+shammai 1204+

The High Court’s disgrace: Putting law before life

Shammai Engelmayer

Only minutes before the start of Thanksgiving at midnight last Thursday, the U.S. Supreme Court did something—albeit narrowly—that this column strives to do: It demonstrated by its action in two cases before it that Torah law, in its narrow and broad senses, remains relevant to our times and, in many ways, is often superior to secular law. In essence, the High Court, albeit temporarily pending full hearings yet to come, ruled that following the law takes precedence over respect for human life.

Sadly and ironically, the Agudath Israel of America, no less, was one of those responsible for the High Court’s temporary ruling. Its appeal was one of two cases challenging an order signed by New York Gov. Andrew Cuomo on October 6. The other case was brought by the Roman Catholic Diocese Of Brooklyn.

Cuomo issued Executive Order 202.68his order because COVID-19 cases had begun to spike in some areas of the state in a frightening way, including in some Brooklyn neighborhoods with heavy Jewish populations where the coronavirus positivity rate was 3.45 percent. Areas in New York State in which the rate climbs to 3 percent or higher are designated as “red zones.” Among the actions Cuomo took was to limit in-person attendance at worship services of every religion in red zones to 25 percent capacity up to a maximum of 10 people.

The two groups argued that Cuomo’s executive order violated their First Amendment rights to freedom of religion. Agudath Israel, in a statement released after the order was signed, called it “appalling to all people of religion and good faith,” a statement that flies in the face of Jewish law on the subject, but more about that below.

The rates had dropped below 3 percent by the time the court issued its temporary injunction, making both Cuomo’s order and the High Court ruling moot. The thinking on the part of the court’s majority, however, is out there for other courts throughout the United States to see when they will be confronted with similar cases in the weeks to come (will be, not if, judging by the climbing COVID-19 toll). No judge likes to be overruled by a higher court, and certainly not by the highest.

The Supreme Court did not rule on the substance of the two complaints. As Cuomo and others have noted, nothing in the temporary injunction actually prevents the state from enforcing its rules against mass gatherings. In addition to the 25 percent restriction in red zones, so-called yellow zones have a 50 percent restriction rate while orange zones are set at 33 percent.

“Nothing in the Supreme Court opinion would seem to indicate otherwise,” agreed New Yorkers for Constitutional Freedoms. Nevertheless, as James McGuire, the organization’s executive director, put it, in “this renewed recognition of the right to the free exercise of religion…the Supreme Court has signaled that it will not stand idly by while religious freedom is unduly infringed.”

The court’s temporary injunction was unsigned. Five of the court’s six conservative justices supported it—Samuel Alito, Amy Coney Barrett, Neil Gorsuch, Brett Kavanaugh, and Clarence Thomas. The sixth Conservative on the High Court bench, Chief Justice John Roberts, joined with Justices Stephen Breyer, Elena Kagan and Sonia Sotomayor in dissenting, mainly because the matter was moot by the time it reached the High Court. Earlier this year, the court ruled 5-4 in two similar cases, but in favor of restrictions, but that was before the death of Justice Ruth Bader Ginsburg and the appointment of Barrett to replace her.

“Even in a pandemic,” the unsigned ruling stated, “the Constitution cannot be put away and forgotten. The restrictions at issues here, by effectively barring many from attending religious services, strike at the very heart of the First Amendment’s guarantee of religious liberty.”

Gorsuch said much the same thing in a brief separate opinion. “Even if the Constitution has taken a holiday during this pandemic,” he wrote, “it cannot become a sabbatical.”

Jewish law also “cannot be put away or forgotten.” Supposedly, the Torah itself contains 613 commandments. In 610 of these—meaning in just over 99.5 percent—life takes precedence over law, period, and it applies if there is merely a suspicion that life is endangered—merely a suspicion.

There are only three exceptions to that rule. if someone says your life will be forfeit unless you kill another person, or unless you commit a sexual crime (rape or incest), or unless you publicly lead a community into abandoning Judaism for another faith, you have to allow yourself to be killed. Those are the only exceptions, however. (See the Babylonian Talmud tractate Sanhedrin 74a.) If someone holds a gun to your head and tells you to bite into a ham sandwich or die, you eat the ham sandwich.

As noted in some of my previous columns relating to health issues in general and COVID-19 in particular, that life comes before law is made clear by the Torah itself. Leviticus 18:5 quotes God as saying, ““You shall therefore keep My statutes, and My ordinances, which if a man does so, he shall live by them.” This means, the Talmud explains, that “man shall live by God’s laws, not die by them.” (See BT Sanhedrin 59a.) Rabbinic rulings from then on have upheld that statement.

Simply put, if a person’s life is in danger, even if only as a possibility, the law must take a back seat no matter who that person is. Life comes before law, even if it does not come before the law as the conservative court majority sees it.

This life-before-law attitude plays out in many ways, as I also have pointed out in the past. We are commanded by the Torah, for example, to fast on Yom Kippur. Nevertheless, if a pregnant woman smells food and craves it, even it is non-kosher food, she is to be fed that food. Similarly, “If a person is seized with an obsessive craving [for food], he is to be fed even with non-kosher food, until he recovers…, [for] whatever threatens to endanger life supersedes [even the observance of] Shabbat.” (Yom Kippur is considered by the Torah as “the Sabbath of Sabbaths.” See the discussion in BT Yoma, beginning with the mishnah on 82a.) The Talmud makes clear that this applies even if the danger is a possibility, but not a certainty.

What Agudath Israel found “appalling” in Cuomo’s order was that he singled out ritually rigid charedi communities in Brooklyn especially, blaming those communities for some of the state’s rising COVID-19 numbers. We have seen similar instances here in New Jersey, especially around Lakewood. What should have appalled Agudath Israel, though, were the various mass-attended events in those communities that lived up to the term “super spreader.” As we saw vividly on TV news programs, these communities have shown an abject disdain for safety guidelines and for the health of everyone in those communities and beyond.

As I noted in a column a few weeks ago, Rabbi Baruch Meir Yaakov Shochet, the leader of the Karlin-Stolin chasidic sect, attacked those who show “contempt for the lives of others.”

“For God’s sake,” he said in a taped message, “we cannot bend any of the rules, under any circumstances. This is not child’s play, it’s life and death and the essence of Jewish law.”

“Can it be,” he wondered, “that some [people] have forgotten the simple laws of pikuach nefesh [danger to life], which is the basis of Judaism…? [We] must do it. This is the will of God and we should be happy for the opportunity we’ve been given to protect human life.”

He might as well have been talking directly to Agudath Israel.

As for the Catholic Church in New York, in an op-ed ironically published in the New York Times on Thanksgiving, only hours after the court’s ruling, no less than the leader of the Church, Pope Francis himself, wrote that “our lives are a gift and we grow by giving of ourselves,” including by protecting others.

He praised those governments worldwide that “have made great efforts to put the well-being of their people first, acting decisively to protect health and to save lives…, imposing strict measures to contain the outbreak.” And he attacked those who protested those measures, “as if measures that governments must impose for the good of their people constitute some kind of political assault on autonomy or personal freedom! Looking to the common good is much more than the sum of what is good for individuals. It means having a regard for all citizens and seeking to respond effectively to the needs of the least fortunate.”

Opposing strict COVID-19 measures is the kind of ignorance the Talmud condemns. As BT Pesachim 49b in another context states of such a person, “He is not concerned about his own life, much less someone else’s life.”

One last thought: Among the objections raised by Agudath Israel and the Church is that Cuomo’s order applied to religious institutions, but not to bars and bicycle shops. among other places of business. Religious institutions should be setting the example of proper behavior for everyone. That is not the role for such enterprises, which nevertheless have other restrictions they must follow. Besides, prayer can be recited anywhere, including at home. Retail businesses can only be run where they are located. Absent an even greater rise in COVID-19 cases, which would bring a total lockdown, struggling business owners are being given a chance to earn a livelihood.