

## MISHPAT IVRI, HALAKHAH AND LEGAL PHILOSOPHY: AGUNAH AND THE THEORY OF “LEGAL SOURCES”

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### 1.0 Introduction

1.1 In the course of a lecture which I gave in London in March 2001 on the problem of the *agunah*, I discussed the availability of and restrictions upon coercion, and the ultimate capacity of the husband to resist it (noting the notorious Israeli case where the husband preferred to live and die in prison rather than release his wife during his lifetime). The audience included a (Jewish) Lord of Appeal in Ordinary, who, in the question session after the lecture, expressed some astonishment. If the husband will not carry out the required act himself, the court, having the legal power to coerce him, must have the right to carry out that act in his stead. That must be the position in any legal system, he argued, since it is inherent in the very notion of a court that any power of coercion must be capable of being made effective. Why, then, he asked, should that not apply equally to the Jewish *bet din*?<sup>1</sup> I fear that I did not have time to do justice (or even injustice) to this observation, and in this audience it is hardly necessary for me to respond to it.<sup>2</sup> Suffice it to say that it represents, in an extreme form, the danger of adopting a purely external, jurisprudential approach to the *halakhah*. For the argument may be formulated in the following syllogistic manner: courts in all legal systems have powers of a certain character; Jewish law is a legal system; therefore the courts in Jewish law

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<sup>1</sup> Naturally, this is a paraphrase, from memory, of his observations.

<sup>2</sup> It is of interest, however, to note Elon's observations in *Gutman v. District Rabbinical Court, Tel Aviv-Jaffa*, 34(1) P.D. 443, 447-448 (1979, quoted by him in *Jewish Law, History, Sources, Principles* (Philadelphia: Jewish Publication Society, 1994), I.120-22), on whether a *bet din* stating that it is a *mitsvah* to grant a *get* is rendering a “judgment” under the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713–1953, where he argues that this is a matter to be decided according to the criteria of the Jewish, not the Israeli system, and that such a *psak* is indeed to be regarded as a judgment.

must have powers of that character.<sup>3</sup> Whether the major premise from which such an argument proceeds is correct or not need not concern us here. What is more interesting is the minor premise, that Jewish law is a legal system (and that it therefore has courts which operate in the manner expected of courts of a legal system). Or, to put the issue slightly differently, we need to ask whether *mishpat ivri* is appropriately conceived as a “legal system”.

## 2.0 *Elon on Mishpat Ivri and the “Sources” Theory of Law*

### 2.1 *Mishpat Ivri and Halakhah*

2.1.1 In his presentation of *mishpat ivri*, Menachem Elon seeks to do two things: on the one hand, to abstract the *mishpat ivri* element from the *halakhah* (clearly, for nationalist reasons – those of application in the modern State of Israel<sup>4</sup>); on the other, to present that which he has abstracted as an example of a legal system, conceived in terms of secular jurisprudence. Why does he seek to do this? We may compare the motivation of Rav Herzog, in seeking to reform the *halakhah* on succession. Rav Herzog sought to make the system acceptable to the general public, in order to gain support for its adoption as the law of the State.<sup>5</sup> Elon, by contrast, seeks to make it acceptable to Western-educated jurists (whose participation in the nationalist agenda is similarly taken to be necessary).<sup>6</sup>

<sup>3</sup> For this structure of argument, see further B.S. Jackson, “Secular Jurisprudence and the Philosophy of Jewish Law: A Commentary on Some Recent Literature”, *The Jewish Law Annual* 6 (1987), 3-42, at 15f., and in relation to Hart’s theory, 17f.

<sup>4</sup> On the choice of the term *ivri* (rather than *yehudi*) as inspired by early 20th cent. Zionism, comparing its use in respect of both the language and the state, see Elon, *supra* n.2, at I.110. I. England, “Research in Jewish Law”, in *Modern Research in Jewish Law*, ed. B.S. Jackson (Leiden: E.J. Brill, 1980), 21-65, at 22, observes that the “assimilation of law to language, as the manifestation of a national organic culture, was a central belief in the German historical school of the 19th-century” (cf. his remarks on Asher Gulak at 42), and argues that Jewish Law, unlike the “Holy Tongue”, cannot be stripped of its religious layers. On the influence of the German Historical School of Jurisprudence on the American Conservative movement, see also Jackson, “Secular Jurisprudence ...”, *supra* n.3, at 10-12.

<sup>5</sup> B. Greenberger, “Rabbi Herzog’s Proposals for Takkanot in Matters of Inheritance”, in B.S. Jackson, ed., *The Halakhic Thought of R. Isaac Herzog* (Atlanta: Scholars Press, 1991: Jewish Law Association Studies, V), 49-112, esp. at 49f., 62f.

<sup>6</sup> England, *supra* n.4, at 54, stresses the dangers of adopting the ideological approach of preparing Jewish law for its reception into State Law, commenting that “there is the danger of selective treatment of historical sources, motivated by a desire to present acceptable solutions for modern Law.” He concedes, however, that the finding of *suitable* solutions in the framework of an existent system of law is, no doubt, “the great practical task of legal dogmatics, constituting a genuine creative function. But this very creative tendency is a

2.1.2 In pursuit of this agenda, Elon seeks to impose a particular version of positivism – Salmond’s version of the “sources” theory of law (§2.2, below); at the same time, he indicates that the type of legal system with which he is comparing the *halakhah* is a “liberal” legal system. For *Mishpat ivri* is defined<sup>7</sup> through a simple exclusionary definition: it

includes only those parts of the *Halakhah* corresponding to what generally is included in the *corpus juris* of other contemporary legal systems, namely, laws that govern relationships in human society, and not the precepts that deal with the relationship between people and God.

A footnote concedes that this self-imposed restriction applies to “current liberal legal systems”.<sup>8</sup>

2.1.3 Elon concedes that “conceptually, the very idea of distinguishing “religious” from “legal” norms, as those terms are generally understood today, is foreign to Jewish law” (I.109), and accepts that “the analytical approach, the terminology, the methods of interpretation, and all the other methods of halakhic clarification and creativity characterize the entire body of Halakhah” (I.111). Nevertheless, he defends the separability of *mishpat ivri* as useful from both academic and practical viewpoints (110f.).<sup>9</sup> In particular, *mamona* (as opposed to *issura*) “generally correspond[s] to most of what is included in the *corpus juris* of contemporary legal systems” and it is the *issur/mamon* distinction which “gives to the “legal” part of the Halakhah – the part particularly sensitive to the effects of constant changes in economic and social life – its great flexibility and extraordinary potential for development” (I.141).<sup>10</sup>

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deviation from pure and objective historical enquiry.” The conclusion would appear to be that Elon’s approach is not objective history, though it is a suitable task for dogmatics!

<sup>7</sup> *Jewish Law*, *supra* n.2, at I.105.

<sup>8</sup> *Jewish Law*, *supra* n.2, at I.105 n.52. On the liberal values endorsed by jurisprudential positivism, and their relation to Jewish religious values, see further Jackson, “Secular Jurisprudence ...”, *supra* n.3, at 26-30.

<sup>9</sup> Cf. Engard, *supra* n.4, at 23-26; Elon replied in “More about Research into Jewish Law”, in *Modern Research in Jewish Law*, ed. B.S. Jackson (Leiden: E.J. Brill, 1980), 66-111, at 67-71.

<sup>10</sup> *Jewish Law*, *supra* n.2, at I.141. For criticism of such a distinction based on content, see Engard, *supra* n.4, at 25f. On the ritual/civil distinction, see further my “Secular Jurisprudence ...”, *supra* n.3, at 39f., and “The Ceremonial and the Judicial: Biblical Law as Sign and Symbol”, *Journal for the Study of the Old Testament* 30 (1984), 25-50.

## 2.2 Elon's Appeal to Modern Jurisprudence<sup>11</sup>

2.2.1 Elon bases the whole structure of his magnum opus, *Hamishpat Ha'ivri*, on a classification of sources into historical, legal and literary, and identifies the legal sources as the sole test of validity. Following Salmond, he defines the "legal sources" as "the sources of law and means of creating law recognised by the legal system itself as conferring binding force on the norms of that system".<sup>12</sup> But whence do these sources of law which confer such validity on the substantive norms themselves derive their validity? Elon again follows Salmond, quoting the following passage:

There must be found in every legal system certain ultimate principles, from which all others are derived, but which are themselves self-existent. Before there can be any talk of legal sources, there must be already in existence some law that establishes them and gives them their authority ... These ultimate principles are the grundnorms or basic rules of recognition of the legal system.<sup>13</sup>

2.2.2 This "basic norm", which Salmond (in the Fitzgerald edition) here describes in terms of both the Kelsenian "*Grundnorm*" and the Hartian "basic rules of recognition", is identified by Elon with "the fundamental norm that everything set forth in the Torah, *i.e.* the Written Law, is binding on the Jewish legal system".<sup>14</sup> We may note that if Kelsenian analysis is to be applied,<sup>15</sup> this rule is *not* to be identified with the *Grundnorm*, but rather with the "historically first constitution",<sup>16</sup> since something further, taken from outside the system itself, is required to give authority to it. The need for such a step is accepted by Elon: "The source of authority of this basic norm itself is the basic tenet of Judaism that the source of authority of the Torah is divine command."<sup>17</sup> This, for Elon, is the real *Grundnorm*.

<sup>11</sup> See further Jackson, "Secular Jurisprudence ...", *supra* n.3, at 3-6.

<sup>12</sup> M. Elon, ed., *The Principles of Jewish Law* (Jerusalem: Keter, 1975), 10; cf. *Jewish Law*, *supra* n.2, at I.232.

<sup>13</sup> J.W. Salmond, *Jurisprudence*, ed. P.J. Fitzgerald (London: Sweet & Maxwell, 1966, 12th ed.), 111-112, quoted at Elon, *Jewish Law*, *supra* n.2, at I.230.

<sup>14</sup> *Jewish Law*, *supra* n.2, at I.232.

<sup>15</sup> Elon appears to want to distance himself somewhat from Kelsen. He notes that Salmond is (merely?) comparing his "ultimate principle" to the *Grundnorm* of Kelsen (*Jewish Law*, *supra* n.2, at I.230). See further text at n.60.

<sup>16</sup> H. Kelsen, *The Pure Theory of Law*, trld. M. Knight (Berkeley and Los Angeles: University of California Press, 1967), 200. For Elon's ambivalence between the constitutional norm as itself the ultimate legal principle or based on that principle, see *Jewish Law*, *supra* n.2, at I.231 n.7, arguing that the basic norm of the State of Israel is to be found in the power granted to the People's Council to function as a Provisional Council of State (following Klinghoffer).

<sup>17</sup> *Principles*, *supra* n.12, at 15; cf. *Jewish Law*, *supra* n.2, at I.233.

He accords to it “axiomatic” status: the basic rules of a legal system “are the initial hypotheses from which all other propositions in the system are derived”, comparing axioms in geometry.<sup>18</sup> For Elon, the constitution is the *Torah*; as for the ground of the constitution: “we leave jurisprudence and pass into the sphere of faith.”<sup>19</sup>

2.2.3 This view of Jewish law, in terms of a hierarchy of authority deriving ultimately from God, may appear natural and unsurprising. There is, however, one aspect of positivism increasingly stressed by legal theorists – particularly by Kelsen and Hart, though in different ways – which has proved particularly attractive to modern Jewish law scholars. It is the degree of discretion, exercised under a power conferred by this very hierarchy of authority, which positivism claims is (and in some versions is necessarily) exercised by the legitimate institutions of the system for the purposes of legal clarification and development. Elon has stressed this factor in terms of the “legislative” sources of Jewish law;<sup>20</sup> Lamm and Kirschenbaum have done the same in respect of judicial discretion.<sup>21</sup> The attractiveness of this model for modern Jewish Orthodoxy lies in its explanation of the legitimacy of legal *development*. Here, the “syllogistic” argument would be: Jewish law, just because it is a system of law, may be expected to possess such institutions; and it is not difficult to proceed from that point to illustrate their existence from the treasure-house of data of the history of Jewish law.<sup>22</sup> Legal development is itself regarded as a positive value, in the context of debates with ultra-conservatives who deny the *moral* authority of the current generation to initiate change.

2.2.4 Elon’s positivism, we may note *en passant*, does *not* entail the exclusion of moral values from the *halakhah*. Positivism accepts that moral values may form part of the law, by virtue of the theory of “incorporation”: if the “sources of law” authorise recourse to moral values, the status of those values within the legal system is legal rather than moral. Indeed, we find in the actual jurisprudence of Justice Elon an example which is all the more striking by virtue of the fact that his judgment concludes not by

<sup>18</sup> *Jewish Law*, *supra* n.2, at I.232.

<sup>19</sup> *Jewish Law*, *supra* n.2, at I.233.

<sup>20</sup> *Jewish Law*, *supra* n.2, at Vol. II, chs.13-20.

<sup>21</sup> N. Lamm and A. Kirschenbaum, “Freedom and Constraint in the Jewish Juridical Process”, *Cardozo Law Review* 1 (1979), 99-133. See also E. Dorff, “Judaism as a Religious Legal System”, *Hastings Law Journal* 29 (1978), 1331-1360, at 1339.

<sup>22</sup> Interestingly, this is denied by M. Silberg, *Talmudic Law and the Modern State*, trld. B.Z. Bokser (New York: Burning Bush Press, 1973), 51, who claims that Jewish law, being a system of religious law, “does not define norms for deciding the law, but norms of behaviour” – thus apparently reducing Jewish law (in Hartian terms) to a system of primary rules only. He also denies (at 57) that there is any recognised competence to effect change in Jewish law.

requiring or permitting a course of action, but rather by recommending and seeking to persuade the parties of the moral force of that recommendation. It occurred in a 1977 tort case, *Kitan v. Weiss*.<sup>23</sup> A man employed as a watchman had lost a son in an automobile accident. He had used a lawyer to sue the driver responsible for the accident. The driver had been acquitted of the criminal charges, and the compensation paid by his insurance company fell far below the amount expected by the father. The latter was dissatisfied at the performance of his lawyer. He became mentally depressed, and began to drink heavily. In his employment as a watchman, he was in possession of a gun provided by his employer. He used the gun to shoot and kill his lawyer. The lawyer's widow then sued the employer of the watchman. The District Court awarded her damages. The employer appealed, on the grounds that there was insufficient causal connection between the employer's allowing the watchman to keep possession of the gun, and his use of it to kill the lawyer. The Supreme Court upheld the appeal. Justice Elon, however, noted that the employer had in fact offered to make a voluntary payment to the widow and her family, and observed that this type of offer corresponded to the halakhic institution of behaviour "beyond the letter of the law" (*lifnim mishurat hadin*). This institution was particularly relevant in cases of indirect causation in tort, where the Talmud itself used the concept of "heavenly law" (*dine shamayim*) in order to bridge the gap between the legal and the moral aspects of responsibility. Such a moral obligation to go "beyond the letter of the law" had, Justice Elon observed, been translated on occasion by rabbinical courts into a recommendation made to the parties to (human) litigation. He argued that the Israeli (secular) judge should similarly take an active part in seeking to persuade the litigants to follow their moral obligations and to go "beyond the letter of the law". Such a step would be in accordance with the spirit of Jewish law, whereby:

there is a special reciprocal tie between law and morality ... which finds its expression in the fact that from time to time Jewish law, functioning as a legal system, itself impels recourse to a moral imperative for which there is no court sanction, and in doing so sometimes prepares the way for conversion of the moral imperative into a fully sanctioned norm.

In so arguing, Justice Elon was going beyond the deontic modalities with which secular, positivist legal systems are familiar. He was advocating supererogatory action: payment of compensation which was not required by the law. The role of the judge was not simply to sit by as a neutral, and say that such a payment was permitted, but that it was a purely private matter between the parties. Rather, he saw the role of the judge as one of active persuasion to the parties to do that which the *halakhah* viewed as the "recommended" behaviour. And this, in a case where the religious

<sup>23</sup> *Kitan v. Weiss*, C.A. 350/77, 33(2) P.D. 785; see D.B. Sinclair, "Beyond the Letter of the Law", *The Jewish Law Annual* 6 (1987), 203-206.

courts had no jurisdiction (unless the parties voluntarily went to them, as arbitral bodies – which had not occurred in this case). It is hardly surprising, then, that the approach of Justice Elon was severely criticised by Justice Shamgar, who took it to represent a systematic blurring of the border between law and morality which was totally unacceptable in a system of positive law such as that of the State of Israel. For Justice Shamgar, the Israeli legal system follows the *secular*, positivist model, which places great emphasis on the certainty resulting from the doctrine of the Rule of Law; for Justice Elon, on the other hand, the Israeli legal system is at heart Jewish, being the legal system of a “Jewish State”, which in his view justifies the adoption of Jewish approaches even where no positivist, Israeli source explicitly authorises them.

- 2.3 Elon’s account prompts two kinds of question: (1) how accurate is this attempt to view *halakhah* in jurisprudential terms, using “accurate” here to refer to the criteria of jurisprudence itself?; (2) how appropriate is this attempt to view *halakhah* in jurisprudential terms, using “appropriate” here to refer to the criteria of the *halakhah*? In discussing these questions, particularly the second, I shall draw on my own recent study of *agunah* as manifesting problems in the authority system of Jewish law.

### 3.0 *Positivism and Religious Law*

Before embarking on this argument, however, it may be useful to review the status of religious law from the viewpoint of jurisprudence itself. For this issue has received more explicit consideration than Elon’s position – and England’s critique of it – might lead one to believe.

#### 3.1 19th Century English Positivism: Bentham and Austin

- 3.1.1 That which unites different extant versions of legal positivism is what has been called: “the tenet ... of the social sources of law”, that is, the claim that “the existence of laws depends upon their being established through the decisions of human beings in society”.<sup>24</sup> This tenet has found expression in a number of different ways, and some interest attaches to the nuances which distinguish them. For Bentham, religious law fell outside his definition of “a law” since the latter required “an assemblage of signs declarative of a volition conceived or adopted by the sovereign in a state”.<sup>25</sup> It was thus the source of the norm that distinguished “law”. Bentham explicitly accepted the idea that the “force” of a law, the “motive

<sup>24</sup> D.N. MacCormick, “Law, Morality and Positivism”, *Legal Studies* 1/2 (1981), 133, citing Raz and Hart. See further my “Structuralism and the Notion of Religious Law”, *Investigaciones Semióticas* 2/3 (1982-3), 1-43, at 1-6.

<sup>25</sup> *Of Laws in General*, ed. H.L.A. Hart (London: The Athlone Press, 1970), 1.

the law relies upon for enabling it to produce the effects it aims at”, could be of a religious nature; indeed, he noted that such “foreign sanctions” as religious<sup>26</sup> or moral motives might occasionally be preferable to such “political” sanctions as were within the capacity of the legislator himself to create.<sup>27</sup> But clearly this would constitute no more than incorporation by a social institution of some aspect of the religious system, for the purposes of the social institution itself. Since the source of the norm (and indeed the choice of sanction) resides, for Bentham, in the sovereign *in a state*, the religious character of the sanction is immaterial. Thus religious norms could not in themselves be regarded as “law”, however much their divine author might be regarded as a sovereign who commanded them. (On the other hand, the Vatican being regarded as a state, a command by the Pope supported by a promise of eternal bliss would count for Bentham as a law.)

3.1.2 The approach of John Austin was different<sup>28</sup> and for present purposes more interesting. He accepted that religious law was law “properly so called”,<sup>29</sup> but denied it the character of “positive law”,<sup>30</sup> which (alone)

<sup>26</sup> Bentham defined a religious sanction as where the pleasure or pain derived “from the immediate hand of a superior invisible being, either in the present life, or in a future”: *An Introduction to the Principles of Morals and Legislation*, ed. J.H. Burns and H.L.A. Hart (London: The Athlone Press, 1970), 34f.

<sup>27</sup> *Of Laws in General*, *supra* n.25, at 133f. On the approach to the issue of sanctions of Otto Bondy, who views Jewish law in predominantly Kelsenian terms, see Jackson, “Secular Jurisprudence ...”, *supra* n.3, at 6.

<sup>28</sup> Bentham was less concerned than Austin to conform to the usages of contemporary language. At the same time, Bentham was a humanist, while Austin was not. Both differences are consonant with Bentham’s denying that “religious law” is “law” while Austin accepted it. But Austin still denied that religious law (not being “positive law”) was properly within the purview of jurisprudence.

<sup>29</sup> *The Province of Jurisprudence Determined* (London: Weidenfeld and Nicolson, 1954), 122: “Of laws properly so called, some are set by God to his human creatures, others are set by men to men”. Cf. p.1: “The divine laws and positive laws are laws properly so called.”

<sup>30</sup> *Ibid.*, 123f. Austin notes that he is here making a choice between two possible meanings of “positive”: “By the common epithet *positive*, I denote that both classes flow from human sources. Strictly speaking, every law properly so called is a *positive* law. For it is *put* or set by its individual or collective author, or it exists by the *position* or institution of its individual or collective author. But, as opposed to the law of nature (meaning the law of God), human law of the first of those capital classes is styled by writers on jurisprudence ‘*positive law*’. This application of the expression ‘*positive law*’ was manifestly made for the purpose of obviating confusion; confusion of human law of the first of those capital classes with that Divine law which is the measure or test of human.” For further meanings of “positivism”, see H.L.A. Hart, “Positivism and the Separation of Law and Morals”, *Harvard Law Review* 71 (1958), 601f.

formed “the appropriate matter of jurisprudence”.<sup>31</sup> Thus, “A law, in the most general and comprehensive acceptance in which the term, in its literal meaning, is employed, may be said to be a rule laid down for the guidance of an intelligent being by an intelligent being having power over him”,<sup>32</sup> or more shortly – a “command”.<sup>33</sup> God was such an intelligent being and possessed power over man;<sup>34</sup> hence the rules set by God for the guidance of man qualified as law “properly so called” (“without extension by metaphor or analogy”). “Positive law”, however, required the satisfaction of a further test, namely that the law be “set by *political* superiors to *political* inferiors”,<sup>35</sup> the equivalent of Bentham’s requirement that the expression of will be conceived or adopted “by a sovereign in a state”.

- 3.1.3 Thus Bentham and Austin share one conceptual distinction, that there is an essential difference between religious law and secular law deriving from the fact that the latter alone involves political institutions, while differing on an issue which at first sight may seem to be restricted to terminology, namely whether religious law could properly be termed “law” at all. The terminological difference does, however, reflect a further substantive issue. Austin, unlike Bentham, believed in a form of natural law. Natural law, or the law of nature, consisted for him in the commands of the Deity, revealed or tacit.<sup>36</sup> The role of such divine law was in part<sup>37</sup> that of a

<sup>31</sup> *Province*, *supra* n.29, at 1, 9.

<sup>32</sup> *Ibid.*, at 10.

<sup>33</sup> *Ibid.*, at 1. Almost (p.33) all laws are commands, but not all commands are laws (13f.), since they may be specific rather than general (18f.).

<sup>34</sup> “Laws and other commands are said to proceed from *superiors*, and to bind or oblige *inferiors*” (p.24); indeed, “... the term *superiority* ... is implied by the term command” (p.25), “... the term *superiority* signifies *might*; the power of affecting others with evil or pain, and of forcing them, through fear of that evil, to fashion their conduct to one’s wishes” (p.24). (Austin rejected the Benthamite notion of “praemary sanctions”: pp.16f.) “For example, God is *emphatically* the *superior* of Man. For his power of affecting us with pain, and of forcing us to comply with his will, is unbounded and resistless” (p.24).

<sup>35</sup> *Ibid.*, at 9ff. At 11 Austin notes that this restriction of the term “positive law” is for convenience and “agreeably to frequent usage”. Somewhat awkwardly, in the light of his notion of law “properly so called”, Austin designates positive law in this sense “law, simply and strictly so called”.

<sup>36</sup> Although sometimes Austin equates the law of nature with divine law *generaliter* (as in the passage quoted *supra*, n.30), elsewhere (e.g. p.34) he identifies it (in line with a strong theological tradition) with the unrevealed part of divine law. The unrevealed part of divine law is still regarded by Austin as consisting in commands (p.134), notwithstanding the fact that it is “set by God to his human creatures, but not through the medium of human language” (p.35). In the light of the conventional understanding of Austin as the archetypal positivist, it comes as something of a surprise to find that about half the Lectures are devoted

“measure or test of positive law and morality: or (changing the phrase) law and morality, in so far as they *are* what they *ought* to be, conform, or are not repugnant, to the law of God.”<sup>38</sup> The study of positive law as it *ought* to be was termed “the science of legislation”, in contrast to the study of positive law as it *is*, which was “the science of jurisprudence”.<sup>39</sup> Despite his insistence on these conceptual distinctions, Austin was concerned also to point out the connections. Divine law was related to secular, positive law “by way of resemblance”,<sup>40</sup> and since the sciences of jurisprudence and legislation were “connected by numerous and indissoluble ties”, then “the nature of the index of the tacit command of the Deity” being “an all-important object of the science of legislation ... is a fit and important object of the kindred science of jurisprudence.”<sup>41</sup> In short, the study of divine law was related by affinity to that of positive law, since there were “numerous portions of the *rationale* of positive law to which (such affinities) are the only or principal key”.<sup>42</sup>

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to the question of “the nature of the signs or index through which the latter [the unrevealed commands] are manifested to Man” (p.4). The relationship between the revealed and the unrevealed divine law (for which Austin relies on Bishop Paley) bears some comparison with Jewish conceptions of that between the *torah shebikhtav* and the *torah shebe'al peh*.

<sup>37</sup> Austin conceived of divine law as also having a role supplementary to positive law, in that it appropriately applied to areas beyond the effective limits of positive law: see pp.160ff. and esp. p.163 n.10: “But the circle embraced by the law of God, and which may be embraced to advantage by positive morality, is larger than the circle which can be embraced to advantage by positive law. Inasmuch as the two circles have one and the same centre, the whole of the region comprised by the latter is also comprised by the former, but the whole of the region comprised by the former is not comprised by the latter.”

<sup>38</sup> *Ibid.*, at 6.

<sup>39</sup> *Loc. cit.*

<sup>40</sup> *Ibid.*, at 2.

<sup>41</sup> *Ibid.*, at 6f. This claim is less difficult to square with that of the exclusive concern of jurisprudence with positive law, in the light of the particular formulation of the role of divine law quoted above at note 38. The study of positive law is taken to include study of the rationale of existing positive law, i.e. why that which is, is as it ought to be, and to this extent there is overlap with the science of legislation, which (for Austin) involves the use of divine law as a measure. Austin does not here describe the role of divine law as telling us what positive law ought to be, insofar as existing positive law does not conform to divine law. That latter endeavour, although legitimately part of the science of legislation, would not overlap with the science of jurisprudence, since it would not be (directly?) concerned with the rationale of existing positive law.

<sup>42</sup> *Ibid.*, at 3. The identification here of divine law as related by affinity is a matter of implication from the explicit descriptions of divine laws as related by resemblance (n.40, *supra*) and of its role as a measure (*supra*, n.38). In all this, Austin seeks to integrate his belief in natural law, in the form described above, with the science of legislation as part of the science of ethics (“or, borrowing the language of Bentham, ‘the science of deontology’” –

## 3.2 Kelsen

3.2.1 Twentieth century positivism has replaced the description of law in terms of a hierarchy of relations between people (subjects and sovereign) within a *political* system with a description in terms of hierarchical relations between rules within a *normative* system. This reduces the difficulty of regarding religious law as law, and indeed Kelsen is able to conceive of a “religious norm system” with a parallel (hierarchical) structure to that of a system of positive law. In fact, he defines the *Grundnorm* of such a system: “The basic norm of a religious norm system says that one ought to behave as God and the authorities instituted by Him command.”<sup>43</sup> For Kelsen, a norm may be derived only from another norm, not from a fact. Kelsen goes to some length to stress that the source of authority of the Decalogue is not the *fact* (real or supposed) of divine command but rather “the tacitly presupposed norm that one ought to obey the commands of God”.<sup>44</sup> Of course, the nature of this tacit presupposition also falls for examination. The *Grundnorm* is not itself “posited”; at most (he ultimately accepted) it is a fiction.<sup>45</sup> Kelsen wants to view it in logical terms: as a necessary condition for normative obligation,<sup>46</sup> rather than in

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*ibid.*, at 6) thus adopting a particular application (see n.41 *supra*) of the conceptual distinction between the study of what is and the study of what ought to be; and he further adheres to Bentham in his admiration for the principle of utility. The latter becomes, however, for Austin the most satisfactory “index of the tacit command of the deity”. It is, perhaps, an incidental effect of Austin’s integration of natural law and utilitarianism that for him that which is the measure of positive law is also a form of law. But it is not easy to decide whether his theology has here influenced his jurisprudence, or vice versa. It would be quite possible to argue that it was his jurisprudence that influenced him to choose that particular form of natural law based on divine *command*. This might account for the artificiality of the notion of an unexpressed, tacit command.

<sup>43</sup> *General Theory of Law and State*, trld. Wedberg (Cambridge Mass.: Harvard University Press, 1946), 115. This is what makes it a system; that it be a system of *norms* requires the presence of sanctions, and this is what makes such a religious system closer to positive law than is morality: *Pure Theory*, *supra* n.16, at 62.

<sup>44</sup> *Pure Theory*, *supra* n.16, at 193f.

<sup>45</sup> See *General Theory of Norms*, ed. M. Hartney (Oxford: The Clarendon Press, 1991), 255f. (ch.59 §iC-D), where he endorses the applicability here of a strong sense of fiction, in Vaihinger’s sense: “it is not only contrary to reality, but self-contradictory ... the Basic Norm is not an hypothesis ... – as I myself have sometimes characterized it – but a fiction. A fiction differs from an hypothesis in that it is accompanied – or ought to be accompanied – by the awareness that reality does not agree with it.”

<sup>46</sup> The *Grundnorm* is a necessary presupposition *if* you want to operate an objective system of normative validity, and thereby justify the exercise of coercive power by the state. See further B.S. Jackson, *Semiotics and Legal Theory* (London, Routledge & Kegan Paul, 1985;

social or psychological terms, like Hart's "acceptance" of the secondary rules of the system from the "internal point of view".<sup>47</sup> For Kelsen, the *Grundnorm* does *not* depend on conscious acceptance by the community or officials, or even conscious knowledge of it on their part. It is, in his view, a logical presupposition of which they may be wholly unaware. As a logical presupposition, it cannot be falsified in terms of fact.

- 3.2.2 Nevertheless, law is for Kelsen virtually equated with positive law (like Bentham but unlike Austin): "Our task will be to examine whether the *social*<sup>48</sup> phenomena described by these words ["law", "Recht", "droit", "diritto"] have common characteristics by which they may be distinguished from similar phenomena, and whether these characteristics are significant enough to serve as elements of social-scientific cognition." For positive law, Kelsen has three requirements: it must (i) regulate human behaviour<sup>49</sup> (ii) through orders which possess normativity, that is an objective meaning independent of the wishes of those who direct them<sup>50</sup> (iii) using socially immanent rather than transcendental sanctions.<sup>51</sup> Religious law fulfils the first two of these criteria of a legal system, but fails the third. Kelsen defines transcendental sanctions as "those that according to the faith of the individuals subjected to the order originate from a superhuman authority",<sup>52</sup> which he appears to understand (only) in terms of "punishment by a superhuman authority", an example of which is

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reprinted Liverpool: Deborah Charles Publications, 1997), 238-42; *idem*, *Making Sense in Jurisprudence* (Liverpool: Deborah Charles Publications, 1996), 106f.

<sup>47</sup> For Hart, the content of the ultimate rule of recognition is the view of officials that they ought to make the constitution the ultimate reason for action, in the interests of social solidarity. He concedes that there may be societies where only "officialdom" accepts the law from the internal point of view: *The Concept of Law* (Oxford: Clarendon Press, 1994, 2nd ed.), 116f. However, to Hart, this was a non-paradigm, exceptional or even pathological instance of law. See further Jackson, *Jurisprudence*, *supra* n.46, at 170f., 173-79.

<sup>48</sup> Emphasis supplied.

<sup>49</sup> *Pure Theory*, *supra* n.16, at 30-32, including the example of the killing of the homicidal ox in the Bible insofar as it may be regarded as regulation of the conduct of man toward the animal. It may, perhaps, be argued that religious law fails this test in that it often regulates human thought as well as behaviour, whereas for Kelsen "the legal order, as a social order, regulates positively the behavior of individuals only so far as it refers, directly or indirectly, to other individuals" (*ibid.*, at 32). But positive law has not infrequently sought to regulate purely "private" behaviour, and it hardly assists Kelsen to argue that this could always be caught as "indirect reference". Moreover, even the conceptual restriction would today be denied by some positivists.

<sup>50</sup> *Pure Theory*, *supra* n.16, at 44-50.

<sup>51</sup> *Ibid.*, at 33.

<sup>52</sup> *Ibid.*, at 28.

given as “the illness or death of the sinner or punishment in another world”.<sup>53</sup>

- 3.2.3 What, then, we may ask, would be Kelsen’s attitude to a religious norm system which prescribed sanctions to be enforced by human, social institutions? If the means by which the sanction is to be enforced is social, does it matter for Kelsen that the source of that means is believed to be transcendental?<sup>54</sup> In terms of Kelsen’s desire for methodological purity, it might be thought that belief in such a source is a purely “historical” or “sociological” factor, and therefore irrelevant to the issue of legal validity. But the issue is far from clear. Natural law is distinguished by Kelsen from positivism not only in respect of the presence or absence of coercion, but also in terms of the claim not to have been made “artificially”, i.e. by an act of human will, and it is this human source that is identified by Kelsen with the (apparently necessary) “positivity” of a legal system.<sup>55</sup> Thus a claim on the part of the subjects of a normative system that its rules (even such as regulate human behaviour) and its sanctions (even such as are enforced through human institutions) have their origin in divine command, would appear to render such a system, for Kelsen, “religious”, non-positive, and therefore non-legal. It further appears to follow that the same normative system may be “religious” with respect to one section of its subjects, but legal with respect to another, according to whether it is or is not believed to be of divine origin. This has a paradoxical application to the law of personal status as applied in the State of Israel today: secularists, who accept its normative force because it is the law of the State, presuppose a *Grundnorm* in terms of which it may be viewed as a system of positive law (not as religious law<sup>56</sup>); believers, who accept its normative force because of its divine origin, presuppose a *Grundnorm* in terms of which it may be viewed (only) as a “religious norm system”.

<sup>53</sup> *General Theory of Law and State*, *supra* n.43, at 20f.

<sup>54</sup> The English translation, “originate from a superhuman authority”, is ambiguous on this issue. In terms of the examples given in the same section, it refers to sanctions through divine means, but that does not necessarily prove that it was so restricted. In the light of the passage cited *infra*, n.55, it would seem that a belief in the transcendental source of a social sanction would equally deprive a normative system of positivity. Whether that would equally deprive it of the character of “law” seems to be a meaningless question to Kelsen.

<sup>55</sup> *General Theory of Law and State*, *supra* n.43, at 392.

<sup>56</sup> Thus, Englard, *supra* n.4, at 25: “The judicial process is formally a *dogmatic* operation: the judge is duty-bound to accept the formal authority of the legal sources according to the internal rules of the system. By open rejection of the formal basis of the normative order, a person places himself outside the original system.” He compares the position of an American judge who rejects the normative relevance of the American Constitution. On this argument, a judge who does not accept the religious basis of the system cannot be applying the very same system as one who does accept that basis, even though both may proceed according to the same conception of the “sources” of Law.

3.2.4 Elon, as noted above (§2.2.2), identifies the source of authority of his basic norm of Jewish law as “the basic tenet of Judaism that the source of authority of the Torah is divine command”. This is incompatible with the Kelsenian model, even that of a “religious norm system”, since for Kelsen a norm may be derived only from another norm, not from a fact. Put differently, faith relates to the truth, not the use, of the initial hypotheses, whereas Kelsen’s *Grundnorm* serves as a necessary presupposition *if* you want to operate an objective system of normative validity,<sup>57</sup> and thereby justify the exercise of coercive power by the state. The theory is thus based ultimately on the assumption that such a system is in itself a value or desideratum; the *Grundnorm* functions as a *means* to achieve that objective. To be fair, Elon does indicate that when we seek to locate the ground of the basic norm of Jewish law in the “the basic tenet of Judaism” that the source of authority of the Torah is divine command, “we leave jurisprudence and pass into the sphere of faith.” For Kelsen, on the other hand, the *Grundnorm* itself (“coercive acts ought to be performed only in accordance with the historically first constitution”<sup>58</sup>), being a norm (if not a positive norm), is very much a matter of jurisprudence.<sup>59</sup>

3.2.5 A second difficulty in the way of adoption of the Kelsenian model resides in the contingent, historical status which Kelsen accords to the “historically first constitution”. Elon’s equivalent to the latter is the rule that everything stated in the Written Law is of binding authority. But Kelsen’s “historically first constitution” may (necessarily) be changed by unilateral, revolutionary action of the subjects of the law. Secular jurisprudence thus accords the current constitution a merely contingent validity, until and unless a revolution occurs and succeeds; but such a possibility can hardly be accepted for Jewish law, wherein the basic law is eternal, or at least (even if we think of notions of *berit hadashah* or concepts of Torah in the messianic age) is not susceptible to change by unilateral action on the part of its subjects. The covenant may be broken, but it cannot be unilaterally revoked by its subjects.

<sup>57</sup> Thus, on this Kelsenian view, juristic participants/commentators on *halakhah* do not have to accept its theological presuppositions; they may make authentic contributions as long as they adhere to its methods, which presuppose only the fictional or logical status of those presuppositions.

<sup>58</sup> For Kelsen, the content of the *Grundnorm* is either the proposition that coercive acts ought to be performed only in accordance with the historically first constitution, or (in a monistic international order) that states ought to behave as they have customarily behaved.

<sup>59</sup> He describes its status as “transcendental-logical”, thus comparable, but only partially comparable, to the basis of a natural law system. On the relationship of the *Grundnorm* to Kant on the one hand and natural law on the other, see *Pure Theory*, *supra* n.16, at 202, 219, discussed in Jackson, *Semiotics*, *supra* n.46, at 239-41.

3.2.6 Elon may well object to this assessment of his theory in Kelsenian terms on broader grounds: his explicit model is Salmond and he notes that Salmond (merely?) “compared” his “ultimate principle” to the *Grundnorm* of Kelsen.<sup>60</sup> In fact, Salmond’s own position, as quoted by Elon, is far from clear: “These ultimate principles are the grundnorms or basic rules of recognition of the legal system.” The terminology of “basic rules of recognition” is Hartian, and there is a substantial difference between the ultimate bases of the legal system in the two theories. The validity of Hart’s “ultimate rule of recognition” is based on the fact of “acceptance” by at least the officials of the system.<sup>61</sup> Whether this would be a satisfactory alternative for Elon is a theological issue into which we need not enter. Suffice it to say that the applicability of Hartian theory to Jewish law prompts further questions, as the remarks on the *agunah* problem in the next section will show.

3.3 Our conclusion must be that the varieties of positivism here reviewed all concur in excluding religious law from their understanding of positive law, if by different routes. For Bentham, the exclusion of religious law indicates that greater significance is being attached, for the purposes of classification, to the role of human political institutions than to either linguistic usage or the nature of the sanctions applied. Austin effected a compromise, designed in part to give greater weight to linguistic usage, while at the same time stressing (with Bentham) the role of human political institutions: religious law might be “law”, but was not “positive law”. Kelsen stresses the nature of sanctions and the perception of divine origin as the points of differentiation, while conceding that religious law may belong to the wider *genus* of normative systems. In effect, however, Kelsen is at one with Bentham and Austin in adhering to the tenet of the social sources of law. For while the political structure (that complex of relationships which we refer to as the “state”) is viewed by him as synonymous with the legal system,<sup>62</sup> the requirement that law involve the use of socially immanent, coercive sanctions virtually restores political institutions to their role as a significant mark of distinction. This conclusion has, of course, a dual effect in terms of Elon’s use of positivist jurisprudence. The objections to it largely evaporate *once* Jewish law has been adopted as the law of a state. They remain fundamental, however, in respect of the *halakhah per se*. In short, it is the nationalist agenda of the *mishpat ivri* movement which itself generates the theoretical model used to describe Jewish law. In what follows, I consider two aspects of Jewish law (largely) without such an agenda, and consider what jurisprudential model, if any, best fits them.

<sup>60</sup> *Supra*, n.15.

<sup>61</sup> See n.47, *supra*.

<sup>62</sup> *General Theory of Law and State*, *supra* n.43, at 181ff.; *Pure Theory*, *supra* n.16, at 286ff.

#### 4.0 *Agunah: a Case Study*

4.0.1 In the recent London lecture to which I referred at the outset, and which is available on the internet,<sup>63</sup> I sketched the history, and problems of authority, relating to three major strategies for the possible solution of the *agunah* problem. Very broadly, the Jerusalem Talmud's view that it was permissible to have a condition in a marriage contract which obviated the need for a *get* (classifying the matter as one of *mamona* rather than *issura*) seems simply to have been lost. The possibility of coercion (classifying the wife as a *moredet*) was largely blocked by Rabbenu Tam, given his view that there was no precedent for it in the Talmud, and that the Geonim had exceeded their authority where they had permitted it. Finally, the power to annul marriages (*hafka'at kiddushin*) fell into disfavour after talmudic times, with increasing restrictions placed upon *takkanat hakahal* which purported to exercise it. In this context, I noted, Ribash justified such restrictions through the use of a doctrine of consensus.

4.0.2 It is not my purpose here to recapitulate or develop that historical sketch, much as it requires amplification. Rather, I wish to revisit the problems of authority which emerge from that history in the context of the question raised in this lecture, that of the appropriateness (or otherwise) of the application of jurisprudential models (notably, that adopted by Menachem Elon) to the *halakhah*. If the versions of positivism considered so far prove inapplicable, is the solution to be found within a "softer" form of positivism<sup>64</sup> or in some other theory? Could it be that the distinction between *halakhah* and *ma'aseh* points to a theory more radical than the "sources" theory of law, one more akin to the ultimate phase of the thought of Kelsen (the "non-logical" Kelsen) or indeed to some form of Legal Realism (with which that phase of Kelsen's thought has indeed been compared)?<sup>65</sup>

#### 4.1 Secondary Rules

Hart's version of legal positivism is based upon what he calls the "union of primary and secondary rules".<sup>66</sup> The latter are rules about rules, specifically rules of recognition, adjudication and change. Hart does not

<sup>63</sup> <http://www.mucjs.org/agunahunit.htm>

<sup>64</sup> Hart has termed his positivism "soft" (as incorporating "legal principles", as he understands them): *supra* n.47, at 250, quoted at Jackson, *supra* n.46, at 206.

<sup>65</sup> On this phase of Kelsen's thought, see further Jackson, *Jurisprudence*, *supra* n.46, at 114-124; *idem*, *Semiotics*, *supra* n.46, at 243-60.

<sup>66</sup> Hart, *supra* n.47, at ch.V, entitled "Law as the Union of Primary and Secondary Rules"; see further Jackson, *Jurisprudence*, *supra* n.46, at 181-84.

claim that their presence is a necessary condition for the existence of “rules of obligation”; rather, they are a mark of a (developed) “legal system”, as contrasted with a (simple society’s) “set of separate standards”.<sup>67</sup> Hart is clear about the value of the more advanced model. It is needed in order to give effect to liberal values in the law (a desideratum, so it would seem, also for Elon: *supra*, §2.1.1), specifically the values of certainty and predictability inherent in the notion of the “Rule of Law”, which itself manifests the values of freedom and autonomy: the citizen is entitled to be able to know in advance the law applicable to him, so that he may freely choose a course of action confident in his knowledge of the legal consequences of such contemplated action. For this reason, Hart originally described his rules of recognition as providing a “conclusive affirmative indication” of the presence or absence of primary rules.<sup>68</sup> This came to be known as the “demonstrability thesis”: primary rules exist only if they can be demonstrated to exist, by the criteria of the secondary rules. It follows from this that these secondary rules must be fashioned in such a way as to be capable of generating such demonstrable results. However, Hart later weakened his position on this. He conceded that the secondary rules were not such as, by definition, to guarantee demonstrable results.<sup>69</sup> In particular, problematic questions regarding the applicability of rules of recognition might arise, which would require judicial determination,<sup>70</sup> indeed, secondary rules of recognition, being formulated in language, were subject to the same problems of “open texture” as were primary rules of law.<sup>71</sup> It followed that they had a “core of settled meaning” and a “penumbra of uncertainty”. Nevertheless, Hart remained wedded to the view that the “core” was dominant over the “penumbra”, in the sense that the rules would generate clear results in the vast majority of cases, the “difficult” (penumbral) cases – where new law (including, here, new rules of recognition) would require to be created by judicial discretion –

<sup>67</sup> Hart, *supra* n.47, at 92.

<sup>68</sup> Hart, *supra* n.47, at 94; see further Jackson, *Jurisprudence*, *supra* n.46, at 181f.

<sup>69</sup> Hart, *supra* n.47, at 251f.; see further Jackson, *Jurisprudence*, *supra* n.46, at 205-209. In the Postscript to the 2nd edition, in which this is conceded, Hart indicates that what is new here is his (limited) acceptance of “legal principles” and his conclusion regarding demonstrability, rather than the workings of the rule of recognition, whose potentially problematic nature (as noted here in the text) had already been accepted in the 1st edition.

<sup>70</sup> “... there are always questions about the criteria of official sources of law to which at any given moment there is no uniquely correct answer to be given until a court has ruled upon the question. And when the courts so rule they modify or develop this most fundamental rule of the legal system” – *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983), 360, reprinted from *Harvard Law Review* 78 (1965), 128-196; see further Jackson, *Jurisprudence*, *supra* n.46, at 183.

<sup>71</sup> Hart, *supra* n.47, at 123, 251.

remaining exceptional.<sup>72</sup> Given that Salmond, whom Elon quotes with approval, alludes to this Hartian theory (“These ultimate principles are the grundnorms or basic rules of recognition of the legal system”, §2.2.1, above), we are entitled to ask whether the rules defining the legal sources of Jewish law are sufficiently certain to count as secondary rules of recognition in Hart’s sense. Naturally, this is a far broader question than can be properly answered on the basis of the present case study, and, to a degree, it calls for a subjective judgment.<sup>73</sup> Nevertheless, I shall point to some areas where, it seems to me, that degree of certainty presupposed by a positivist sources theory is lacking.

- 4.1.1 The status of the Talmud in the *halakhah* is paramount: superior, arguably, even to the Bible, in that it is the talmudic understanding of the Bible which is binding.<sup>74</sup> If one hesitates to use the term “statute” in this context, it is because of the form of the Talmud, not its status (or, at least, the status of the decisions found in it). What rules exist, then, to determine the text of the Talmud? A crucial example occurs in the talmudic discussion of the *moredet* in *Ketubot* 63b, where we encounter a dispute between Amemar and Mar Zutra regarding both the definition and treatment of the *moredet*. The definitional problem need not here concern us. What is important is the substance. The essential issue is as follows:

... if she says, however, “He is repulsive to me (מאִיס עָלַי),” [Amemar said] she is not forced (לֹא כִּי־פִינִין לָהּ). Mar Zutra said: She is forced (כִּי־פִינִין לָהּ).

The issue between Amemar and Mar Zutra is thus whether the wife is to be compelled back (into marital compliance). Mar Zutra takes the view that she is; Amemar takes the view that she is not. Are we to take Amemar to imply that she is entitled to a divorce, even a coerced divorce? The text is not explicit, and later authorities have differed. However, recent work towards a critical edition of the Talmud text has revealed a significant variant. MS Leningrad Firkovitch reads:<sup>75</sup>

<sup>72</sup> Hart, *supra* n.47, at 134f.; see further Jackson, *Jurisprudence*, *supra* n.46, at 185.

<sup>73</sup> As Hart himself indicates: “The underlying question here concerns the degree or extent of uncertainty which a legal system can tolerate if it is to make any significant advance from a decentralized regime of custom-type rules in providing generally reliable and determinate guides to conduct identifiable in advance”: *supra* n.47, at 251; Jackson, *Jurisprudence*, *supra* n.46, at 207.

<sup>74</sup> Cf. Elon, *supra* n.2, at III.1099-1100, noting, *inter alia*, traditions prohibiting “adding to or subtracting from” it, clearly applying to the Talmud a biblical principle first stated in relation to the Biblical text itself.

<sup>75</sup> *Dikdukei Soferim ha-Shalem [The Babylonian Talmud with Variant Readings ... Tractate Kethuboth]*, ed. R. Moshe Hershler (Jerusalem: Institute for the Complete Israeli Talmud, 1977), II.88. See E. Westreich, “The rise and decline of the wife’s right to leave her husband in medieval Jewish law” (Heb.), *Shenaton Hamishpat Ha’Ivri* XXI (1998-2000), 126; *idem*, “The

... if she says, however, “He is repulsive to me (מאִיס עַלִּי),” [Amemar said] he is forced (כִּי־פִינִין לִיהָ). Mar Zutra said: She is forced (כִּי־פִינִין לָהּ).

Here, Amemar takes the view that it is the husband who is coerced, which can hardly mean anything other than that he is coerced to give her a *get*.

The issue raised by the variant text of Amemar’s opinion is of great importance for the later development of the *halakhah*. The Geonim accepted and developed compulsion against the husband of a *moredet*, but their view was ultimately rejected by Rabbenu Tam. For Rabbenu Tam, the Geonim had no authority to go beyond the Talmud, and the Talmud referred to coercion, in the case of the *moredet*, only in respect of the wife, not in respect of the husband. But Rabbenu Tam apparently did not have access to *this* variant MS tradition.<sup>76</sup> Suppose that scholarship ultimately concludes that the variant represents the original text, so that the Talmud does contemplate coercion of the husband? Would such an historical discovery be taken into account by halakhic authority? A recent study of this problem by Rabbi Moshe Bleich<sup>77</sup> cites the view of Rabbi S.Y. Zevin, the editor of the modern volume of *variae lectiones*, that:

... a variant talmudic text is significant only when it can be demonstrated that an early-day authority based his ruling upon that version of the text.

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Rise and Decline of the Law of the Rebellious Wife in Medieval Jewish Law”, in *Jewish Law Association Studies XIII, The Zutphen Conference Volume*, ed. H. Gamoran (Binghamton, NY: Global Publications, 2001, forthcoming).

<sup>76</sup> Rather, he had access to a different variant, לֹא כִּי־פִינִין לִיהָ, which (unless we apply here the view of S. Friedman, “Three Studies in Babylonian Aramaic Grammar” (Heb.), *Tarbiz* 33 (1973-4), 64-69, that לִיהָ can itself be used as the female preposition, in which case the variant introduces no substantive change in Amemar’s view from that in the traditional text) would appear to conflate the traditional text of Amemar’s view with the variant in MS Leningrad Firkovitch. However, לֹא כִּי־פִינִין לִיהָ makes little sense in context. Cf. S. Riskin, *Women and Jewish Divorce: The Rebellious Wife, The Agunah and the Right of Women to Initiate Divorce in Jewish Law, A Halakhic Solution* (Hoboken, NJ: Ktav Publishing House, Inc., 1989), 167 n.8; B.S. Jackson, “*Moredet*: Problems of History and Authority”, in *The Zutphen Conference Volume*, ed. H. Gamoran (Binghamton: Global Publications, 2001; *JLAS* XIII), forthcoming, for further discussion and documentation of the לֹא כִּי־פִינִין לִיהָ variant amongst other Rishonim.

<sup>77</sup> M. Bleich, “The Role of Manuscripts in Halakhic Decision-Making: Hazon Ish, His Precursors and Contemporaries”, *Tradition* 27/2 (1993), 22-55. A reader has kindly referred me also to M.B. Shapiro, *Between the Yeshiva World and Modern Orthodoxy: The Life and Works of Rabbi Jehiel Jacob Weinberg 1884-1966* (London and Portland, Oregon: The Littman Library of Jewish Civilization, 1999), 196-7 n. 101 (to which I have not as yet had access).

But should that apply even when manuscripts become available which were not available at all to the earlier authorities? Is the situation not comparable to the principle of *hilkheta kebatra'i*, where account is taken of the fact that the new argument could not have been known to the earlier authorities? However that may be, R. Moshe Bleich concludes that:

... for halakhic purposes, it is the consensus of contemporary authorities that inordinate weight not be given to newly published material. Even earlier authorities who gave a relatively high degree of credence to newly discovered manuscripts did so within a limited context. Accordingly, formulation of novel halakhic positions and adjudication of halakhic disputes on the basis of such sources can be undertaken only with extreme caution.<sup>78</sup>

In this formulation, it is “the consensus of contemporary authorities” which serves as the criterion for the determination of (in Hart’s terms) a “secondary” rule of the legal system, one which tells us how we are authorised to recognise and change the primary halakhic rules. Both Elon and Engard, we may note, are in basic agreement that in this kind of situation, it is halakhic authority rather than historical scholarship which determines the issue. Engard observes:

Legal hermeneutics take into account the results of historical and philological research, but they use it in their ‘logical interpretation’ only in the spirit of dogmatics. Hence, the non-historical understanding of legal sources in dogmatic reasoning.<sup>79</sup>

Elon notes that the “scientific researcher” has to examine variant texts according to different manuscripts and may reach substantially different conclusions from the *posek*,

... and this too is perfectly permissible and acceptable and even desirable from the Halakhic point of view, provided that the researcher does not purport to act as a judge or *posek*, but merely desires to contribute to the comprehension and clarification of the *Halakhah*.<sup>80</sup>

But if the *posek* is then entitled to decide such vital matters as the text of the Talmud *ex auctoritate*, or by following tradition rather than scholarship, we may be tempted to ask whether it is the same *halakhah* which he applies and the researcher clarifies? In any event, we may wonder whether the formulation of the (dogmatic) criteria by Rabbi Bleich provides that degree of certainty presupposed by a positivist sources

<sup>78</sup> *Ibid.*, at 45.

<sup>79</sup> Engard, *supra* n.4, at 30.

<sup>80</sup> Elon, *supra* n.9, at 90.

theory. Establishing the text of the primary document, one might have thought, would demand something more clearly operational than this.<sup>81</sup>

- 4.1.2 A second example relates to the relationship between the Jerusalem and Babylonian Talmudim in relation to *tena'in* in marriage. Despite the principle (*kelal*), stated in the Tosefta (*Kiddushin* 3:7-8), that “Contracting out of a law contained in the Torah as to a monetary matter is valid, but as to a nonmonetary matter is void”, here exemplified by the distinction between a condition “I hereby betroth you ... on condition that if I die you shall not be subject to levirate marriage” (void) and a condition “that you have no claim against me for food, clothing, or conjugal rights” (valid), R. Yose, in the Jerusalem Talmud, *Ketubot* 5:9 (30b), takes the view that a clause allowing the wife a unilateral right of divorce (for “hatred”) was indeed to be classified as “monetary” and thus was valid.

R. Yose said: For those who write [a stipulation in the marriage contract] that if he grow to hate her or she grow to hate him [a divorce will ensue, with the prescribed monetary gain or loss, and] it is considered a condition of monetary payments, and such conditions are valid.

אמר רבי יוסה אילין דכתבין אין שנה אין שנה תניי ממון ותניין קיים

Riskin attaches great significance to this Palestinian tradition.<sup>82</sup> There is nothing in the Babylonian Talmud which explicitly negates it. Moreover, there are two *ketubot* in the Cairo Geniza where conditions of just this kind are to be found,<sup>83</sup> and some (notably, Me'iri<sup>84</sup>) have suggested that the

<sup>81</sup> Contrast the procedures for certifying the text of a statute of the U.K. Parliament, discussed in my “Who Enacts Statutes?”, *Statute Law Review* 18/3 (1997), 177-207.

<sup>82</sup> Riskin, *supra* n.76, at 30.

<sup>83</sup> See Riskin, *supra* n.76, at 79-81.

<sup>84</sup> See Riskin, *supra* n.76, at 82, quoting Me'iri thus: “And my Teachers testified concerning their teachers, who explained concerning that which the Geonim innovated in this law [of *moredet*], that [the Geonim] relied [for their decrees] upon what was written in the Jerusalem Talmud on this legal discussion: that they write [a stipulation in the marriage contract], “that if he hates her or if she hates him, it is a monetary stipulation and it takes effect”; that is to say, whatever they stipulate [becomes operative]. If he hates her and divorces her, she receives both the alimony as well as any additions to the alimony; and similarly, if she hates him, he is forced (*sheyezakek*) to divorce her, whether with the entire alimony or with somewhat of a reduction [from it]. Everything takes effect in accordance with their stipulation ... And [the teachers] wrote concerning this that the Geonim innovated [the decrees] because they were accustomed to write in their marriage contracts that if she should hate him, she would receive her alimony and go out [with a bill of divorce] ... and after this custom had spread [the Geonim] established that it be enforced in practice, even at a time when the stipulation was not written [into the marriage contract]. [They treated the matter]

Palestinian Talmud's acceptance of such conditions may underlie the Geonic *takkanot* to which Rabbenu Tam took such exception.<sup>85</sup> However that may be, many later authorities proceed as if conditions of this kind are self-evidently excluded, applying the principle of כל המתנה על מה שכתוב בתורה תנאו בטל. What, then, is the weight of an explicit ruling in the Jerusalem Talmud, against what is (at best) implicit as in the Babylonian tradition? This is not a (post-talmudic) situation where we apply *hilkheta kebatra*'i, but our problem is highlighted by *Rema*'s formulation of that principle:

In all cases where the views of the earlier authorities are recorded and are well known and the later authorities disagree with them – as sometimes was the case with the later authorities who disagreed with the *geonim* – we follow the view of the later, as from the time of Abbaye and Rava the law is accepted according to the later authority. However, if a responsum by a *gaon* is found that had not been previously published, and there are other [later] decisions that disagree with it, we need not follow the view of the later authorities (*aharonim*), as it is possible that they did not know the view of the *gaon*, and if they had known it they would have decided the other way.<sup>86</sup>

R. Yose's view, not disputed in the Jerusalem Talmud, is certainly "recorded" and cannot be regarded as "not previously published". But it hardly appears to be "well known". Riskin observes that the Babylonian Geonim were apparently unaware of this stipulation provided for in the Jerusalem Talmud.<sup>87</sup> What then is the status of "neglect" of such a tradition? And if there is no clear answer to this question, does that threaten that degree of certainty we should expect from a legal system based upon a "sources" theory of law, or does it fall within what even Hart

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as if [the stipulation] had been written, as was the case with other stipulations of the marriage contract."

<sup>85</sup> See Riskin, *supra* n.76, at 81-83, noting the view of Mordecai Friedman, *Jewish Marriage in Palestine: A Cairo Geniza Study* (Tel-Aviv: University of Tel-Aviv, 1981), II.42f., that these documents of the late Geonic period prove the correctness of Me'iri's view. Riskin is doubtful: "If at that time a coerced, immediate divorce and the various monetary benefits were provided for a woman in a special marriage contract stipulation, then why did the Geonim need to ensure the normative procedure with a decree? And why did the various heads of the Babylonian scholars not mention such a stipulation in their responsa?" He sees the *takkanot* and the use of conditions as separate traditions, noting that the Jerusalem Talmud never included the case of a woman who claimed "He is repulsive to me" under the law of the rebellious wife (the basis of the Geonic decrees). On the Palestinian *ketubot*, see also M.A. Friedman, "Divorce upon the Wife's Demand as Reflected in Manuscripts from the Cairo Geniza", *The Jewish Law Annual* 4 (1981), 103-126.

<sup>86</sup> As quoted by Elon, *supra* n.2, at I.271.

<sup>87</sup> Riskin, *supra* n.76, at 83.

would accept is an inevitable sphere of problematic questions regarding the applicability of rules of recognition?

## 4.2 Dogmatic Error

Citing the obligation to follow their verdict “even when it appears to you that they are saying that right is left and left is right, you must obey them” (*Sifre Shoftim* 154 on *Deut.* 17:11), Elon observes:<sup>88</sup> “The *Halakhah* is thus identified with those to whom it is entrusted, to the point that even an error of the halakhic authorities is still *Halakhah*.” Elon would thus appear to deny the possibility of dogmatic error in the *halakhah*. Both the definition and effects of dogmatic error present problems which may be illustrated from the history of the *agunah*.

- 4.2.1 First, the question of definition. May a dogmatic error relate to a matter of halakhic *history*, and thus to an issue of fact rather than norm? In terms of the maxim Elon cites: is it such an error when they say that right *is* left and left *is* right, or is this a shorthand for a normative statement: when they say that you ought to (drive on the) right rather than the left, etc? The very version of the “sources” theory which Elon uses distinguishes literary, historical and “legal” sources, in which the last may itself be regarded as a response to the question: “by what authority is any rule claimed to be binding”? A dogmatic error, on Elon’s own formulation of “legal sources”, would thus be an error relating to “those processes and methods recognized by the legal system itself as giving binding effect to a particular legal norm.”<sup>89</sup> But what when those processes and methods themselves involve the making of claims regarding halakhic history? Are we to say that (i) insofar as the halakhic process involves the making of claims regarding halakhic history, those claims are themselves halakhic claims; (ii) that they are therefore to be decided by recourse to authority rather than history; and thus (iii) that any halakhic doctrine of dogmatic error therefore applies to them just as much as to any other halakhic *psak*?

I return to the history of the *moredet*. It presents two types of problem, which in my London lecture I perhaps failed to distinguish sufficiently sharply. On the one hand, there are what we may call purely dogmatic questions, including questions of talmudic interpretation. For example:

- (a) Assuming the *traditional* text of Amemar’s ruling, did it imply coercion of the husband or not?
- (b) Did the ruling of Rabbanan Sabora’i, requiring the wife to wait 12 months for her *get*, imply (as Sherira Gaon clearly

<sup>88</sup> *Jewish Law*, *supra* n.2, at I.244.

<sup>89</sup> Elon, *Jewish Law*, *supra* n.2, at I.229.

understood<sup>90</sup>) that after that period the court would compel him?

On the other hand, there are the historical premises on which purely dogmatic questions may depend. For example:

- (c) What was the original text of Amemar's ruling on the wife proclaiming *ma'is alay* in the Talmud (§4.1.1, above)?
- (d) What did the Geonim mean (and practice) by compulsion? Were they willing, in the final resort, to override the husband's resistance, whether by having the court authorise the writing and delivery of the *get*, or by *hafka'at kiddushin*, as some texts would appear to suggest?<sup>91</sup>

Or take the question of the authority on which the Geonim proceeded. Rabbenu Tam appears to have taken the view that the Geonim lacked the authority to impose (immediate) coercion on the recalcitrant husband of a *moredet*, because there was no talmudic authority for it.<sup>92</sup> Such an argument might involve two claims. The first is purely dogmatic (there is no authority to coerce in circumstances where the Talmud does not sanction it); the second relates to the historical premises of the application of this argument to the Geonic decrees (the Geonim considered that there *is* authority to coerce even in circumstances where the Talmud does not sanction it). Suppose that Rabbenu Tam was in error in respect of the latter, in other words that he was misinformed as to the basis of authority which the Geonim in fact claimed for what they did? Suppose that he was misinformed, for example, as to:

- (e) the text of the talmudic passages on which the Geonim relied;  
or

<sup>90</sup> "They then enacted that she should remain without a divorce for twelve months in the hope that she would become reconciled, and after twelve months they would compel her husband to grant her a divorce": Responsum of R. Sherira Gaon, translated by Elon, *Jewish Law*, II.659; Hebrew text in Riskin, *supra* n.76, at 56-59.

<sup>91</sup> See the following sources quoted by Riskin (*supra* n.76): *Halakhot Gedolot* (at Riskin, 49): "... we grant her a bill of divorce immediately (ויהבינן לה גיטא אלתר)"; Rav Shmuel ben Ali (at Riskin, 62f.: "they grant her an immediate divorce (נותנין לה גט לאלתר)"; anonymous 13th-cent. responsum (at Riskin, 52f.): "they wrote her an immediate bill of divorce" (וכתבי לה גט לאלתר)"; Rosh *Resp.* 43:8 p.40b (at Riskin, 126f.): "... For they relied on this dictum: "Everyone who marries, marries in accordance with the will of the Rabbis" [bKet 3a] (כל המקדש אדעתה דרבנן מקדש) (כל המקדש אדעתה דרבנן מקדש), and they agreed to annul the marriage (והסכימה דעתם להפקיע הקידושין) when a woman rebels against her husband"; see further Jackson, *supra* n.63, at §3.2.

<sup>92</sup> Riskin, *Women*, *supra* n.76, at xiii, 94, 96: "And Rabbenu Tam raised another problem, that in the entire [Talmudic] discussion there is no mention of forcing the husband, only of forcing the wife ..." (*divkhol hashemu'ah eyno mazkir kefiyat haba'al ela kefiyat ha'ishah*, p.94), quoting *Sefer Hayashar leRabbenu Tam*, ed. E.Z. Margoliot (New York: Shai Publications, 1959), 39ff., based on *Sefer Hayashar leRabbenu Tam, Responsa*, ed. S.F. Rosenthal (Berlin: Itskovski, 1898), *Siman* 24, p.39.

- (f) the manner in which they interpreted the talmudic text available to them; or
- (g) their reliance upon a source of authority other than talmudic interpretation? (There are, in the texts, distinct suggestions of *tsorekh hasha'ah*<sup>93</sup> – a concept to which, it has been noted, Rabbenu Tam was unsympathetic<sup>94</sup>)?

We might, of course, take the view that the *actual* bases on which the Geonim proceeded were irrelevant to Rabbenu Tam, since his position was that there was *no possible* basis of authority for the Geonic decrees. But that in itself involves our adopting an historical premise for future dogmatic reasoning: the premise that we know the precise basis on which Rabbenu Tam rejected the views of the Geonim. In fact, the (notoriously problematic) text of the *Sefer Hayashar* leaves us with a doubt even as to Rabbenu Tam's precise view of the final position of the Talmud as to the availability of coercion of the husband after the 12 month waiting period required by Rabbanan Sabora'i.<sup>95</sup>

<sup>93</sup> Sherira Gaon, *supra* n.90, though not using this language, surely has the concept in mind when he writes: "After the time of the *savoraim*, Jewish women attached themselves to non-Jews to obtain a divorce through the use of force against their husbands; and some husbands, as a result of force and duress, did grant a divorce that might be considered coerced and therefore not in compliance with the requirements of the law [as under the law one may not use duress to force the giving of a divorce]. When the disastrous results became apparent, it was enacted ..." In what Riskin, *supra* n.76, at 86f., has identified as the earliest source to turn against the Geonic practice, the *Sefer Ha-Maor* of Rabbenu Zerayah Halevi, written between 1171 and 1186, the Geonic decree (*takanah*) is attributed to הוראת שעה; Rosh similarly explicitly construes these circumstances as amounting to "emergency measures, צורך שעה, to go beyond the words of the Torah and to build a fence and a barrier" (Riskin, *supra* n.76, at 125).

<sup>94</sup> Riskin, *supra* n.76, at 108, quotes and approves Shalom Albeck, "Yahaso shel Rabbenu Tam le-Va'ayot Zemano", *Zion* 19 (1954), 104-41, for the view that Rabbenu Tam "never utilizes the argument that the conditions have changed since the days of the Talmud. He rather chooses to resolve the problem by presenting new interpretations to the statements of the Talmud."

<sup>95</sup> With the quotation in n.92, *supra*, contrast the continuation: "... After all, we learned in the Talmud that [the Sages] did not force [a divorce] until twelve months, and they [the Geonim] advanced the forcing of the divorce before [the time which] the law [allows] (שאנו שנינו בתלמוד שאין כופין עד תריסר ירחי שתא) ... It is obvious that the divorce is invalid, even if he says "I wish it" [after having been forced], for Rav Nahman states at the end of Tractate Gittin [86b], "A divorce which is forced by a Jewish [court] in accordance with the law is valid, but a divorce which is not in accordance with Jewish law is invalid, [and she may not marry anyone else. If she does so, her children from that union are illegitimate ....] And this [divorce] within the twelve-month period is not in accordance with Jewish law ..."

In short, the conceptual problem remains: do the historical premises on which (purely) dogmatic questions depend themselves count as dogmatic questions, to which the halakhic doctrine of (no) dogmatic error applies?

4.2.2 Consider, next, the (jurisprudential) effects of a doctrine which rejects dogmatic error. Kelsen, we may recall, was also concerned with the problem of legal errata. To accommodate the phenomenon of a legal system which accorded legal validity to an erroneous judicial decision (erroneous in the sense that it conflicted with the legal sources operating within that particular system), he devised what began as a theory of “normative alternatives”: the courts “... are authorized by the legal order to create either an individual norm whose content is predetermined by the general norm *or* an individual norm whose content is not predetermined, but to be determined by the organs themselves ...”<sup>96</sup> Ultimately, however, this led Kelsen to reject any sources theory at all: legal validity was based exclusively on the authority of the legal organ concerned, and “legal science”, the construction of the law in terms of the relationships between *propositions* (as opposed to *decisions*) derived from the sources of law, was a quite separate exercise, and not to be regarded as part of positive law.<sup>97</sup> This is a model to which I shall return in the context of the halakhic distinction between *halakhah* and *ma’aseh*. However, it prompts further questions about the position of Rabbenu Tam in the context we have been considering.

What was the intended effect of the judgment of Rabbenu Tam, that the Geonim had lacked the authority to coerce the husband of a *moredet*? Does that mean not only that their *takkanot* were invalid, as sources of law for the future, but also that any *gittin* given in reliance on them were invalid? The latter proposition would conflict with *Sifre Shoftim* 154, with which this discussion commenced: “even when it appears to you that they are saying that right is left and left is right, you must obey them”. Indeed, Rabbenu Tam is credited with the proclamation of a *herem* against anyone who cast doubt on the *gittin* of another Rabbi.<sup>98</sup> So perhaps we should

<sup>96</sup> *Pure Theory*, *supra* n.16, at 269, 354. Cf. *General Theory of Norms*, *supra* n.45, at ch.58 §xxi.

<sup>97</sup> See further Jackson, *Jurisprudence*, *supra* n.46, at 114-118.

<sup>98</sup> See Rav Moshe Morgenstern, *HATOROT AGUNOT - Sexual Freedom from a Dead Marriage* (privately published, 1999), vol.I, ch.II, p.27f. (previously at <http://www.agunah.com/>): “Rabbenu Tam cited by Mordecai, end of Laws Gitin tractate Gitin #455 made a cherem with a death penalty — by heaven — to anyone who libels another Rabbi's Get. See Ramo Even Hoezer 154:22 ... The Noda Beyahudoh expanded on this cherem and stated even if those Rabbis, who criticize another Rabbi's Gitin and libel them, be as tall as the Cedars of Lebanon, be great scholars, if they libel another Rabbi's Gitin they will be guilty of the sin of violating Rabbeim (sic) Tam's cherem carrying the gravity of the death penalty by Heaven. In 1768 Nodah Beyohudah warned the Bet Din of

conclude that, despite his criticism of the Geonim, Rabbenu Tam accepted the doctrine of (no) dogmatic error in respect of the individual *psak*. Such a distinction might well be viable in the *halakhah*: there can be no dogmatic error in respect of the *psak* of a *bet din*, but there can be dogmatic error in relation to “legislation” or “doctrine”.

Such a distinction is not, however, compatible with Kelsen’s version of the positivist theory of the “sources” of law, which (i) makes no conceptual distinction between “individual norms” and “general norms”, and (ii) ultimately led Kelsen to the more radical position, that “individual norms” (decisions of courts in relation to individual cases) were based ultimately on the authority of those courts, and not on their application of “general norms” defined by a doctrine of sources. Kelsen’s ultimate position, moreover, left unresolved the question of the source of authority of the courts themselves. If that was based upon some (general) rules of competence, were not the latter “general norms” defined by a doctrine of sources?<sup>99</sup> If such a relationship was indeed, as Kelsen argued, to be rejected on logical grounds, then the very authority of the courts would itself need to be explained on non-positivist grounds.

A halakhic distinction, as regards dogmatic error, between the *psak* of a *bet din* on the one hand and “legislation” or “doctrine” on the other, could therefore be compatible with a positivist “sources” theory only if the latter (a) included a general norm comparable to Kelsen’s doctrine of “normative alternatives” and (b) applied that norm (unlike Kelsen, even in his “classical” period) *only* to “individual” and not to “general” norms.

- 4.2.3 What might be the present implications of these arguments for the problem of the *agunah*? Let us assume, for the purposes of this argument:
- (a) (as regards the issue in 4.2.1), that the historical premises on which (purely) dogmatic questions depend do themselves count as dogmatic questions, to which the halakhic doctrine of (no) dogmatic error applies, and
  - (b) (as regards the issue in 4.2.2), that the halakhic rule of no dogmatic error does imply a general norm comparable to Kelsen’s doctrine of “normative alternatives” but that it applies *only* to “individual” and not to “general” norms.

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Frankfort of the death penalty invoked for slandering the Get of another Rav. Rav Moshe Feinstein reiterated the cherem Igros Moshe Even Hoezer 1:137. The prohibition of Mamzaras is considered from the point of view of Halacha, Jewish Law, as set apart from every other Law of Torah.”

<sup>99</sup> See further Jackson, *Semiotics*, *supra* n.46, at 257f.; and on problems of judicial procedure, Jackson, *Jurisprudence*, *supra* n.46, at 118-22.

My earlier example of a textual doubt in the Talmud might be viewed in this context. Thus, it might be argued: (i) the halakhic process involves the making of claims regarding the (authentic) text of the Talmud; (ii) such claims are therefore to be decided by recourse to the views of halakhic authorities rather than historians; and (iii) any *psak* based upon what historians or even later halakhic authorities may regard as an erroneous version of the Talmud remains binding. Such an outcome, we might think, is not too disturbing, at least if the acceptance of such error is confined to the original *psak*. Elon, for one, might well argue, that (a) the system itself provides a dynamic, “processes and methods” (such as the doctrine of *hilkheta kebatra’i*) whereby later authorities may recognise and, for the future, rectify such errors; moreover, (b) it is the role of the “scientific researcher” to provide later authorities with arguments for such change, even if such arguments are to be regarded (with Kelsen) as merely “historical” rather than “legal” sources for change.

How might this apply to more general questions of norms of authority within the halakhic system? If some of the Rishonim were able to maintain that the Geonim were in error in assuming an authority to deviate from talmudic principles, is it possible for later generations to take the view that their own predecessors have been in error in their own conceptions of the degree of authority available within the system? Given the principle of *hilkheta kebatra’i*<sup>100</sup> (failing which the principle that “Jephthah in his generation is like Samuel in his generation”<sup>101</sup>) is it still

<sup>100</sup> *Shulhan Arukh Hoshen Mishpat* 25:8: “Since the later authorities saw the statements of the earlier ones but gave reasons for rejecting them, we assume, as a matter of course, that the earlier authorities would have agreed with the later ones.” See Elon, *supra* n.2, at I.266ff., noting that it applies even to a single individual later in time who disagrees with the views of a number of earlier authorities, and stressing (at 271) that it came to apply only if the later authority refers to and discusses the earlier opinion and shows by proofs acceptable to his contemporaries that, although contrary to the position of the earlier authority, his own view is sound. For an example of the use of the principle as recently as the mid-19th century (in the context of *hafka’at kiddushin* based on *takkanot hakahal*), see Elon, *supra* n.2, at II.874-78, on Isaac Abulafia, *Resp. Pnei Yitshak, Even Ha’ezer*, #16 (p. 94d).

<sup>101</sup> I. Ta-Shma, “The Law is in Accord with the Later Authority – *Hilkhata Kebatrai*: Historical Observations on a Legal Rule”, in *Authority, Process and Method. Studies in Jewish Law*, ed. H. Ben-Menahem and N.S. Hecht (Amsterdam: Harwood Academic Publishers, 1998), 101-128, translated (with a 1994 Postscript) from *Shenaton Hamishpat Ha’Ivri* 6-7 (1979-80), 405-423, maintains that the idea that *hilkheta kebatra’i* confers authority on the *contemporary posek* to reject an earlier precedent (rather than provide him with a rule of preference as between earlier authorities) “is an entirely novel idea of Ashkenazic origin for which I can find no traditional sources” (at 107; see also 114, 125). Rather, “the principle conferring authority upon the current *posek* ... originates in an altogether different rule: “Jephthah in his generation is like Samuel in his generation.””

possible for a majority in a later generation to adopt a minority view<sup>102</sup> of an earlier generation.<sup>103</sup> There is, indeed, a reluctance (at least) to do this if the effect will be to contravene the final decision of the Talmud,<sup>104</sup> but where the latter (as here) is unclear in its effect, the problem becomes one of interpretation of that final decision, and the principle of *hilkheta kebatra'i* may still apply.

But does the halakhic “dynamic” operate in that way, such that the rectification of previous error is simply a matter of the further deployment of “legal sources”? Or are there conservative tendencies which tend to resist such rectification, out of respect for the earlier authorities? Elon himself maintains that the application of *hilkheta kebatra'i* must be acceptable to the contemporaries of the one propounding it.<sup>105</sup> That question is significant, however, also for our present theoretical purposes: we have to ask whether the operation of such conservative tendencies can themselves be accounted for within the parameters of a positivist theory of “legal sources”?

#### 4.3 Consensus, Desuetude and the Role of the *Gadol Hador*

##### 4.3.1 We have encountered already two examples of contemporary scholars who gloss aspects of the operation of “legal sources” in the *halakhah* with a

<sup>102</sup> For the principle of following the majority view, the most famous source is the talmudic story of the oven of Akhnai, *B.M.* 59b, which derives this conclusion from the biblical phrase *ahare rabim lehatot*, *Exod.* 23:2. See further Elon, *supra* n.2, at I.261-264.

<sup>103</sup> Indeed, non-normative views are themselves treated with sanctity: *elu ve'elu divre elohim hayyim*, *Erub.* 13b. Elon, *supra* n.2, at I.259, quotes Samson of Sens, commenting on *M. Eduy.* 1:5 (and relating it to *elu ve'elu...*): “Although the minority opinion was not initially accepted, and the majority disagreed with it, yet if in another generation the majority will agree with its reasoning, the Law will follow that view.”

<sup>104</sup> For the exclusion of “questions that were ... definitively decided in the Talmud as compiled by R. Ashi and Ravina” from the principle of *hilkheta kebatra'i*, see Asheri, *Piske ha-Rosh*, Sanhedrin, ch.4, #6, quoted by Elon, *supra* n.2, at I.269, and, in this context, Rabbenu Tam, *Sefer Hayashar leRabbenu Tam, Responsa*, ed. Rosenthal, #24 (p. 40): “Legislation (*hora'ah*) ended with Ravina and R. Ashi”, quoted by Elon, *supra* n.2, at II.661. However, Elon, *supra* n.2, at II.665, concludes: “The majority view is that the legislative power of the *geonim* was not limited to monetary matters (as Rabbenu Tam held it was), but was fully effective even with regard to marriage and divorce.” (But see, against this, R. Brody, “Kelum Hayu Ha-Geonim Mehoqeqim”, *Shenaton Ha-Mishpat Ha-Ivri* 11-12 (1984-1986), 279-315, esp. 298-300.) Riskin, *supra* n.76, at 108, 176 n.25, also observes that Rabbenu Tam, in his view of the authority of the final decision of the Talmud in relation to the constitution of a divorce (i.e., that there must be a twelve-month waiting period even when coercion was permitted), was upholding a minority view.

<sup>105</sup> See Elon, quoted *supra* n.100.

doctrine of consensus. Rabbi Moshe Bleich observes that “it is the consensus of contemporary authorities that inordinate weight not be given to newly published material” and Elon, as just noted, maintains that the application of *hilkheta kebatra'i* must be acceptable to the contemporaries of the one propounding it. Indeed, it has become commonplace to hear that any proposed solution to the problem of *agunah* must command a consensus. But consensus is not a new notion in the history of the *halakhah*. I noted, in introducing this lecture, that Ribash justified restrictions on *hafka'at kiddushin* through the use of a doctrine of consensus, and I shall return to this text presently. There is, however, a preliminary theoretical issue to be considered. Where does consensus fit within any account of Jewish law based upon a theory of legal sources?

- 4.3.2 Consensus is *not* listed as a source by Elon in his four-volume *magnum opus*; indeed, it does not even appear in his subject index! It would appear that “consensus” is not regarded as an independent source of law, but rather as a condition upon the operation of any established source of law (a “meta-source”, perhaps). But is this additional condition normative (and, if so, in what sense)? And how did it come about? The traditional position, after all, is that we follow *majority* decisions; a majority may not represent a consensus.
- 4.3.3 Some have identified the origins of the doctrine of consensus in the Islamic doctrine of *ijma*, mediated through Maimonides.<sup>106</sup> However this may be,<sup>107</sup> we find it applied by Ribash in the context of *hafka'at kiddushin*. Ribash was asked about the validity of a communal enactment which declared void (שיהיו קדושי נפקעין) any marriage entered into without the knowledge and participation of both the communal officials and a *minyan*, and which declared the woman free to “marry without any divorce (מבלי שום גט) and is not even required to obtain a divorce to remove any possible doubt.” Ribash sought to reassure the questioner (*Resp.* #399): there exists an (independent) power conferred by the Talmud on בני העיר (*B.B.* 8b); moreover, he buttresses this with a “consensual” argument: the communal institutions represent the people, so that the people are by such *takkanot*, in effect, adopting new standard conditions (*tena'in*) in their own future marriages. He adds, moreover, that even if it

<sup>106</sup> S.W. Baron, *A Social and Religious History of the Jews* (Philadelphia: Jewish Publication Society of America and New York: Columbia University Press, 1958, 2nd ed.), VI.100 (I am indebted to Prof. Gerald Blidstein for this reference), arguing from Maimonides, Introduction to *Mishneh Torah*, in justifying the binding character of “all matters stated in the Babylonian Talmud” on the grounds that “with respect to all matters stated in the Talmud there is universal agreement [*hiskimu aleyhem kol yisrael*] among all Israel.”

<sup>107</sup> In the very context of coercion of the *moredet*, Maimonides applied the talmudic principle of majority decision (here applied to a majority of communities, rather than scholars), when he rejected the view of the Geonim (*Hilkhot Ishut* 14:14).

were necessary to rely upon the principle of *כל המקדש* in cases such as this, the questioner need not hesitate in attributing that power to the *kahal* (על דעת הקהל) as well as to the Rabbis: indeed, once the people of a town agree to such conditions by enacting the *takkanah*, those conditions will serve as implied terms (binding even on one who *מקדש סתם*). Ribash thus concludes unequivocally that the community has the power to adopt the proposed *takkanah*. That being so, the final paragraph of the responsum comes as a surprise:

This is my opinion on this matter in theory. However, as to its practical application I tend to view the matter strictly; and I would not rely on my own opinion, in view of the seriousness of declaring that she needs no divorce to be free [to marry], unless all the halakhic authorities of the region concurred, so that only a “chip of the beam” [cf. *Sanh.* 7b] should reach me [i.e., so that I do not take upon myself the full responsibility, but only part of it].

להלכה. אבל למעשה, הייתי חובך להחמיר, ולא הייתי סומך על דעתי זה, לחומר הענין: להוציאה בלא גט. אם לא, בהסכמת כל חכמי הגלילות. כי היכי דלמטיין, שיבא מכשורא

Ribash is not willing to bear the responsibility for this decision alone; he requires the concurrence of “all the halakhic authorities of the region” (הסכמת כל חכמי הגלילות) – despite the fact that he had earlier pronounced the approval of the local scholar for such a communal enactment as desirable but not essential. We are thus left with a paradoxical situation: such a power of communal enactment may itself be halakhically exercised *without* a consensus of rabbinic authorities, but a consensus *is* required for a formal *haskamah* for such exercise, since the individual authority consulted is reluctant to take sole responsibility for giving such an *haskamah*. Elon observes<sup>108</sup> that this reflects a desire “to divide the responsibility for the decision among as many authorities as possible”; perhaps we should say, rather, that it reflects a desire to divide the responsibility for *authorisation* of the decision among as many authorities as possible.

- 4.3.4 How should we analyse this? Are we dealing here simply with a question of *attitudes* – a sociological or psychological phenomenon, such that the questioner may feel content with Ribash’s statement of the *halakhah*, and may either feel justified in proceeding without a formal *haskamah*, or may shop around to try to find one elsewhere? One may, indeed, recognise a modern example of such an analysis in the approach of Rabbis Morgenstern and Rackman in relation to *hafka’at kiddushin* today. Or is *ma’aseh* to be regarded as a *separate normative order*, such that the

<sup>108</sup> Elon, *supra* n.2, at II.856.

questioner here would not be “halakhically” entitled to enact the proposed *takkanah* without an *haskamah*, and the *posek* is entitled (perhaps even required) to withhold any such *haskamah* in the absence of a consensus? These, of course, are huge (and hugely important) questions. I will here only suggest the possibility of an historical development: what appears to have originated as a sociological phenomenon has come to be taken as normative. For present purposes, our interest is chiefly in the theoretical implications of this distinction – in particular, for any account of the *halakhah* based on “legal sources”.

- 4.3.5 The distinction between *halakhah* and *ma’aseh* figured in the debate between Elon and Englard on the methodology of *mishpat ivri* some years ago. Elon appeared to accept a “dualist” model, at least to the extent that he recognised differences in method between the *darshan* (“traditional study”: *a fortiori*, the “scientific researcher”, §4.1.1) and the *posek*, the latter being concerned only “with the crystallisation of the *Halakhah* on his subject, as it is reflected in the literature of the *Poskim* and in the *Responsa*”, and not with all the historical sources leading to the development of various schools of thought, or with the more theoretical aspects of the topic. Elon accepted, in particular, that the “student” and the *posek* might reach different conclusions, resulting from the fact that for the *posek*, there developed special rules for treating the literature, e.g. that the commentary of Rashi is intended only to explain and not to lay down binding rules, that *responsa* decisions are preferred to other halakhic literature, etc.<sup>109</sup> Englard, while accepting the fact of such a distinction within the *halakhah*,<sup>110</sup> strongly rejected such a dualist analysis of it: “It is totally unacceptable that the modern scholar should reach a legal solution which is different from that of the Rabbi. The decisions of the religious authorities are the very historical data constituting the object of the modern scholar’s study.”<sup>111</sup> The difference between Elon and Englard may be formulated, jurisprudentially, in terms of the relationship between doctrine and decision-making. Elon conceives of the *halakhah* as encompassing both, each with its own “rules of recognition” and thus capable of generating different solutions. Englard, by contrast, defines the *halakhah* as the “*decisions* of the religious authorities” (emphasis supplied), and

<sup>109</sup> Elon, *supra* n.9, at 89.

<sup>110</sup> Englard, *supra* n.4, at 40: “It is a most interesting and characteristic feature of the Jewish legal tradition that the scholars themselves openly acknowledge a distinction between legal analysis for theoretical purposes and legal analysis for practical ends. Their understanding was that the difference in the objective of the study is apt to influence the content of the solution. The Talmudic distinction between conclusions *lehalakhah* and those *Halakhah lema’aseh* expresses that idea of tensions between theory and practice in legal scholarship.” For the distinction, he cites *B.B.* 130a, *Sanh.* 71a: “And why was it written? Enquire and be recompensed!”.

<sup>111</sup> Englard, *supra* n.4, at 52.

takes doctrine to be secondary to, and wholly dependent upon, such decision-making. In this, his approach may be compared to that of Kelsen,<sup>112</sup> in the last period of his work, where he came close to rejecting any theory of legal sources in favour of a Realist view: positive law consisted in the acts of will, decisions, of judges and in the “practice of the judiciary”.<sup>113</sup> Englard, however, does not reject a theory of legal sources, but gives it a decidedly non-positivist slant: on the one hand, the solution to any halakhic problem “must be grounded in the legal sources conceived as valid and binding”;<sup>114</sup> on the other:

One would be gravely mistaken in considering a legal system exclusively through its conceptual framework. The judicial process in its endeavour to lay down a rule of behaviour in a concrete situation is not confined to purely conceptual reasoning. There are additional elements of a pre-dogmatic nature with valuative contents. Value judgments precede or accompany the various ways of conceptual reasoning.<sup>115</sup>

He is referring, inter alia, to the “intensive desire to reduce dissent”<sup>116</sup> in the halakhic literature, together with the value in itself of *Talmud Torah*. Thus, while for Elon consensus (even if it had a purely non-normative origin) may have become one of the additional rules of recognition which the *posek* (alone) must observe, for Englard it would appear to function as a “pre-dogmatic” (or “meta-halakhic”?) value (which has become) inherent within the process of halakhic decision-making, and which therefore cannot be excluded even from any “theoretical” account of the state of the *halakhah*.

<sup>112</sup> See further my, “Modern Research in Jewish Law: Some Theoretical Issues”, in *Modern Research in Jewish Law*, ed. B.S. Jackson (Leiden: E.J. Brill, 1980), 136-157, at 157.

<sup>113</sup> See Kelsen, *General Theory of Norms*, *supra* n.45, at 115 (ch.28); Jackson, *supra* n.46, at 121f.

<sup>114</sup> Englard, *supra* n.4, at 38.

<sup>115</sup> Elsewhere (*supra* n.4, at 53f. n.124), he offers more fundamental reasons for rejecting any simple reduction of the *halakhah* to a legal system: “We still hold firm to our view that the religious character of Jewish law constitutes its soul and by losing it, the law loses its essence. We disagree with the assumption that the halakhic solutions to interpersonal human conflicts possess a specific Jewish character unheard of in other legal systems. We claim that the specific Jewish trait is to be found not in the continuity of a substantive legal principle, but in the continuity of legal tradition, constituted by the authoritative sources and by the conscious acceptance of their binding force and metaphysical significance.” On this, and on Albeck’s very different conception of the *halakhah* as a system of religious law, see also my comments, *supra* n.112, at 138f.

<sup>116</sup> Englard, *supra* n.4, at 28.

4.3.6 Both accounts, in their different ways, still require some answer to the question how normative status came to attach to consensus: how was it transformed (if indeed it has been transformed) from a psycho-sociological attitude to a criterion of normative validity? In the context of the *agunah*, how and at what stage does the non-exercise of certain powers, e.g. *hafka'at kiddushin*, become normative? For if we are not entitled to argue: “just because changes have been effected in the past, the authority must exist to make further changes today”, it must follow that we cannot argue either: “just because changes have not been effected in the past, the authority cannot exist to make changes today.” One possible answer to this question, of the transformation of the status of consensus, may reside in the limited notion of desuetude recognised by the Jerusalem Talmud in the principle: *haminhag mevatel et hahalakhah*<sup>117</sup> – provided, that is, that we can construct the *practice* of requiring consensus as a *minhag* (of the *poskim?*), and take it here to be applicable to matters of *mamona* rather than *issura*. But this would appear paradoxical, given that much of the objection to solutions to the problem of the *agunah* has been based on classification of the issue (other than by the Jerusalem Talmud) as a problem of *issura*.

4.3.7 Yet even if an account can be given of the normative status of consensus, it remains difficult to bring it within the parameters of a “sources” theory of law, whether on Elon’s model or that of England. For we also find, today, an apparently competing source of authority, that of the *gadol hador*.<sup>118</sup> This too may be illustrated from the problem of the *agunah*. Much of the debate regarding the availability and scope of annulment in cases of *kiddushe ta’ut* has centred around a number of decisions of Rav Moshe Feinstein. Of these, Rabbi Howard Jachter observes:

<sup>117</sup> See, e.g., E. Dorff, “Judaism as a Religious Legal System”, *The Hastings Law Journal* 29 (1978), 1331-1360, at 1345f.; A. Harari, “Desuetude”, in *Studies in Jewish Legal History, Essays in Honour of David Daube*, ed. B.S. Jackson (London: Jewish Chronicle Publications, 1974), 101-103 (= *Journal of Jewish Studies* 25 (1974)), at 109; and especially B. Lifschitz, “Minhag mevatel halakhah”, *Sinai* 86 (5740), 8-13; I. Ta-Shma, *Early Franco-German Ritual and Custom* (Heb.) (Jerusalem: Magnes Press, 1992), 61-69.

<sup>118</sup> Reflected in a story told by Elon, *supra* n.9, at 89f. n.52, in support of his view of the difference in method and approach between traditional study and the activity of the *posek* (above): “R. Hayyim of Brisk had a query regarding a practical matter. He decided to turn to the leading authority of these times, R. Isaac Elhanan of Kovno. He wrote: “These are the facts and this is the question; I beg you to reply in a single line – ‘fit’ or ‘unfit,’ ‘Guilty’ or ‘not Guilty’, without giving your reasons.” When R. Hayyim was asked why he had done so, he replied “That decisions of R. Isaac Elhanan are binding because he is the *Posek* of our generation, and he will let me know his decision. But in scholarship and analysis my ways are different from his and if he gave his reasons I might see a flaw in it and have doubts about his decision. So, it is better if I do not know his reasons.”

Rav Moshe in these responsa certainly stretched the halacha to its outer limits and virtually no other halachic authorities have adopted his position (although a great rabbi may choose to issue a ruling in accordance with Rav Moshe's views in case of emergency when it is absolutely impossible to procure a Get from the husband).<sup>119</sup>

On this view, it would appear that even today it is possible for a "great Rabbi" to follow these decisions of Rav Moshe Feinstein, even *without* a consensus on the halakhic issue in question. The paradox, of course, is readily resolved if we interpret the demand for consensus not as consensus on the substance of the law, but rather consensus as to which authority, which *gadol*, to follow. But that raises further questions regarding the nature of religious authority, to which I now turn.

## 5.0 *The Jurisprudence of Revelation*

Jurisprudential disputes regarding the relations between doctrine and decision-making may readily be translated into the Weberian typology of forms of authority: doctrine reflects a legal-rational form of authority, decision-making a "charismatic" form. More simply still, we have a choice between the authority of the text and the authority of the person, the decision-maker. But while the Weberian typology suggests a correlation between this distinction and that between religious (charismatic) and secular (rational) authority, the history of Jewish law indicates the attribution of divine inspiration to *both* forms of authority.

### 5.1 The Inspired Judge

5.1.1 I have argued that the judge, in the Bible, is conceived as inspired by God at the level of the individual decision. The accounts of both early (royal) adjudication and the earliest charges given to the judges appointed by those kings coincide in stressing direct divine inspiration rather than recourse to a divine text. According to *Proverbs* 16:10: "Inspired decisions are on the lips of a King; his mouth does not sin in judgement." The famous adjudication by Solomon of the case of the two prostitutes (*I Kings* 3:16-28) concludes with the narrator's observation: "And all Israel heard of the judgment which the king had rendered; and they stood in awe of the king, because they perceived that the wisdom of God was in him, to render justice." Perhaps the most famous charge to the judges in the Bible is that of Deuteronomy 16, where they are commanded to deliver

<sup>119</sup> "Viable Solutions to the Aguna Problem", "Unaccepted Proposals to Solve the Aguna Problem", <http://www.tabc.org/koltorah/aguna>.

“righteous judgment” (*mishpat tsedek*).<sup>120</sup> This is further explained in both negative and positive terms: negatively, that the judges must avoid both partiality and corruption; positively, that they must pursue justice. The account of the “judicial reform” of the ninth century King Jehoshaphat is closely parallel: his charge to the first instance judges he appoints makes no reference to their using a written law book; rather, he tells them to avoid partiality and corruption (as in *Deuteronomy*) and that “(God) is with you in giving judgement” (*ve'imakhem bidvar mishpat*).<sup>121</sup>

- 5.1.2 The notion that the judge was divinely inspired did not disappear with the constraints imposed by a written text. The Babylonian Talmud records approximately thirty cases (according to the study of Hanina Ben Menachem) where it is said that the rabbinic judge decided the case “not in accordance with the *halakhah*”.<sup>122</sup> I believe that this is a survival of the original conception of the judicial role as based not upon written texts, but rather upon direct divine inspiration. The practice, however, proved controversial: though accepted by the Babylonian Talmud, it appears to have been opposed by the Palestinian authorities, and it has never been formally incorporated into the powers of the judiciary (though that, one may argue, is precisely in line with its very nature). It is not difficult, however, to locate approaches to the *halakhah* (such as that of England)

<sup>120</sup> *Deut.* 16:18-20: “You shall appoint judges and officers in all your towns which the LORD your God gives you, according to your tribes; and they shall judge the people with righteous judgment. You shall not pervert justice; you shall not show partiality; and you shall not take a bribe, for a bribe blinds the eyes of the wise and subverts the cause of the righteous. Justice, and only justice, you shall follow, that you may live and inherit the land which the LORD your God gives you.”

<sup>121</sup> *2 Chronicles* 19:5-7: “Consider what you do, for you judge not for man but for the LORD; he is with you in giving judgment. Now then, let the fear of the LORD be upon you; take heed what you do, for there is no perversion of justice with the LORD our God, or partiality, or taking bribes.” The fact that Jehoshaphat is elsewhere concerned with the use of a book of written *torah*, which he has used for public instruction (*2 Chron.* 17:9), makes its absence from the judicial reform all the more striking. On these sources, see further B.S. Jackson, *Studies in the Semiotics of Biblical Law* (Sheffield: Sheffield Academic Press, 2000), 116-119.

<sup>122</sup> See Haninah Ben Menachem, *Judicial Deviation in Talmudic Law* (Chur etc.: Harwood Academic Publishers, 1991); see also, more broadly, his “The Judicial Process and the Nature of Jewish Law”, in *An Introduction to the History and Sources of Jewish Law*, ed. N. Hecht, B.S. Jackson, D. Piattelli, S.M. Passamaneck and A.M. Rabello (Oxford: The Clarendon Press, 1996), 421-437, concluding, at 434f., that “we are justified in doubting the sufficiency of the modern, Western concept of law for the purposes of describing the *halakhah*.”

which stress the priority of *ma'aseh* over theoretical study – and, of course, the status ascribed to a *gadol hador* – within this tradition.<sup>123</sup>

## 5.2 The Inspired Text and its Interpretation

5.2.1 Justice was thus originally conceived not as a function of a revealed text, but rather as the activity of an inspired judge.<sup>124</sup> The judge was not, originally, an interpreter of texts; he was a doer of justice. Revelation, however, does not operate exclusively through inspired persons. The sacred texts do, indeed, have revealed status and by the end of the Biblical period acquired normative status not only for didactic purposes (*talmud torah*) but also in the process of adjudication. It seems clear that from the very beginning of rabbinic literature, in the tannaitic period, this was taken to imply the perfection of the divine draftsmanship of the *Torah*, one consequence of which, I have argued, was the acceptability of forms of analogical argument – the forms which Leib Moscovitz has appropriately termed “non-propositional”<sup>125</sup> – based not on substantive comparison but rather upon purely literary (formal) aspects of the text.<sup>126</sup> Such arguments, we may note, manifestly lack the “demonstrability” (§4.1) which Hart sought within a secular, liberal legal system, one wedded to the conception of the “Rule of Law”; rather, they call for a “Hercules”, whom Dworkin has described as a “lawyer of superhuman skill, learning, patience and acumen”.<sup>127</sup> The very scope or freedom of interpretation which they implied generated conceptions such as *elu ve'elu divre elohim hayyim*

<sup>123</sup> So too may the role of the messiah in relation to the *halakhah* be conceived within this tradition. Riskin, *supra* n.76, at 98f., quotes Rabbenu Tam: “But as for permitting an invalid bill of divorce, we have not had the power to do so from the days of Rav Ashi [nor will we] until the days of the Messiah.”

<sup>124</sup> See further my “Justice and Righteousness in the Bible: Rule of Law or Royal Paternalism?”, *Zeitschrift für Altorientalische und Biblische Rechtsgeschichte* IV (1998), 218-262; *Studies*, *supra* n.121, at 90-92, 141-43.

<sup>125</sup> L. Moscovitz, “Some Aspects of Legal Analogy in Rabbinic Literature”, Paper delivered at the Zutphen Conference of the Jewish Law Association, July 2000 (not yet published), and in his forthcoming book on rabbinic conceptualisation.

<sup>126</sup> “On the Nature of Analogical Argument in Early Jewish Law”, in *The Jewish Law Annual* XI (1994), 137-168; “A Semiotic Perspective on the Comparison of Analogical Reasoning in Secular and Religious Legal Systems”, in *Pluralism in Law*, ed. A. Soeteman (Dordrecht: Kluwer Academic Publishers, 2001), 295-325.

<sup>127</sup> *Taking Rights Seriously* (London: Duckworth, 1978), 105. I have described the methodology of this Dworkinian Hercules as involving “a hermeneutic holism of truly rabbinic proportions”: “Historical Observations on the Relationship between Letter and Spirit,” in *Law and Religion*, ed. R.D. O’Dair and A.D.E. Lewis (Oxford: Oxford University Press, 2001 = Current Legal Issues Vol. 4), 110.

(itself, we may note, mediated by a *bat kol*).<sup>128</sup> And so the issue of inspiration necessarily arose not only in relation to *psak* but also in relation to *derash*: the tale of the oven of Akhnai presents a contest between a notion of (delegated) democracy of interpretation and inspired interpretation, which the Talmud resolves in favour of the former.<sup>129</sup> But even the notion of a democracy of interpretation has itself been reinterpreted in revelational terms: according to R. Solomon Luria, the variety of opinions is explicable in terms of the variability of perception of the one true revelation, which all had personally (through the presence of their souls at Sinai) received.<sup>130</sup>

- 5.2.2 The dilemma presented by theories of divine revelation may be put as follows: the inspired person and the inspired texts are not true alternatives. Since the text does not speak its own interpretation, human interpreters are always required, and if the office, and thus the person, of the judge is taken, ultimately, to be inspired, there is a natural tendency to expect the same of the *darshan*. There, are, indeed, those who would maintain the priority of the activity of interpretation of the revealed law over that of decision-making for practical purposes. R. Moshe Feinstein and others have maintained a distinction between absolute halakhic truth and truth for the purposes of decision-making.<sup>131</sup> The Vilna Gaon is reported to have said that if he were offered infallible instruction by an angel he would refuse, since he wanted to arrive at the truth by his own efforts.<sup>132</sup>
- 5.2.3 It is not difficult to understand many of the difficulties in the jurisprudential analysis of the *agunah* problem as reflecting these and

<sup>128</sup> *Erub*. 13b, though whether the continuation should be read as a distinction between *halakhah* and *ma'aseh* is not entirely clear: see further Jackson, "Secular Jurisprudence ...", *supra* n.3, at 33f.; *idem*, "Jewish Law or Jewish Laws", *The Jewish Law Annual* 8 (1989), 28-30; *idem*, "Literal Meaning and Rabbinic Hermeneutics: A Response to Claudio Luzzati and Jan Broekman", *International Journal for the Semiotics of Law / Revue Internationale de Sémiotique Juridique* XIV/2 (2001), 134f.

<sup>129</sup> *B.M.* 59b. R. Nissim Gerondi, in commenting on the oven of Akhnai passage, suggested that the sages realised that R. Eliezer came closer to the truth than they, but felt bound nevertheless to follow the reason of the majority. See further Lamm and Kirschenbaum, *supra* n.21, at 103.

<sup>130</sup> See Lamm and Kirschenbaum, *supra* n.21, at 104f.

<sup>131</sup> See Lamm and Kirschenbaum, *supra* n.21, at 105. They note, at 114, that the Maharal of Prague considered Maimonidean rationalism to lead to a preference for the *via contemplativa* rather than the *via activa*.

<sup>132</sup> L. Jacobs, *Jewish Values* (London: Vallentine and Mitchell, 1960), 24. See also N.L. Rabinovitch, "Halakha and Other Systems of Ethics: Attitudes and Interactions", in *Modern Jewish Ethics*, ed. M. Fox (Columbus: Ohio State University Press, 1975), 89-102, at 97, quoting Maharal.

related theological tensions. Rather than struggle to fit them within a positivist jurisprudential theory, some version of the “legal sources” theory of law, itself a version of the “tenet ... of the social sources of law” (§3.1.1), perhaps we should see them as exemplifying the problems of a Jewish jurisprudence of revelation.<sup>133</sup> In this context, such problems as the correct reading of the Talmud and the significance of dogmatic error once it has become “received wisdom”, take on a new dimension. There are those who would maintain that these aspects of “*kabbalah*” are providential. Clearly, any such views cannot be assessed within secular jurisprudence. If, more generally, the secondary rules of recognition of the system fail to provide the degree of certainty which a secular system of law might expect, are we to conclude that “certainty” resides, within the system, not through a system of doctrine (dogmatics), but rather in the theological status of the *decisions* of the *posek*, in whom the residue of the biblical conception of the inspired judge resides? Again, one may be tempted to assess the problem of the relationship between the approaches of the Jerusalem and Babylonian Talmudim not in terms of a particular sub-question within the concept of *hilkheta kebatra'i*, but rather in terms of the theological significance of the Jerusalem tradition in the context of the revival of a form of Jewish halakhic authority in – Jerusalem.<sup>134</sup> And how, finally, might one approach the problem of consensus? The very notion of a *haskamah* for a *takkanah* seems to conflate different traditions of personal inspiration within the *halakhah*. It reflects a reluctance to rely upon the authority of this (“legislative”) form of decision-making, so that the endorsement of a dogmatic authority is also sought. That doctrinal authority, however, will not rely upon (his individual) inspiration for the interpretation of sacred texts, but requires a consensus of other dogmatists. This may be viewed as a theological version of the common contemporary critique, that the halakhic authorities are suffering from a “loss of nerve”. But the issue, ultimately, has to be addressed in just such theological terms.

<sup>133</sup> From an external viewpoint, there is a common model which justifies the analogy implicit in this concept: both secular jurisprudence and the *halakhah* may be conceived in semiotic terms, presenting parallel but different exemplifications of a communicational model, within which we have to identify the respective processes of communication (media, codes, etc.), as well as the pragmatic dimensions of communication, which include the status and authority attributed to the participants within the communicational system.

<sup>134</sup> We may recall the observation of Rabbenu Tam (n.123, *supra*): “But as for permitting an invalid bill of divorce, we have not had the power to do so from the days of Rav Ashi [nor will we] until the days of the Messiah.” But can we be sure that Rabbenu Tam would not have interpreted the foundation of the State as *atchalta di-ge'ulah*?

6.0 *Conclusion: Jurisprudence and Halakhah*

6.1 Does jurisprudence, then, have any contribution to make to the study of *halakhah*? The burden of my argument has been that it represents an external theoretical framework, which cannot be imposed syllogistically on the *halakhah*, through the assumed argument that jurisprudence is the general theory of legal systems; the *halakhah* is a legal system; therefore general jurisprudence applies to the *halakhah*.

6.2 Rather, we are engaged in a constructive exercise in comparative theory (I might even say, comparative ethics): jurisprudence studies the ways in which legal systems structure themselves on the basis of particular values; if we wish the *halakhah* to manifest those values, these might be the ways in which it might be structured. But are not the values of secular, liberal legal systems quite different from those of religious systems in general, and the *halakhah* in particular? This is a matter for investigation, based on the empirical data (institutional and theoretical) of the *halakhah* itself. In this context, the Noahide concept of *dinim* may repay further investigation: might it be regarded as including secular *jurisprudence*?

6.3 Of course, any such exercise in comparative theory can go in either direction: *halakhah* may itself enrich the jurisprudential stock of “ways in which legal systems structure themselves on the basis of particular values”, and indeed some would argue that there is a Jewish, postmodernist-leaning, strand in American jurisprudence today which is seeking to do precisely that. A possible conclusion may be that religious law is not law in the positivist sense, but all law is ultimately religious – inevitably having, if it is to be rational, a non-social, transcendental base. However this may be, exercises in comparative theory have the potential to sharpen questions in ways not available using purely internal resources. In this sense, secular jurisprudence may have a less direct, but nevertheless significant, contribution to make than that assumed by Elon and the *mishpat ivri* movement – a contribution to the theology of Jewish law.