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“The Pope and a Question of Immunity”

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In the latest chapter of the sexual abuse scandal in the Catholic Church, lawyers for Pope Benedict XVI have asked President Bush to declare the pontiff immune from liability in a lawsuit that accuses him of conspiracy in covering up the molestation of three boys by Juan Carlos Patino-Arango, a Texas seminarian who allegedly molested them during counseling sessions in the church in the mid-1990s. The lawsuit alleges that the Pope, while heading the Vatican's Congregation for the Doctrine of the Faith as Cardinal Ratzinger, was involved in a conspiracy to hide Patino-Arango's crimes and to help him escape prosecution.

I don't know if the allegations are appropriate or not, or whether the pontiff was involved in any improper activity. The Vatican claims that Cardinal Ratzinger's 2001 letter to bishops around the world explaining that "grave" crimes such as the sexual abuse would be handled by Congregation for the Doctrine of the Faith and that these cases were subject to "pontifical secret" was not meant to hide abuse or to prevent victims from reporting it to law enforcement authorities. It claims that the document deals with church law only and does not address informing secular authorities. Archbishop Joseph Fiorenza of the Archdiocese of Galveston-Houston, TX, also named as a defendant in the suit, explained, "These matters are confidential only to the procedures within the Church, but do not preclude in any way for these matters to be brought to civil authorities for proper legal adjudication. The Charter for the Protection of Children and Young People of June, 2002, approved by the Vatican, requires that credible allegations of sexual abuse of children be reported to legal authorities."¹ Yet, Father John Beal, professor of canon law at the Catholic University of America, admitted that the letter extended the church's jurisdiction and control over sexual assault crimes. And Archbishop Tarcisio Bertone who co-signed the letter had previously claimed, "In my opinion, the demand that a bishop be obligated to contact the police in order to denounce a priest who has admitted the offence of paedophilia is unfounded."²

While Jewish law certainly does not apply to the head of the Roman Catholic Church and it is not for this Jew, a noncommunicant outsider to the Church, to pass judgment on the merits of Church doctrine, nevertheless, the appeal for diplomatic immunity in this case is an issue for all peoples of all faiths to deal with from their own religious and ethical perspectives.³

¹ <http://www.houstonvoice.com/2005/4-29/news/localnews/pop suit.cfm>.

² <http://observer.guardian.co.uk/international/story/0,6903,1469055,00.html>.

³ This essay will not deal with the relationship between the Jewish community and civil authorities dealt with by such concepts as *mesirah* and *arka'ot shel Aku'm*.

Is the Pope a Head of State? Is he a religious leader? Should Benedict XVI “hide” behind the cloak of immunity?

Sovereign immunity and diplomatic immunity are ancient concepts that protect heads of states in their own countries and abroad. They are the natural consequences of the divine right of kings and the idea that there can be no legal right against the authority that makes the law in the first place. Diplomatic immunity protects diplomats from harassment or arrest by foreign governments.

As for Jewish law, we start with the Mishnah, Sanhedrin 18a,
 The High Priest may judge and be judged, testify and be testified against... the King may neither judge nor be judged, testify nor be testified against.

The High Priest, the principal religious leader of the ancient Jewish Temple in Jerusalem, was not immune from prosecution. It was understood quite clearly that his religious credibility depended on his moral integrity. Guilty of a crime against God or other people, he was judged and punished by a human court, after which he was restored to his position (*Hilkhot Sanhedrin* 17:8). This last detail is as inspiring as it is instructive: anyone can sin and everyone can repent. In fact, “In the place where penitents stand even the wholly righteous cannot stand” (*Berakhot* 34b). And sinful leaders are a *desideratum*. The Talmud advises that a person should not be appointed as a leader of a community unless that person “carries a basket of reptiles on his back (in the modern idiom: has skeletons in his/her closet), so that if he became arrogant, one could say: Turn around!” (*Yoma* 22b). And Hassidim spoke of *yeridat ha-tzaddik*, the spiritual descent of the righteous leader for the purpose of elevating himself and his followers.

What better spiritual role model than one who can relate to the failings, frailties and challenges of ordinary people? Of course, the type of transgression committed, the nature and extent of the repentance achieved, the rate of recidivism of the illicit act, the impact of reappointment on previous victims and the implications of this individual’s continued service on the community are very relevant when considering restoring such a person to this honored and influential post and are beyond the scope of this brief essay.

So, if the pontiff is a spiritual leader, the chief spiritual leader of his communicants, what message is he sending if he avoids taking responsibility for his actions? What behaviors is he modeling for sinners—and aren’t we all sinners of one type or another—by invoking what appears to be a legal loophole?

But then, the Vatican claims that he is Head of State. (Let’s put aside the church/state issues as well as the perception that this religious leader chooses to be defined in secular rather than sacred terms.) According to *Halachah* (Jewish Law), can a head of state be tried in a court of law?

We have already seen the Mishnah's statement, "the King may neither judge nor be judged, testify nor be testified against." The reason? Perhaps it would be a diminution of the dignity of the monarchy. Perhaps it would interfere with a sovereign's exercise of leadership and ability to govern. Invoking the opening verses of Psalms 17, "A prayer of David...Let my verdict come forth from Your presence," the Midrash, *Devarim Rabbah* 5:8, suggests that only God can judge the King.

The Babylonian Talmud, *Sanhedrin* 19a, teaches that not all kings were exempt from judgment. It distinguishes between the scions of David, who may be brought to court, and all others. The Mishnah, exempting a king from judgment applies to all other kings, but

...the Kings of the House of David may judge and be judged, as it is written, "O House of David, thus saith the Lord, execute justice in the morning;" (Jeremiah 21:12) and if they may not be judged, how could they judge: is it not written, *Hitkosheshu vakosheshu*, (Zephaniah 2:1) which Resh Lakish interpreted, 'adorn yourself first and then adorn others'?

This suggests that all heads of state *should* be liable for judgment. What is the reason then that the Kings of Israel were exempt? The Talmud tells the story of Alexander Jannaeus (Yannai) who lived from 103-76 B.C.E. and was the third son of John Hyrcanus. He was King of Judea but not of the House of David. Summoned to appear in court by Shimon ben Shetach and asked by him to testify, Yannai replied, "I shall not act in accordance with what you say, but in accordance with what your colleagues say." Fearing what the king might do to them if they insisted that he testify, the other judges did not say a word. Angered by their timidity and apprehension, Shimon ben Shetach called upon God to hold them to account. The angel Gabriel appeared and smote them. "It was there and then enacted: A King [not of the House of David] may neither judge nor be judged; testify, nor be testified against."

So the Kings of Israel could not be called to court—not out of any principle calling for respect for the sovereign or of any concern for the smooth functioning of the government, but because of the arrogance of a monarch and the dangerous consequences for the courts, the country and the rule of law that could ensue if his presence undermined justice. (See *Hilkhos Melakhim* 3:7).

Not being "judgable" has significant consequences for the leader's ability to govern. "Is it not written, *Hitkosheshu vakosheshu*, (Zephaniah 2:1) which Resh Lakish interpreted, 'adorn yourself first and then adorn others'?" In other words, not only from a technical legal standpoint, but from a practical one as well: one's credibility and authority to make law, to enforce law and to inspire others to abide by law depends on one's personal accountability to the law.

Responsibility and accountability are essential leadership traits. The Midrash (*Midrash Tehillim* 76) observes that of all the tribes of Israel, it was from Judah that David came and from Judah that the monarchy would be established. The reason? Because when faced with the opportunity to kill Joseph and hide the evidence, Judah said

to his brothers, “What profit is it if we slay our brother, and conceal his blood?” (Genesis 37:26). Rabbi Chaim Shmuelevitz, *zt”l*, the *Mir Rosh Yeshiva*, explained that this showed Judah’s unique sense of responsibility and accountability. He explained that what Judah was saying was this: “If we kill Joseph and hide his body, then we will never have to accept responsibility for what we have done. This cannot be.” A true leader does not engage in cover-ups.

So did his letter to the bishops prevent the legal authorities from getting these cases? Is he a priest or Head of State? Is his position and that of his Church enhanced or diminished by pleas of immunity? How should this leader, and all leaders, be held accountable for actions that may have harmed others or prevented them from getting the help they need?

Religious communities, all religious communities, clergy and laity alike, need to assert the responsibility and accountability they espouse and live up to their own conviction not to stand idly by the blood of their sons and daughters. Perhaps immunity is an important tool in modern diplomacy and perhaps a head of state should be immune in the courts of law in his country and in others’. But no one, no head of state and no priest or rabbi or imam, is immune from accountability in the Court of Public Opinion, where the true battle for the hearts and minds *and souls* of the masses is being waged.

JSafe: The Jewish Institute Supporting an Abuse Free Environment works to promote a Jewish community in which all of its institutions and organizations conduct themselves responsibly and effectively in addressing the wrongs of domestic violence, child abuse and professional improprieties, whenever and by whomever they are perpetrated. Through its certification program, publications, and educational initiatives, *JSafe* promotes universal gold standards for training and policies that prevent abuse, that ensure that survivors are treated supportively and appropriately, and make perpetrators accountable, thereby promoting a safe environment for all children and adults. **Rabbi Mark Dratch** is Founder and CEO of *JSafe*.