# When God is the Legislator

Two of the legal systems we have looked at claim to be based on rules laid down by God–Jewish law on the Torah, Islamic law on the Koran and the divinely inspired practice of the Prophet Mohammed. That claim raises problems which are less serious in legal systems based on the decisions of a ruler or legislator. Similar problems occur with a system such as U.S. Constitutional law. The Constitution does not claim to be divinely inspired but is often treated in legal culture as if it were. Although it is possible to change it through human action, the process is cumbersome.

One problem occurs when God gets it wrong, when the humans implementing the legal system are reluctant or unwilling to go along with some of its commands. Consider, the instructions in Deuteronomy (21:18-21) mentioned in the chapter on Jewish law for dealing with a disobedient son:

If a man have a stubborn and rebellious son, which will not obey the voice of his father, or the voice of his mother, and that, when they have chastened him, will not hearken unto them: Then shall his father and his mother lay hold on him, and bring him out unto the elders of his city, and unto the gate of his place; And they shall say unto the elders of his city, This our son is stubborn and rebellious, he will not obey our voice; he is a glutton, and a drunkard. And all the men of his city shall stone him with stones, that he die: …

The punishment seems a little extreme not only to modern sentiments but to ancient sentiments as well. If it is, however, God's command, what is one to do?

A similar issue is raised for Muslims by Koran 5:38, which establishes the punishment for the *Hadd* offense of theft.

“As for the thief, whether man or woman, cut his hand as punishment from God for what he had done[[1]](#footnote-1)“

A similar problem in U.S. Constitutional law is raised by the Second Amendment,[[2]](#footnote-2) which holds that:

“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”

Further, the Fourteenth Amendment holds (among other things) that:

“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; […].”

That is interpreted[[3]](#footnote-3) as imposing the restrictions in the Bill of Rights on the states as well as the federal government. In U.S. law, cities and counties are creations of the state government, so the restrictions apply to them too. It appears to follow that any law at any level of U.S. government prohibiting or restricting individual ownership of firearms–or, arguably, tanks, fighter planes or nuclear weapons–is unconstitutional.

For a different sort of example, consider the requirement in Torah law that all debts be cancelled every seven years, which converts any loan that would expire after the seventh year into a gift. A less extreme problem was created by the doctrine in Jewish, Islamic, and Christian law forbidding loans at interest.[[4]](#footnote-4)

Authorities of all three legal systems found ways of working around the fixed point created by the nominally authoritative rule. The halakhic scholars did it first. Maimonides, basing his view on the work of earlier authorities, writes of the disobedient son:

He is not liable for stoning until he steals from his father and buys meat and wine at a cheap price. He must then eat it outside his father's domain, together with a group that are all empty and base. He must eat meat that is raw, but not entirely raw, cooked but not entirely cooked, as is the practice of thieves. He must drink the wine as it is thinned as the alcoholics drink. He must eat a quantity of meat weighing 50 *dinarim* in one sitting, and drink half a *log* of this wine at one time. …

… According to the Oral Tradition, we learned that this law concerns a youth of thirteen between the time he grew two pubic hairs and the time at which his entire male organ is surrounded by pubic hair. After the entire male organ is surrounded by pubic hair, he is considered as independent and is not executed by stoning.

If his father desires to convict him and his mother does not desire, or his mother desires and his father does not desire, he is not judged as a “wayward and rebellious son,” as implied by Deuteronomy 21:19: “His father and mother shall take hold of him.”

If one of the parents has had his arm amputated, was lame, dumb, blind, or deaf, the son is not judged as a “wayward and rebellious son.” These concepts are derived as follows: “His father and mother shall take hold of him” - This excludes parents with amputated arms” “And bring him out” - this excludes the lame. “They say” - this excludes the dumb. “This son of ours” - This excludes the blind. “He does not heed our voice” - This excludes the dumb.[[5]](#footnote-5)

It was a matter of debate whether anyone had ever satisfied all the conditions and been stoned.

Islamic scholars followed a similar, if less extreme, strategy, as described in the previous chapter. To qualify as a Hadd offense, a theft had to meet a long list of requirements. A theft that failed to meet any one of them might still be punishable under *tazir* law but did not require the *Hadd* punishment of amputation.

In the U.S., a variety of arguments were used to limit the effect of the Second Amendment. The reference to a militia could be interpreted as restricting the right to members of the National Guard, provided one was willing to ignore the broader sense of unorganized militia, consisting, when the Constitution was written, of all adult males, and also the fact that the reference was put as a reason, not a restriction. It could be argued that since the purpose was to maintain the militia, only weapons suitable for military use counted. On that basis, it was held that a law banning sawed-off shotguns did not violate the amendment.[[6]](#footnote-6) As long as a majority of the members of the Supreme Court favored restrictions on firearm ownership, it was always possible to find some basis for justifying them.

A similar issue arose during the New Deal with the constitution's restraint on the power of the federal government. The tenth amendment reads:

“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

That appears to make the federal government one of enumerated powers, only allowed to do those things that the Constitution specifies. This raised a problem for an administration that wanted to do things not obviously in any of the enumerated categories, such as imposing restrictions on agricultural output in order to push up its price. The solution was found in the interstate commerce clause of the Constitution, which holds that: “The Congress shall have Power … To regulate Commerce ... among the several States … .” In *Wickard v. Filburn*, the federal government argued that a farmer growing crops to feed to his own livestock was substantially involved in interstate commerce since if he had not grown those crops he would have had to buy feed for animals, purchases which would have affected the price of feed on the interstate market. The Supreme Court, recently threatened with packing if it continued to block New Deal policies, accepted the argument. Cases since–most recently *Gonzales v. Raich*, which held that the interstate commerce clause justified a federal ban on marijuana produced and consumed within a single state–have very nearly repealed the tenth amendment, since almost anything the federal government wants to do[[7]](#footnote-7) can be justified to a sympathetic Supreme Court as a regulation of interstate commerce.

A modern example of the problems that can be raised by the attempt to work around an inconvenient rule of divine origin is provided by the case of momsers in modern Israeli law. Under religious law a momser, someone whose parents not only were not but could not have been married, such as a married woman’s child by a father other than her husband, cannot marry. In order to prevent such children from being legally identified as momsers and thus forbidden religious marriage, the Israeli Justice Ministry instructed courts to refuse to authorize tests of tissue evidence of disputed paternity. This raised a problem for mothers seeking child support from the fathers of such children.[[8]](#footnote-8)

These examples demonstrate the ability of legal scholars in three different legal systems to work around legal rules they disapprove of but cannot change. In each case, the solution was interpretation. No set of legal rules is sufficiently complete to answer all questions and eliminate all ambiguity, a point illustrated by the failure of the body of statutes of the Imperial Chinese system, very much more extensive and detailed than the rules of the Torah, the Koran, or the Constitution, to do so. When there are two or more plausible readings of a rule's implication, someone must decide which to accept.

Once that point has been accepted, the next step is to find some basis in the original set of rules to justify not merely the particular interpretation but the unrestricted power to interpret. In the case of Jewish law, Torah explicitly commanded that, when the law was unclear, the opinion of the majority, interpreted as the majority of halakhic scholars, more specifically of the Sanhedrin, was to prevail. One might object that since that applied only when the law was unclear it could not trump a command as explicit as the one requiring a disobedient son to be stoned. That objection was answered by the doctrine of the oral Torah.[[9]](#footnote-9) The interpretation of the halakhic scholars might seem implausible, but it was based on what God told Moses on Mount Sinai passed down in oral tradition to the scholars of the present day and so had the same authoritative status as the original rule.

Islamic law was based not only on the Koran but on the practice (*sunna*) of the Prophet as revealed in the traditions of what he and his companions did and said. Which traditions were to be trusted was a question to be resolved by scholarship, a process that could be biased in favor of traditions that supported the interpretations the scholars wanted. According to several traditions, Mohammed held that the Muslims would never be agreed on an error. By suitable interpretation of that, scholars got the doctrine of *ijma*, according to which, once there was a consensus in favor of an interpretation, the matter was settled.

In U.S. constitutional scholarship, the Supreme Court's power to interpret the Constitution, even to overrule Congress if it held that Congress was violating the Constitution, originated with *Marbury v. Madison*, a decision of the Supreme Court. It was made plausible by the obvious need for someone to interpret ambiguities. Once established, it could be gradually converted into the doctrine that the Constitution was whatever the Court said it was.

A second solution to the problem of working around rules that cannot be changed is to impose a different set of rules through a different mechanism. Rabbinic authorities created a legal form, *Prosbul*, that made it possible to create a debt that would not be canceled in the seventh year. Halakhic scholars defended the right of communal authorities in the diaspora to do things forbidden by Torah and/or rabbinic law as an authority inherited from the kings of Israel, who had enforced their own law in a fashion sometimes inconsistent with the constraints of religious law. Islamic rulers created their own courts separate from the *Shari’a* courts and used them to enforce rules inconsistent with *Shari’a*, for example by convicting defendants without the eyewitness testimony of two Muslims. An equivalent in U.S. law is the use of the regulations of executive agencies to create and enforce their own legal rules without requiring congressional authorization.

All of these solutions had to be implemented by judges or legal scholars. Another approach is for the people the rules apply to work out, possibly with the help of legal scholars, ways of obeying the letter of the law while evading the spirit. That describes how people within Jewish, Christian, and Muslim systems dealt with the prohibition on interest common to all three systems. One example was by setting up a partnership contract in which one partner provided capital, one labor, and they shared the resulting profit. Another was to structure a loan contract to make the return uncertain, for instance by borrowing in one currency and agreeing to repay in another. The amounts could be set up to yield an expected return implying interest but not a guaranteed return.

The issue still exists in modern day Saudi Arabia, probably the state closest to the traditional Islamic legal system. One solution is for a bank to combine an interest free loan with a second transaction in which the borrower buys something, such as a car, from the bank, then sells it back at a lower price.

Orthodox Judaism provides other examples. Jews are forbidden to carry things on the Sabbath outside the boundaries of their courtyard. A courtyard is defined by the wall that surrounds it. A wall is still a wall even if it has doorways. Two telephone poles with a wire strung between them can, with a little effort, be interpreted as a doorway. String enough wire from pole to pole around your neighborhood and the entire neighborhood can be interpreted as a single courtyard, an *eruv*, making it legal to carry things around it on the Sabbath.

The Catholic church does not permit divorce. It may, however, be possible for a couple that wishes to end its marriage to discover grounds for arguing that it was never married and so get an annulment. One way of doing so in the medieval aristocracy, which was heavily intermarried, was to find in a couple’s genealogy evidence that they were related closely enough to trigger the church’s broadly defined incest rules. All of these were, still are, ways in which individuals could work around inconvenient restrictions of unchangeable law.

One problem is dealing with cases where God got it wrong. Another is maintaining judicial uniformity. What happens if two halakhic scholars, both judges, disagree about the interpretation of Torah? What they are disagreeing about is not what the law should be but what it is–and truth is not determined by majority vote. If each follows his interpretation, the result is a legal system where what outcome you get depends on which judge you go to.

The solution to that problem is, arguably, part of the point of the story of the oven of Akhnai. The instruction in the Torah to deal with ambiguous questions by accepting the view of the majority was interpreted to mean that, while truth was not determined by majority vote, law was. A judge who held to a minority interpretation after the Sanhedrin had voted it down could continue to argue for his position but was required to judge according to the opinion of the majority.

That solution depended on the existence of a well-defined body of authorities to decide legal disputes. The Sanhedrin gave its last decision in 358 A.D. Thereafter, legal uniformity depended on judges in the diaspora agreeing about what authorities they were willing to accept. The eventual result was the breakdown of legal uniformity, with different communities accepting the doctrines of different scholars and much law made by local communal authorities. That problem was ameliorated by the fact that most legal controversies were intra-communal so under a single set of rules.

Islamic law never had a doctrine of majority rule; differing interpretations coexisted and, in the form of the four orthodox schools of Sunni law, still do. But the doctrine of consensus provided a basis for the claim that certain issues had been settled and could not be reopened.

U.S. constitutional law need not be, often is not, consistent across federal circuits, but inconsistencies seen as problematic can be eliminated by a Supreme Court decision.

As these examples show, both the problems of divinely inspired law and the solutions are similar across a considerable range of societies and legal systems.

“It is, perhaps, a fact provocative of sour mirth that the Bill of Rights was designed trustfully to prohibit forever two of the favorite crimes of all known governments: the seizure of private property without adequate compensation and the invasion of the citizen's liberty without justifiable cause.... It is a fact provocative of mirth yet more sour that the execution of these prohibitions was put into the hands of courts, which is to say, into the hands of lawyers, which is to say, into the hands of men specifically educated to discover legal excuses for dishonest, dishonorable and anti-social acts. “ H.L. Mencken, *Prejudices: A Selection*, pp. 180-2

1. There is some dispute as to the exact meaning of the words used, but this is the usual reading. Questioning the exact meaning of words is one tactic for working around such fixed points. [↑](#footnote-ref-1)
2. The first ten amendments, commonly referred to as the bill of rights, were passed in 1789, two years after the Constitution was ratified. [↑](#footnote-ref-2)
3. There has been dispute as to how much of the Bill of Rights is incorporated. *McDonald v. Chicago*, 561 U.S. 3025, 130 S.Ct. 3020 (2010) was the first case in which the Supreme Court held that the Second Amendment was incorporated via the 14th Amendment and so applied to state governments as well as to the federal government. [↑](#footnote-ref-3)
4. In the case of Jewish law, the ban only applied to loans to fellow Jews. [↑](#footnote-ref-4)
5. This only a partial list of the conditions Maimonides states in *Mishnah Torah*, Book XIV, Treatise 3, Chapter 7. [↑](#footnote-ref-5)
6. [*United States v. Miller*](http://laws.findlaw.com/us/307/174.html), 307 U.S. 174 (1939) [↑](#footnote-ref-6)
7. One exception was United States v. Lopez, which held that the interstate commerce clause was not a sufficient basis for a federal law that made it unlawful for any individual knowingly to possess a firearm at a place that he knew or had reasonable cause to believe was a school zone. [↑](#footnote-ref-7)
8. For details, see <http://www.haaretz.com/print-edition/features/better-to-be-a-mamzer-or-to-grow-up-without-a-father-1.196149>. [↑](#footnote-ref-8)
9. **1** All the commandments that were given to Moshe at Sinai were given together with their interpretation, as it is written “and I will give thee the Tables of Stone, and the Law, and the Commandment” ([Exodus 24,12](http://www.mechon-mamre.org/e/et/et0224.htm#12)). “Law” is the Written Law; and “Commandment” is its interpretation: We were commanded to fulfill the Law, according to the Commandment. And this Commandment is what is called the Oral Law.

   **2** The whole of the Law was written down by Moshe Our Teacher before he died, in his own hand. He gave a scroll of the Law to each tribe; and he put another scroll by the Ark for a witness, as it is written “take this book of the Law, and put it by the side of the Ark of the Covenant of the LORD your God, that it may be there for a witness against thee” ([Deuteronomy 31,26](http://www.mechon-mamre.org/e/et/et0531.htm#26)).

   **3** But the Commandment, which is the interpretation of the Law--he did not write it down, but gave orders concerning it to the elders, to Yehoshua, and to all the rest of Israel, as it is written “all this word which I command you, that shall ye observe to do . . .” ([Deuteronomy 13,1](http://www.mechon-mamre.org/e/et/et0513.htm#1)). For this reason, it is called the Oral Law.

   (Maimonides, *Mishnah Torah*, Introduction) [↑](#footnote-ref-9)