many questions also arise in kashrus laws about the kind of bird, which is allowed to be eaten (Rye 14: 11-20), about the civil relations, divorce in particular (Tetsye 24: 1-4), about the criminal ones considering incurring penalties (Mishpatim 22: 1-2), and so on.

The above examples are only a tiny part of the array of issues on which Jewish sages did not find the answers in the written Torah. In addition, historical development of the Jewish community created new circumstances, living conditions, and put questions, to which the Written Laws gave no answers. Moreover, taking into consideration the centuries-old Jewish history, the amount of changes taking place in society was big enough. That is why, according to Jewish tradition, the oral law became the necessary and the only source of proper understanding of the Written Law. Since, as already mentioned, "Thora, its halacha, details and explanations were given through Moses at Sinai"⁸, it is clear that the Oral Law was given to explain the Written one and was based on its authority.

Realizing that the interpretation of the Written Torah is inevitable sages said in Sifra: "The Torah

¹ Рав Моше Пантелеят. От Синая до наших дней. История передачи устной Торы. <http://toldot.ru/tora/articles/articles_524.html> (2015, September, 3).

² Талмуд. Т. IV (Книга 7 и 8) (2007). Москва: Издатель Л. Городецкий, 452.

³ Талмуд. Т. VII (Мехильта и Сифра) (2009). Москва: Издатель Л. Городецкий, 718.

⁴ Талмуд. Т. I (Книга 1 и 2) (2006). Москва: Издатель Л. Городецкий, 63.

⁵ Тора. Пятикнижие и гафттаротт (2007). Москва: Мосты культуры; Иерусалим: Гешарим.

⁶ Талмуд. Том VIII (Гемара: Трактат Берахот) (2011). Москва: Издатель Л. Городецкий, 23.

⁷ Тора. Пятикнижие и гафттаротт (2007). Москва: Мосты культуры; Иерусалим: Гешарим.

⁸ Талмуд. Т. VII (Мехильта и Сифра) (2009). Москва: Издатель Л. Городецкий, 718.

speaks the language of people and diversifies its expressions, but all they are subject to interpretation"¹. It should be noted that the Torah itself provides an example when through obscurity an existing law needed to be interpreted. Such is an example in the case of Tslofhada's daughters, who came to Moses asking for clarification of the situation with the death of their father. As a result, Moses "presented their case before God", after what the turns of inheritance were established (Pinchas 27: 1-11)². However, not only the written Torah, but the whole system of Jewish legal material is constructed in such a way that the vast majority of it are the sources, which are derived by interpretation. N.V.Malinovskaia in her thesis emphasizes highlighting the interpretation in law system : "The system of objects of Hebrew interpretation was quite difficult and characterized by a distinguishing feature, i.e. each previous object of interpretation generated the next one, in the sense that interpretation results were becoming the independent objects of interpretation in the future"³.

It is important to mention that in the written Torah similar situations are provided as a forecast of strange laws and ways of solving them, which will occur : "If a matter eludes you in judgment, between blood and blood, between judgment and judgment, or between lesion and lesion, words of dispute in your cities, then you shall rise and go up to the place the Lord, your God, chooses. And you shall come to the Levitic kohanim and to the judge who will be in those days, and you shall inquire, and they will tell you the words of judgment. And you shall do according to the word they tell you, from the place the Lord will choose, and you shall observe to do according to all they instruct you. According to the law they instruct you and according to the judgment they say to you, you shall do; you shall not divert from the word they tell you, either right or left. "(Shoftim 17: 8-11)⁴ As we can see, the legislator in the written Torah exhorts to contact the authorized entities for the explanation in ambiguous situations, or when there is some obscurity in the law. The expression "in those days" was given to ensure the credibility of judges of any period. Moreover, the judge's decisions, and Jewish tradition says that this refers to the Sanhedrin were binding. "Demonstrative refusal to obey regulations of Sanhedrin was seen as a revolt against the Torah and punishable by death"⁵, Dr. J. Hertz comments.

Thus, the two main abovementioned reasons for the unity of the oral and written laws, give us a clear understanding of a unique nature of the Jewish law. The same source of origin and that the Oral Law explains the rules and laws of the Written one show that there is an inextricable link and interdependence of the two parts of the same doctrine. However, in order to properly understand the Oral Law, we should point out to some of its features, which, in our opinion, depict its character in the most objective way. These features include:

1. Oral Law is a theoretical concept which covers both legal knowledge, transmitted orally, and the entire amount of legal material, interpreted after the canonization of Written Torah;
2. Oral Law is derived from written and one that is based on the authority of the laws of the latter;
3. The dynamic nature of the Oral Law expressed through the evolutionary process of Jewish law, which is to update the law according to social progress;
4. Despite the Divine nature of the Oral Law, its authors were the sages - authoritative experts in Written Torah;
5. Each norm and legal position of the Oral teaching preserve the force of law and do not lose their validity over time, even if there is no need to use them anymore.

Thus, the abovementioned features in general reflect the essence of the Oral Law and allow theoretically understand its idea. It is important to mention that the Oral Law as a concept is not a separate legal act, but a term that covers both teaching that existed before the period of Sinai legislation and the system of norms, principles and laws created after the canonization of the Pentateuch. With this in mind, we offer the following definition of the Oral Law: a set of oral and after that written halakic and haggadic legal material existing in Jewish society, which was first created by interpretation of the Written Torah and then derived from its laws and systematized in the course of historical development into separate collections (Mishna , Midrash, Talmud, etc.).

At the same time, exploring the nature and essence of the Oral Law, attention is drawn to the fact

¹ Талмуд. Т. VII (Мехильта и Сифра) (2009). Москва: Издатель Л. Городецкий, 615.

² Тора. Пятикнижие и гафттаротт (2007). Москва: Мосты культуры; Иерусалим: Гешарим.

³ Малиновская, Н.В. (2010). *Интерпретация в праве: генезис, эволюция, актуализация*: дисс... канд. юрид. наук. Воронеж, 15.

⁴ Тора. Пятикнижие и гафттаротт (2007). Москва: Мосты культуры; Иерусалим: Гешарим.

⁵ Тора. Пятикнижие и гафттаротт (2007). Москва: Мосты культуры; Иерусалим: Гешарим, 1194.

that in the Jewish teachings there are ideas that are not to be taken literally. This is the principle that resonates with both, written and oral Torah, that is "Torah from the Heaven." Despite the fact that many times in the halakic literature there are allegations that the entire Oral Law with Mishnah and Gemara itself was given at Sinai, it is hard to imagine what was the amount of information given to Moses, if we take the words of the halachists literally. In addition, taking into consideration the centuries-old Jewish history, it is evident that Moses could not grasp in such a short period of time all the information contained in the oral teachings.

Agoura Joseph in his work "Introduction to the Oral Torah," summarizing the Jewish tradition, explains: "There immediately is a clear answer to this question:" Not all the Oral Torah [but rules] of it God taught Moses. Thus, says the author, sages believed that at Mount Sinai Moses received in addition to the Written Torah not the Oral Torah, as such, but information on its structure, directions of its development, rules and principles according to which the next generation should develop the Oral Law"¹. Thus, by the Oral Torah which Moses received we should understand the system of principles, rules and basic knowledge of the Oral Law, according to which Jewish sages and judges of all periods were to interpret the Written Torah, develop new laws and make judgments.

The fact that the Jewish sages were granted the right to create the Oral Law is repeatedly emphasized in Halacha. Thus, in his work "The Book of Commandments" in the second principle of interpretation of the Torah Jewish halachist Rambam notes: "All that is not written in the Torah directly, but derived from it through the thirteen principles of interpretation, as most sages directly specified," the body of Torah " or "it is [the law of] the Torah" - should be attributed to [bequeathed by] the Torah, as did those who received it [and gave us]. But if sages do not point to it directly, the law should be related to the regulations of the sages, because there is no indication of it in the text of the Torah"². Rabbi Tversky Isadore, a professor of Jewish philosophy, emphasizes this in his anthology works of Maimonides describes: "Maimonides held a sharp distinction between the two components of the Oral Law: tradition that is complete, absolute and can never be disputed, and laws, which came as a result of the accepted canons of interpretation"³. The first, in the words of the scientist, is related to laws that have no basis in biblical text, or they are based solely on tradition, such as the requirement to Tefillin to be square and black. The second group, and most of the Oral Law is based on interpretations, inferences and analogies, on the law revision and is now part of an authoritative tradition, only after the conclusions were harmonized, after the establishment of the standards by the majority decision or through other principles of the legal process"⁴.

Taking into account such a vision of Oral teachings by Jewish lawyers, it is clear that in its structure, it is also divided into certain groups, each one accommodates laws combined by certain criteria and characteristics. As the evidence of this, it is appropriate to mention the classification of the Oral Torah laws based on the teachings of the Rambam, and set forth by Israeli professor of Bar-Ilan University. Yehuda Eisenberg. In his book "What the Torah is" the scientist studies the following groups of the laws of the Oral Torah:

1. The laws of the Torah, that is those laws that were given in writing and orally at Sinai ("dinim deorayta"). These include:

-Perushym mekubalim ("clarifications, preserved by tradition") - interpretation of the texts which are difficult to understand in the written Torah.

- Halacha leMoshe miSinai ("Halacha that Moshe received at Sinai), laws that have no direct connection with the written Torah and can not be derived from it, neither by thinkings, nor based on any of the thirteen methods of interpretation of the Written Torah known by sages.

- Perushim mehudashim ("new clarification"), laws that were withdrawn by the Jewish sages of the Written Torah with the help of logical inference or on the basis of the abovementioned thirteen methods of interpretation. The scientist notes that unlike the previous two groups of laws for which there is no dispute by the sages, the first mehudashim often caused disputes to arise and these laws were established by the Supreme Court, Sanhedrin. And only after when a law was adopted by Sanhedrin, it became the law of the Torah, Din deorayta, or was removed from the Torah.

2. Laws of the sages, that is, those that are set by sages ("dinim derabanan"). These include:

¹ Агур, Й. (1995). Введение в Устную Тору: Ч. 1-2. Тель-Авив: Издательство Открытого университета, 16.

² Рабби Моше бен Маймон (2013). *Книга заповедей*. Москва: Книжники; Лехаим, 85.

³ Рамбам (Маймонид) (1990). *Избранное. Т. 1*. Иерусалим: Библиотека-Алия, XXX.

⁴ Рамбам (Маймонид) (1990). *Избранное. Т. 1*. Иерусалим: Библиотека-Алия, XXXI.

- Hzeyrot ("decrees), laws deduced by prophets and sages with the aim to reduce the "protection" around the Torah, in other words, additional measures taken in order to save people from the violation of its laws. This type of law derived from Va-caviar 18:30, where sages are allowed to establish hzeyrot through the words of the Torah: "Keep what I kept" (677, Torah). Yehuda Eisenberg explains that the sages interpret the phrase this way: God commanded that around the protection created by Him, His law, His Torah, was built additional protection by sages, and that ishzeyrot.

- Takanot ("resolutions"), laws established by the prophets and sages to regulate relations between people and laws designed to awaken Jews to the more ardent fulfillment of the commandments, not being, unlike hzeyrot, "a protection" around the Torah¹.

Taking into account this approach to understanding Jewish jurists laws, it is evident that the subjects of law-making in the case of oral law are sages. This has been repeatedly emphasized in the Talmud. So, Chapter 3 in the Mishnah, of Ketubbot treatise 5 states: "Such is the first Mishnah. Later Beth-Din established ..."². Another example is the word of rabbi Joses: "Look how the early Fathers diverged about this halacha and deduced the word of the Torah from the words of the scribes and the scribes' words from the words of the Torah" (Tosefta [1,8] to the Mishnah 2 Chapter II of the Treaty Tevul-Yom)³. Despite divine revelation at Sinai, which laid the foundation for further development of Oral legal doctrine, namely Jewish legal scholars of all time have created a system that Oral Law, which is known to us today.

Opinions in the Jewish legal science on the Oral Law are so many and each of them deserves attention. The Wise Men of all ages held discussions on the issue of priority of interpretation and law, and that both doctrines originated in the Jewish legal tradition. Taking into consideration controversial nature of Jewish law, a clear answer to these questions, guided by Halacha, can be given. Every legal opinion contains its vision of the problem, its arguments and references to the law. However, unquestioned belief in Jewish legal position is that both oral and written law are inseparably linked, complementing each other. Being a whole, they are a source of divine revelation, but with different functions and properties. Oral Law is intended to explain, interpret and complement the written and provide answers to those questions, the answers to which the Written one does not give. However, the authority and validity of the Written Torah is a limitation, beyond which the Oral Law can not proceed.

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¹ Айзенберг, Й. (1989). Что такое Тора? <<http://www.istok.ru/library/jewish-education/torah/what-is-the-torah>> (2015, September, 03).

² Талмуд. Т. III (Книга 5 и 6) (2007). Москва: Издатель Л. Городецкий, 136.

³ Талмуд. Т. VI (Книга 11 и 12) (2007). Москва: Издатель Л. Городецкий, 608.