

How Torah Law is Different from Civil Law

By Rabbi Dovid Markel

The section in Torah dealing with civil law begins with the words, “And these are the ordinances that you shall set before them¹.”

There are two categories of Torah commandments (*mitzvot*):

- a) commandments that are between man and G-d (*mitzvos bein adam l'makom*)
- b) commandments that are between man and his fellow (*mitzvos bein adam l'chaveiro*)

While it is clearly understood and appreciated how the laws between man and G-d are part and parcel of the religious experience, there is a tendency to regard the laws between man and his fellow as rulings designed for the benefit of civil society. Based on this notion, it is often taken for granted that Torah law has the same basic framework as other judicial systems.

Comparisons by legal scholars are often drawn between Torah law and its civil counterparts. It is assumed that because they have the same general agenda and structure, there can be a dialogue between the two systems, in which the ideals of one can be assessed and evaluated in relation to the other.

Because the judicial system of the Torah is often viewed through this paradigm, some Torah laws do not seem to make sense from the judicial point of view. For example, there are cases in which, on the surface of it, the rulings of Torah do not seem to advance civil order. However, by reassessing the approach of Torah and arriving at a proper appreciation of its intent and how it functions, many questions will fall away of their own accord.

The purpose of this article is to create a paradigm shift in the way Torah law is often understood and to clarify the differences between it and secular civil law.

To accomplish this objective, we will explore a Torah ruling that on the surface seems to go contrary to normative legal reasoning. This ruling will first be analyzed according to normative legal thought and will then be explained according to traditional Torah sources. By presenting the Torah's unique approach, it is hoped that the reader will have a more enlightened appreciation and understanding of the role of Torah as a legal structure, the way it functions, and its purpose in the world.

Two Witnesses

¹Exodus 21:1

The Torah judiciary system relies heavily on the testimony of witnesses and instructs the rabbinic court to execute all matters based on their words.

The Torah says²: “A single witness shall not stand up against a person regarding any iniquity or sin, whatever sin he may sin. The matter shall be confirmed by the mouth of two witnesses or by the mouth of three witnesses.”

The words of two witnesses confirm that the event regarding which they are testifying took place. Their words are considered verified.

The Talmud³ expresses this idea by stating, “in the case of testimony, a hundred are like two, and two are like a hundred!” The testimony of the witnesses is completely accepted by the court, as if it was the testimony of a hundred witnesses⁴ and the matter about which they have testified is “confirmed.”

While the logic behind accepting two witnesses in the same manner we accept a hundred witnesses may seem remarkable—as normative thinking would give greater weight to the testimony of the many over the few—the reasoning is actually quite simple. Once the two witnesses are categorically accepted, it makes no difference whether there were two or one hundred; two witnesses are absolutely accepted just as one hundred witnesses are absolutely accepted⁵.

While the Torah is keenly aware of the possibility that the testimony of the witnesses may be false and that their account may have been fabricated from thin air, it nevertheless instructs that their testimony be accepted unquestioningly.

This is expressed in Maimonides’ statement⁶, “We are commanded to render judgment based on the testimony of two witnesses, though we do not know that their testimony is true or false.” In practice it is accepted as truth, though the possibility that they are lying always exists. We do not necessarily believe them *objectively*. Rather, we believe them in regards to rendering judgment on the case⁷.

Examining the Witnesses

While the Torah directs the courts to accept the testimony of these witnesses, notwithstanding the possibility that they may be lying, it also instructs the courts to thoroughly examine the witnesses, to assess if they indeed are being truthful.

² Deuteronomy, 19:15

³ Shavuos, 42a

⁴ There, the Talmud expresses that although one generally follows the majority of opinions that is only regarding estimations. However, concerning testimony, we follow the words of two witnesses.

⁵ Shav Shmaasa, 2:22. See as well, Kovetz Shiurim, Bava Kama 49, and Tzafnas Panei’ach, Klalei HaTorah V’haMitzvos 2 for other reasoning’s behind this ruling.

⁶ Rambam, Principles of the Torah, 8:2

⁷ Tzafnas Panei’ach to Rambam, Principles of the Torah, Ch. 7, Tzafnas Panei’ach, Klalei HaTorah V’haMitzvos 2

The Torah charges the judges with the directive⁸, “And you shall inquire and research thoroughly.” This commandment instructs the judges to cross-examine the witnesses to see if they are indeed being honest in their testimony. If the account of the two witnesses varies their testimony is discounted.

The judges would cross-examine the testimony with the following seven basic questions⁹: 1) In what seven year cycle did the event occur? 2) In what year? 3) In what month? 4) On what day of the month? 5) On what day of the week? 6) At what time? 7) In what place?

Additional questions were asked as well, depending on the specific scenarios that the witnesses testified about. The following are examples of some basic questions by which the courts would probe the witnesses¹⁰:

“In a case where the witnesses would testify that a person had worshipped false deities, the judges would ask them: “Which deity did he worship,” “What service did he perform?” If the witnesses testified that he desecrated the Shabbos, the judges asked them: “Which forbidden labor did he perform,” “How did he perform it?” If they testified that he ate on Yom Kippur, the judges would ask them: “Which food did he eat,” “How much did he eat?” If the witnesses testified that the individual killed someone, the judges would ask them, “With what did he kill him?”

All these inquiries were integral questions posed by the court to examine the witnesses, to ascertain the trustworthiness of their testimony.

In addition, there were additional inquiries that had nothing to do with the fundamental testimony of the witnesses.

The questions asked in this portion of the examination did not concern facts that were integral to the testimony itself, but were rather side questions, to determine whether the witnesses kept to a single narrative of the events. Examples of these questions could be¹¹, “What garment was the murderer wearing and what garment was the victim wearing? Were their clothes white or black? What was the color of the soil where the victim was killed? Was it whitish or reddish?” The more questions asked, the more praiseworthy¹², as it tended to eliminate perjury as much as possible.

In actually, the judges were so reluctant to condemn someone to death that the Talmud makes the following observation¹³:

⁸ Deuteronomy, 13:15

⁹ Talmud, Sanhedrin 40a; Maimonides, Laws of Testimony, 1:4

¹⁰ Maimonides, Laws of Testimony, 1:4

¹¹ Maimonides, Laws of Testimony, 1:6

¹² Maimonides, Laws of Testimony, 1:6

¹³ Talmud, Makos, 7a

A Sanhedrin that effects an execution once in seven years is branded as a destructive court; Rabbi Eliezer ben Azariah says: once in seventy years¹⁴. Rabbi Tarfon and Rabbi Akivah say: If we were members of the Sanhedrin no one would have ever been executed.

The Talmud explains that they would avoid a verdict of capital punishment by plying the witnesses with so many questions until they were unable to answer to the court's satisfaction. In the words of the Talmud¹⁵:

How could they affect such a policy? Both Rabbi Yochanan and Rabbi Elazar suggested that the witnesses could be plied with [intimate] questions such as, 'Did you take note as to whether the victim was suffering from some fatal affliction or was he in perfect health?' Rabbi Ashi added: "Should the reply be, 'He was in perfect health', they could further be embarrassed by asking, 'Maybe the sword only severed an internal lesion?'" What could be asked in a case of incest? — Both Abaye and Rava suggested asking the witnesses whether they had seen the offenders as intimate as 'a tube and its brush?'

Thus, we see that though the judges had the power to mete out capital punishment, they highly valued human life and were extremely hesitant to do so.

False Testimony

Invariably, there will sometimes be attempts to falsify testimony and for that the Torah gives the following directive¹⁶:

If a false witness stands against a person, to bear perverse testimony against him, then the two people who are in dispute with each other shall stand before HaShem, before the *Cohanim* (priests) and the judges who will be in those days...and the judges shall investigate thoroughly, and behold, the witness is a false witness; he testified falsely against his brother; then you shall do to him as he conspired to do to his brother, and thus purge evil from among you.

However, the construct by which false witnesses—(*zomemim*-conspirators)—can be incriminated, is only by means of the court **directly** implicating the false witnesses themselves. The Mishna¹⁷ explains this as follows:

Witnesses are not condemned as *Zomemim* until they themselves are [directly] incriminated; How, for example? If they had declared: "We testify that 'So and So' killed that person", and other witnesses retorted, "How could you testify to that; that murdered person or that [alleged] murderer was with us on that very day, at such and

¹⁴ The Talmud is not sure if R. Eliezer ben Azariah's words are a censure to the above statement, or was merely observing that the courts would not execute an individual more than once in seventy years.

¹⁵ *ibid*

¹⁶ Deuteronomy, 19:16-19

¹⁷ Talmud, Makos, 5a

such place?” [Then] the witnesses are not thereby condemned as *Zomemim*. But, if these [other] witnesses stated, “How could you testify to that, as on that very day, **you** were with us at such and such [different] place?” [Then] the former are condemned as *Zomemim*.

The punishment for false testimony is as stated by the above verse: “you shall do to him as he conspired to do to his brother.¹⁸” False witnesses are punished with the same punishment that they were attempting to bring upon their brother¹⁹.

Punishing the Conspirators

Interestingly enough, according to Torah law, the scheming witnesses were only punished if they did **not** succeed in their plot. If their scheme accomplished its goal and the accused received punishment, the witnesses were not punished altogether!

The Talmud²⁰ formulates this as follows: “Witnesses are not put to death as attested *Zomemim* until after the termination of the trial... ‘Do unto him as he **proposed** to do unto his brother’, which clearly implies that his brother is still alive.”

The Talmud understands that because the verse²¹ stated, “Do unto him as he **proposed** to do unto his brother,” the witnesses are only punished when the testimony is still in the **proposition** stage. If, however, the testimony already brought about an execution of punishment, the conspirators are no longer punished.

One would assume that if a **lesser** crime warrants punishment, a **greater** crime should warrant punishment all the more. However, the Talmud²² explains that regarding punishment of an individual, it cannot be derived using *a priori* logic; the Torah must specifically dictate it. The Talmud states²³, “No penalty is inflicted on the strength of a logical inference.”

In order for the courts to punish a person, it must say so in the Torah; either directly or derivatively.

In the case of the *Zomemim*, the only opportunity for administering penalty upon them is during the short window of time between the end of the trial and the proposed execution of the accused. If the witnesses were found to be false **after** they had succeeded in their plot and the defendant had already been executed, they were not punished at all!

¹⁸ There are instances where the exact punishment is not meted out and instead the plotters receive lashes. See Talmud, Makos, 2b.

¹⁹ See however, Talmud, Makos, 2a and Sanhedrin, 89a for exceptions to this rule.

²⁰ Talmud, Makos, 5b

²¹ Deuteronomy, 19:19

²² Talmud, Makos 5b, See as well Maimonides, Laws of Testimony, 20:1

²³ Talmud, Makos, 5b

On the surface, this does not seem to make sense; if the testimony of the false witnesses failed and they did not accomplish their plot, then they are punished. However, if their conspiracy was successful, and they indeed brought undue retribution upon an innocent victim, then they receive no punishment whatsoever!?! What logic can there possibly be here?

In traditional rabbinic texts this question is answered and elucidated in various ways. Each of these elucidations demonstrates a facet in which the Torah legal system differs significantly from its secular counterpart. Hopefully, the explanation of how this question is answered will provide a paradigm shift and new appreciation of Torah jurisprudence.

However, before investigating the reasoning of the Torah, let us explore the secular theories regarding the punishment of crime. Once we understand the secular position concerning penalties, we can clarify the Torah viewpoint.

Theories for Punishment

In the secular legal system there are three general theories for the justification of capital punishment. They are²⁴:

- a) Incapacitation
- b) Deterrence
- c) Retribution

Incapacitation: This theory suggests that once an individual has committed a particularly heinous crime he should be permanently eliminated from society in order to incapacitate him from perpetrating more such crimes.

Deterrence: This theory suggests that a criminal should receive punishment as a deterrent to *other* people from committing a similar crime. Through punishing the criminal, we educate society with a shared value system and teach them that there are consequences to their actions. The intent of the punishment is not merely to castigate the *perpetrator*, but serves to teach society as a whole that crime does not pay.

Retribution: This theory suggests that since the felon harmed not only the victim, but society at large, therefore, in retribution society has the right to return a punishment that fits the crime. When someone commits a crime, he creates a debt to society that can only be repaid with a punishment of like value.

Now, according to all of these secular theories for punishment, the ruling of the Torah regarding the penalty toward witnesses that conspired and gave false testimony seems to make no sense.

The Case of Conspirators

²⁴ Purposes of punishment: Effects of utilities of criminal sanctions on perceived appropriateness. McFatter, Robert M. Journal of Applied Psychology, Vol 67(3), Jun 1982, 255-267

According to any of the above theories, it would stand to reason that in the case of the false witnesses, the conspirators should be punished, **especially** if their conspiracy was successful and their victim was put to death as a result of their false testimony.

- a) If we accept the theory of incapacitation it would make sense that if the Torah metes out punishment for the lesser crime—of *attempting* to have the accused executed through false testimony; there should therefore be even greater reason to mete out punishment for the greater crime—of successfully causing the accused to be executed through false testimony. If Torah states that for the lesser crime the conspirators must be eliminated from society, it makes logical sense that they should be eliminated for the greater crime.
- b) If we accept the theory of deterrence, it stands to reason that the more terrible the crime, the greater the deterrence needed for people to desist from committing it. In this case too, shouldn't there be a deterrence to discourage people from thinking that they could succeed in such a conspiracy? If it becomes known that successful false witnesses go scot free, won't it encourage others to perpetrate the same crime?
- c) If we accept the theory of societal retribution, it stands to reason that the greater the crime, the greater the debt to society and therefore, the greater the punishment. When the false witnesses are successful in their conspiracy and the accused is put to death, does it not stand to reason that they should be punished and that their punishment should be commensurate to the crime?

This being the case, the ruling of the Torah in this case is very perplexing according to secular thinking.

The following are some classic rabbinic explanations for this curious law:

Their Sin is too Heinous

The first approach to understanding this through a Torah perspective is predicated on a greater understanding of the *purpose* of punishment in Jewish thought.

Though according to the secular rubric, punishment falls under one of the above mentioned constructs, according to the paradigm of Torah; the reason for punishment is entirely different.

The Torah concept of punishment may be appreciated based on the following Talmudic statement²⁵: “When he is about ten cubits away from the place of stoning, they say to him ‘confess’, for such is the practice of all those who are executed; they [first] confess, for he who confesses has a portion in the World to Come.”

When a person is punished by the court, it serves to cleanse him of his sin and ensure that he have a portion in the World to Come. The concept of punishment is therefore not merely to

²⁵ Talmud, Sanhedrin 43b

incapacitate him from committing more crimes, to deter others from perpetrating it or to mete out retribution. Punishment rather serves as atonement for sin.

It is therefore understood that when a sin is particularly heinous, the punishment of the court is insufficient in fully cleansing it. The court therefore abstains from executing punishment and defers it to G-d, because only He can truly purify such a blemish.

Rabbi Yosef Karo, author of *Shulchan Aruch* (The Code of Jewish Law) explains that because of this, when the false witnesses are *successful* in their testimony, the court does not execute them. In such a case, the court cannot fully cleanse the sin, even through capital punishment.

These are Rabbi Karo's words²⁶: "It is improper for the court to atone for them by executing them. Rather, they should be left to be judged with terrible punishments after their demise."

In other words, if the earthly court would punish them, they would actually be doing them a great favor by giving them a degree of atonement for their sin, thus **lessening** the punishment!! Giving false witnesses a punishment by an earthly court would be doing them a favor and since they acted so very wickedly, they are unworthy of it!! Therefore, they are not punished by the earthly court. Rather, their punishment is deferred to G-d who can mete out far greater punishment!

From this we understand two manners in which the judicial system of Torah differs from the civil judiciary:

- A) The nature and purpose of punishment is different, as it serves to atone for sin rather than to exact retribution, deter crime or incapacitate the perpetrator.
- B) Although the courts are an independent system of judgment, they rely on the Divine and Ultimate Judge to mete out punishment when it would be improper for them to do so.

The Nature of Their Act

Nachmanides provides an additional reason for the law regarding false witnesses. In his Torah commentary he explains that we do not punish false witnesses once the accused has been executed by the rabbinic court, because G-d Himself is involved in the verdict together with the court. This being the case, we presume that the court is not susceptible to regular human error.

He bases this on the following three verses:

- 1) "HaShem will not abandon him in his hand, nor let him [the righteous] be condemned when he is judged²⁷."
- 2) "Do not show favor in judgment; you shall listen to the small and to the great alike; do not fear any man, for the judgment is G-d's²⁸"

²⁶ Kesef Mishna, Laws of Testimony, 20:1

²⁷ Psalms, 37:33

²⁸ Deuteronomy, 1:17

3) “G-d stands in the Divine assembly; amongst the judges He shall judge²⁹.”

When someone is brought before the rabbinic court to be judged for his crimes, not only human judges are involved in determining his case. G-d takes part as well. The Torah clearly states this when it says, “amongst the judges He shall judge.”

G-d says, “Nor let him [the righteous] be condemned when he is judged.” From this we understand that if a person was indeed condemned, we must conclude that he was not righteous. If he was righteous he would not have been condemned.

It is implicit that since “the judgment is G-d’s,” and “amongst the judges He shall judge” therefore when the judges do everything in their power to assess whether a defendant is guilty or innocent, G-d does not let them falter.

If the court condemns an individual to death and carries out the sentence, it is because they are correct in the sentence and this person indeed deserved the death penalty, because while man is susceptible to error, G-d is not.

In the words of Nachmanides³⁰:

If Reuven was executed, we regard the testimony of the first set of witnesses as true and that he was killed due to his sins; for if he was righteous, G-d would not have left him in their hands and would not have found him guilty when judging him. Moreover, He would not have let righteous judges that stand before Him to spill innocent blood. This is because “the judgment is G-d’s” and “amongst the judges He shall judge.” All this is a tremendous benefit for the judges of Israel and assurance that G-d agrees with them and together with them in judgment.

In other words, the judicial system of the Torah is predicated on the belief that G-d involves Himself in the verdict of the rabbinic court. This being the case, He would not let an innocent defendant be executed, nor allow a righteous court to make such a grave error.

We understand another important difference between civil law and Torah law from Nachmanides’ words. The Torah system is distinctly religious and predicated on the faith that G-d is intimately involved in the affairs of the court. Therefore, the assumption is that when the rabbinic courts have acted in an irreversible manner (i.e the death penalty) they were correct in their ruling. They are not vulnerable to human error because G-d is involved.

A G-dly Court

²⁹ Psalms, 82:1

³⁰ Devarim, 19:19

Rabbi Yehudah Lowe, the *Maharal* of Prague, brings yet another viewpoint of this law. He prefaces³¹, that in order to understand it, one must first appreciate the profound difference between Torah law and secular law generally. He states:

There is no doubt that the reason why the words of the sages seem farfetched is due to the difference in kinds of wisdom. This is because the Sages, of blessed memory, were in possession of a tradition of G-dly wisdom and based their path upon this wisdom. Therefore, an individual that does not possess this path and only has paths of natural human intellect cannot fathom their words. Because of this there is a discrepancy between their (the Sages') opinions and the opinions of others. This is similar in the Torah itself. There are many things in Torah that are removed from human understanding, because the words of Torah are G-dly and very distant from human comprehension...

The *Maharal* clarifies that the reason why many Torah and Rabbinic laws are difficult to comprehend is because a different system of logic is at play. The logic of the Torah is not human logic. Instead, it is a G-dly wisdom that was given to the Jewish people. Because the reasoning of the Torah is the result of Divine intelligence, the ideas of Torah are often abstract and do not fit into our usual way of thinking.

This idea is echoed in Tanya³² as well:

Therefore the Torah is compared to water. Just as water descends from a higher place to a lower place, so also the Torah descended from its place of glory, which is His blessed will and wisdom; [for] the Torah and the Holy One, Blessed be He, are one and the same, and no thought can apprehend Him at all. From there [the Torah] progressively descended...until it became vested in corporeal substances and in things of this world, which comprise almost all the commandments of the Torah, their law etc.

While Torah deals with the discussion of corporeal matters, it begins as an abstract G-dly wisdom. Even after the Torah descended into human comprehension, it remains a G-dly system of laws that is remote from mortal understanding. Torah laws are based on a G-dly vantage point that cannot fully be appreciated by our human intellect.

Not only are Torah laws different in the sense that they are based on G-dly wisdom, but they serve a different purpose altogether. While we often assume that its laws comprise two categories—religious law and civil law—in truth, even the civil laws are actually religious in nature.

The primary function of Torah laws and consequently, of the rabbinic courts, is not to create or promote civilization, but rather to *adjudicate G-dly laws*³³.

³¹ Be'er HaGolah, Be'er 2

³² Tanya, Ch. 4

³³ See however, Maimonides, Guide to the Perplexed, 3:35 that insinuates that appointing judges was indeed to create a civil society.

Rabbi Nissan Gerundy (*The Ran*) in his book, *Derashos HaRan*³⁴, explains the difference in focus between Torah law and civil law:

Our Torah is unique compared to the laws of the nations of the world, in that the role of our *mitzvos* (commandments) and *chukim* (statutes) is not at all connected with the improvement of civilization. Rather, their result is that the “Divine Influence” rests upon our nation and that He adheres to us....

I therefore reason that just as the *chukim* (statutes) have no role in the improvement of civil order—in that they have their own reason closely related to the resting of the Divine Influence—so too, the *mishpatim* (judgments, i.e. civil laws) of the Torah have a large role, as if sharing the reason of bringing about the resting of G-dliness upon our nation, plus improving our society. However, it could be that they tend more towards the loftier matter, more than improving society, because that type of improvement could be fulfilled by the king we appoint over us.

However, the purpose of the judges and *Sanhedrin* (high court) was to judge the people with true judgment that is righteous in and of itself, the result of which is that G-dliness adheres to us, whether it completely fulfills societal matters or not. Because of this, it could be that some of the laws and ordinances of the nations may be closer to improving civil order than what we find in some of the *mishpatim* (judgments) of Torah. Nonetheless, this creates no lacking, because whatever may be lacking would be fulfilled by the king.

On the contrary, we have an advantage over the ordinances of the nations, for since the *mishpatim* (judgments) of the Torah are righteous in and of themselves, as Scripture states, "and they shall judge the people with a righteous judgment", therefore through them the Divine influence is drawn down, adheres and rests upon us. This is why the chief justice and the choicest judges were situated in the place where the Divine Influence was revealed. That is, the Men of the Great Assembly were situated in the *Lishkas HaGazit* (Chamber of Hewn Stone, located in the courtyard of the Holy Temple)...

Also, if civil order needed greater improvement, the king would fulfill it. We therefore find that the appointment of the judges was solely to judge Torah laws, which are righteous in and of themselves, as in the verse, "They shall judge the people with righteous judgment," whereas the appointment of the king was to fulfill the improvement of state order and all the needs of the time.

Based on the above elucidation of the difference of focus between civil law and Torah law, we can have a greater understanding of the law regarding the punishment of false witnesses.

³⁴ Drasha 11

A Crime of Thought

R. Yehuda Lowe³⁵ (The *Maharal* of Prague) gives two explanations of the reasoning behind this ruling. Both are based on the rationale that the offence committed in the false testimony was one of *conspiracy* and that it can only be punished when it still is in the conspiracy stage, not once the court has already acted upon it.

The crime that the witnesses performed was the conspiracy to harm an innocent man. The word “*zomemim*” used to describe these witnesses means *plotters*. Maharal compares this term with similar language used in other places in *Tanach* (The Bible).

In the book of Lamentations³⁶ the verse states, “*Assa Hashem asher zamam, bitza imraso,*” - HaShem has done what He has **planned**, He has executed His decree.” Here, the word *zamam* is translated as **planned**.

In Tehillim as well³⁷, the verse states, “*Al titen HaShem m’avayei rasha, z’mamo al tafek, yarumu sela,*” – “HaShem, do not grant the desires of the wicked; do not grant fruition to his **conspiracy**; they always exalt themselves”.

In both of these quotes the root-word *zomem*, means a plan or conspiracy that has yet to be fulfilled in actuality. Just as in the above citations, here too, the false witnesses schemed and plotted and they are punished specifically for their plot, not for the result it may have caused.

The reason they are punished for their *thoughts* of conspiracy rather than their *actions* is as follows:

Before the court went through with the execution of the accused, it still was possible to adjudicate concerning the thought or scheme, because the *thought* still existed. As long as the court is dealing with their scheme, the thought is “present”. The court can therefore punish the false witnesses who hold it.

However, once the judgment has been executed, the scheme no longer exists. Now it has progressed into the realm of action—and the action has been fulfilled by the court—**not** the witnesses! Therefore, judgment cannot be meted out on the thought or scheme.

The *Maharal* points out the difference between a crime that is committed in action and a crime that is committed only in thought. When an individual actually murders, the effect of the action tangibly exists and the courts can consequently adjudicate it. However, when a crime is performed only in thought, the court cannot. The reason for this is that the actual deed, that is, the execution, was not performed by the **witnesses**. It was done by the **court**. It was the **court**

³⁵ Be'er HaGolah, Be'er 2

³⁶ Lamentations 2:17

³⁷ Psalms 140:9

that killed the defendant. Since this act is not directly linked to the witnesses, once the scheme no longer exists, the court cannot punish them.

The Boomerang Effect

The *Maharal* provides yet another explanation for this rule. The reason the courts cannot punish them is because the courts never punish false witnesses with a *novel* punishment in the first place. Instead, they merely **redirected** their words upon themselves. However, once the verdict has already been carried out their testimony can no longer be redirected.

The medium by which the false witnesses are punished is, as Torah dictates, “You shall do to him as he plotted to do to his brother.” The court redirects the testimony of the false witnesses upon themselves, thus punishing them with their own words.

This is similar to what the book of Esther relates concerning Haman³⁸, “His wicked plot, which he had thought against the Jews, recoiled against his own head.”

As long as a plot has not come to fruition, it is comparable to a rock that has been thrown. If the rock does not hit its mark, it is possible for it to strike the one who threw it. As long as the rock is flying through the air it can hit an unintended target. However, once the rock has hit its mark, it can no longer hit anything else.

The testimony of these witnesses may be compared to the energy invested in the rock. If the energy does not hit the object of the plot, it can still be diverted upon the plotters themselves. In other words, as long as their testimony has not resulted in the execution of the defendant, it still is possible to reverse their plot and divert it upon them instead. However, once it has already taken place, it is like the rock that has already hit its mark. It can no longer be diverted and the rabbinic court is powerless to punish them.

Getting Away With Murder

The various explanations provided above have given us insight as to why the rabbinic courts do not punish false witnesses once judgment has been executed. However, if such witnesses are not punished, won't it encourage murderous plots, when evil people realize that if their scheme succeeds no punishment will be forthcoming? How can we let them get away with this?

However, for two reasons this is not actually what happens:

- A) The Torah declares³⁹, “Distance yourself from falsehood, and do not cause death to the innocent and the just, for I will not acquit a wicked person.” From the words “do not cause death to the innocent”, the Talmud⁴⁰ extrapolates that once a person has been declared innocent by the court; he may not be retried again for the same crime. However, if he is

³⁸ Esther, 9:25

³⁹ Exodus, 23:7

⁴⁰ Talmud, Sanhedrin, 33b

indeed guilty, we need not be concerned, because G-d is the ultimate Judge and in the end, either in this life or in the hereafter, he will get his just deserts because, “I will not acquit a wicked person”. As Rashi puts it, “If he emerges innocent from your hand [i.e., from the courts], I have many agents to put him to death—with the death penalty that he deserves⁴¹.”

G-d is the ultimate and True Judge and He will find a way to punish a person who deserves punishment. The Talmud⁴² recounts:

Two persons had slain; one in error and another intentionally, and in both cases there were no witnesses. The Holy One, blessed be He, appoints them both [to meet] at the same inn; he who had slain with intent sits under the step-ladder and he who had slain in error comes down the step-ladder, falls and kills him. Thus, he who had slain with intent is [duly] slain, while he who had slain in error [duly] goes into banishment.

So too regarding these false witnesses. G-d will find a way to punish them for their crime, even if they cannot be punished by the court.

- B) Although the rabbinic courts cannot punish false witnesses through the standard legal means, they can exact punishment through extra-legal means. The courts are permitted to punish an individual for the sake of teaching a societal lesson, so that people will not take advantage of the system.

According to this formula, if the court (acting with the intent of creating civil order) sees that there is a need to kill these false witnesses, either to prevent them from perpetrating another crime or to ensure that others do not learn from their deeds, they may choose to do so. The Talmud⁴³ relates, “R. Elazar Ben Yaakov stated, “I heard that even without any scriptural authority the court may administer flogging and [death] penalties; not because of the transgression of the words of the Torah, but for the sake of making a fence (safeguard) around the Torah.”

From this ruling and from the points mentioned above, it is clear that in actuality there are two systems at play in Torah jurisprudence; the role of the court and the role of government. The responsibility of the court is to rule regarding Torah matters and the task of government is to create civilized society.

⁴¹ Rashi, Exodus, 23:7

⁴² Makos, 10b

⁴³ Yevamos, 90b

In the above-quoted words of the *Ran*,

The purpose of the judges and Sanhedrin was to judge the people with true judgment that is righteous in and of itself, the consequence of which is that G-dliness adheres to us, whether it completely fulfills societal matters or not...whatever may be lacking would be fulfilled by the king... if civil order needed greater improvement the king would fulfill it...

This duty of government to create civil order may also be fulfilled by the courts in an extra-legal manner, as the need arises. In the words of Maimonides⁴⁴, "When a Jewish king desires to slay any of these murderers and the like - who are not liable for execution by the court - by virtue of his regal authority, in order to perfect society, he has the license to do so. Similarly, if the court desires to execute them as a result of an immediate fiat, because it is needed at the time, they have the license to do as they see fit."

In Conclusion

Though it has become common to compare Jewish law with civil law and draw commonalities or differences between them, in truth, they are founded on completely different axioms and are altogether of a different category from each other. Therefore, drawing comparisons between them is tenuous at best.

We have established multiple points as to the uniqueness of the Torah approach:

- 1) Punishment serves a different role in Torah jurisprudence than in secular law. The Torah's vision of punishment is one of cleansing. When the courts cannot cleanse the individual through punishment, they abstain from punishing.
- 2) G-d is the ultimate judge. While the secular system must be worried that an individual will get off scot-free, the Torah system of punishment is predicated on the axiom that although the individual may not be judged in the physical court, he will indeed be judged in the Divine one.
- 3) While secular courts must rely completely on human logic and are therefore susceptible to human error, Torah courts work differently. G-d involves Himself (so to speak) and is present in the courts, thus ensuring that the wicked are punished and the innocent go free. When the courts indeed execute punishment, they can be confident that their ruling is correct, as G-d allowed it to take place.
- 4) The function of the Jewish court is to enforce Torah law, not to facilitate a working civil society. The Torah is a Divine set of laws based on abstract ideas that sometimes are removed from creating a functioning civilization. Just as the religious laws of the Torah serve to draw down G-dliness upon His people, the judicial ones serve the same purpose.
- 5) While at times, the rules of Torah lack adequate deterrents for creating a smooth civil system, Torah created a parallel system to fill that void. As the need arises the

⁴⁴ Rambam, Laws of Murder, 2:4

government and the courts are authorized to administer their own punishments for the purpose of establishing civil order.

The Torah tells us⁴⁵, "You shall appoint judges and marshals for yourself in all the gates [of your towns] that HaShem your G-d is giving you for your tribes, and they shall judge the people with righteous judgment."

Maimonides explains⁴⁶ that judgment is indeed a kindness for society, for without it, evil would run rampant. "They are wrong who suppose that it would be an act of mercy to abandon the laws of compensation for injuries; on the contrary, it would be perfect cruelty and injury to the social state of the country. It is an act of mercy that G-d commanded⁴⁷ 'You shall set up judges and marshals for yourself in all your cities.'"

May we merit that HaShem will reestablish the Torah judicial system thereby bringing about that G-dliness will rest upon all Israel! May it be speedily in our days. Amen.

⁴⁵ Deuteronomy, 16:18

⁴⁶ Guide to the Perplexed, 3:35

⁴⁷ *ibid*