Part I
Religious Ambivalence towards Law

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Is Talmudic Law a Religious Legal System?

A Provisional Analysis

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Abstract

The claim that Talmudic law is a religious legal system has long been, and continues to be, put forward by both traditional scholars of Jewish law and contemporary academic researchers. The question of whether Talmudic law is a religious legal system most certainly did not engage the Sages of the Talmud, but addressing it will help us grasp the nature of Talmudic law. Furthermore, juxtaposing Talmudic law to Biblical law will help us delineate the concept of religious law, and shed light on certain developments in the evolution of Jewish law.

Keywords

Talmud – religious legal system – Jewish law – legal system – political theology

1 Introduction¹

The claim that Talmudic law is a religious legal system has long been, and continues to be, put forward by both traditional scholars of Jewish law² and contemporary academic researchers.³

The question of whether Talmudic law is a religious legal system most certainly did not engage the Sages of the Talmud,⁴ but addressing it will help us grasp the nature of Talmudic law. Furthermore, juxtaposing Talmudic law to Biblical law will help us delineate the concept of religious law and shed light on certain developments in the evolution of Jewish law.

Let us consider what this claim entails. Sometimes the assertion that a given legal system is a religious legal system merely seeks to indicate that it is part of a certain religion or was created within the framework of that religion. Such an assertion does not provide any information about the nature of the said system, just as the phrase *French law* says nothing more than that the system is used in France.

The assertion may, however, be intended as a more informative description of the system. And indeed, in most cases, the assertion that Jewish law is a religious system makes a claim about the nature of Jewish law – for example, the claim that it differs in a specific way from Western legal systems such as common law and civil law. This sort of claim is put forward in both academic contexts and ideology-laden polemical contexts. In the latter, the assertion is made for the purpose of emphasizing the religious nature of Jewish law either so as to reject it as irrelevant to present-day life, or conversely, to assert its superiority to secular systems. But in both the academic and the polemic contexts, the concept of a religious legal system is considered a given rather than a notion that calls for explication.

1 A revised version of *Is Talmudic Law a Religious Legal System? A Provisional Analysis*, first published in *Journal of Law And Religion* 24 (2/2008–09).

2 See Maimonides, R. Nissim Gerondi (Ran), R. Joseph Albo, R. Isaac Arama, Abarbanel, R. Kook.

3 See Gulak, *Foundations of Jewish Law*; Silberg, *Talmudic Law and the Modern State*, p. 88; Elon, *Jewish Law*; Englund, *The Problem of Jewish Law in a Jewish State*; Rackman, *Jewish Law as Religious Law*, p. 85; Cohn, *Secularization of Divine Law*; Jackson, *The Concept of Religious Law in Judaism*; Jackson, *Judaism as a Religious Legal System*.

4 The Talmud developed in two major centres of Jewish scholarship: Babylonia and Palestine. The Jerusalem or Palestinian Talmud ("Yerushalmi") was completed around 350 CE, and the Babylonian Talmud ("Bavli"), which is the more complete and authoritative one, was written down around 500 CE, but was further edited for another two centuries. The Talmud served as the basis for all codes of rabbinic law.

The popularity of the misconception that Jewish law is a paradigmatically religious legal system can be explained, to some degree, by another pervasive misconception, namely the notion that Jewish law is formalistic. Unless this latter misconception is debunked, I will argue, it is impossible to comprehend the essential nature of the Jewish legal system.

The distinction between so-called “religious” legal systems, and non-religious systems, is, in my view, more complex than is recognized by those who claim that Jewish law is a religious legal system. What traits must be exhibited by a legal system for the claim that it is a religious legal system to be correct? This paper has two goals. I will seek to identify the traits that any legal system must have for it to be justifiably regarded as a religious legal system. But in addition, I will attempt to ascertain whether, and to what extent, Talmudic law is a religious legal system. In asking this question, I will assume that the halakha of the Talmud is indeed a legal system, and will limit my analysis to examination of its characterization as “religious.”

2 Preliminary Remarks

Before tackling the tasks I have set out, some preliminary remarks are in order:

2.1 *The Notion of a “Religious Legal System” Is Not Given in Nature, but Is a Product of Reflection*

How are we to explicate the notion of a religious legal system? We cannot do so by referring to a particular legal system (canon law, for example) as the paradigm case of a religious legal system, for the simple reason that no legal system is self-evidently religious. The designation *religious system* cannot be read off nature, but is the product of human reflection. Characterization of a legal system as religious is always based on assessing whether it fulfils conditions we ourselves have stipulated. One such condition might be the system’s closeness or openness. Borrowing from the sociology of knowledge, we can distinguish between *open* and *closed* legal systems, the former being systems that have relatively clear criteria demarcating that which is part of the system and that which is not, the latter being systems that lack such criteria. To put it in jurisprudential terms, an open system is one that has a well-defined rule of recognition. The distinguishing feature, then, is the degree of explicitness of the system’s rule of recognition.

The transition from a closed legal system to an open one, which is a monumental development in the history of human legal culture, reflects, I would

submit, the transition from religious legal systems to non-religious legal systems. I will return to this point later.

2.2 *Religiosity Is a Relative Concept: Whether a System Is Religious Is a Matter of Degree, as Opposed to an Either-Or Determination*

The concept of a religious legal system is a cluster-concept – it encompasses several traits, not all of which need apply simultaneously. This generates a continuum. At one pole is the class of religious systems proper: those with all the traits of religious systems. At the other pole is the class of non-religious systems proper, with none of the said traits. Both poles are likely to be empty classes: no existing legal system has or lacks all the traits in question. Actual legal systems are located on the continuum somewhere between the two poles. A legal system's religiosity is determined by its proximity to or remoteness from one of the poles. Note that what we usually conceive of as secular systems also exhibit some traits of religious legal systems, and vice-versa.

The notion that secular legal systems have completely freed themselves from the iron grip of the religious worldview is no more than wishful thinking. This observation attests to a very important feature of what is known as *political theology*. In his seminal *Political Theology: Four Chapters on the Concept of Sovereignty*, written in 1922, Carl Schmitt (then a critic of liberalism, and later, an unrepentant Nazi; Schmitt nonetheless became, and remained, a highly influential political theorist) argued that the main concepts of modern political theory were secularized versions of older theological concepts. The enterprise of political theology seeks to discern remnants of religious thinking in the structure of legal systems that have no religious ideology whatsoever.

I want to stress this point because it is often denied – especially by legal thinkers. For example, Jerome Frank, writing in 1930, asserts that:

The close and avowed relation of law to religion is a matter of the distant past. The legal profession has long since been split off from the priesthood. To speak of the longing for unattainable legal exactness as due to a “survival” of the bygone domination of law by religion is to be betrayed by word-magic. The word “survival” implies that ancient and obsolete group attitudes, although without present meaning, continue inherently to express themselves.⁵

⁵ Frank, *Law and the Modern Mind*, p. 213.

In fact, however, the picture is much more complex, and the very opposite of what Frank asserts is actually the case. Religious language has a far greater hold on us than we would like to admit.

When discussing modern legal systems, and even contemporary legal systems, it is therefore important to be aware of religious concepts from the past, so that we can detect the traces of older religious legal thinking in modern legal systems. Let me put it differently. It is, I believe, prudent to consider contemporary legal systems in the light of ancient legal systems, and see what traces we can find of the old regime, so to speak, that is, the theological notions that were pervasive in pre-modern law.

The use of religious language and concepts by thinkers who have no commitment to religious ideology is a phenomenon that can, of course, be found outside the realm of law. For instance, Wittgenstein and Einstein frequently speak about God, misleading people into interpreting their remarks as religious, even though it is obvious that they are merely using figurative language. Interestingly, at one point, Wittgenstein makes this patently clear: "I would like to say 'this book is written to the glory of God,' but nowadays that would be chicanery."⁶

As we will see, if we deconstruct the notion of religious law into its component units, religious elements can be identified in legal systems that are not committed to any religious ideology.

2.3 *A Legal System May Use Specialized Tools to Advance an Ideology*

It is essential to distinguish between ideologies and the legal systems employed to advance them. We can distinguish, for example, between capitalist ideology and Marxist ideology, between nationalistic ideology and multicultural ideology. The legal arrangements in societies espousing these ideologies will presumably differ in many respects. For example, the laws of inheritance in a society committed to capitalism will differ from those prevailing in a Marxist society. Likewise, a society committed to a religious ideology will have rules governing ritual behavior and worship. However, in addition to rules advancing ideals such as those underlying the law of inheritance, we may find that certain ideologies adopt distinctive legal tools – for instance, specific procedures for legislation, adjudication and interpretation – that enhance their ideological agendas. If a society shapes a legal tool in a unique way to advance its worldview, it will differ from other societies not merely in its ideology and the content of its rules, but also in the tools it uses to advance its ideas. On the other hand, there may well be cases in which a society's ideology is not

⁶ Wittgenstein, *Philosophical Remarks*, Foreword.

projected onto its legal tools. Such a society would use the legal structure that follows rationally from the generic goals of ordering human society and promoting harmony.⁷

The question, therefore, is the following: has the religious ideology that is at the heart of Talmudic law – and with regard to this there can be no dispute – shaped unique legal tools that differ from those found in secular societies?

2.4 *Self-Reported Accounts of Legal Practice Are Not Necessarily Veridical*

In discussing the nature of Talmudic law, we should not content ourselves with declarations made by judges, thinkers and scholars, though we should, of course, attend to what they have to say on the issue. Legal rhetoric is distinct from legal practice, and often serves political objectives, hence it would be a mistake to characterize a system as religious or non-religious on the basis of this rhetoric alone. Likewise, how the addressees of the system perceive its nature is of little relevance to our analysis, though were we engaged in sociology rather than jurisprudence, their perceptions would be paramount.

3 Analysis of Religious Law

Let me suggest three parameters salient to the determination that a legal system is a religious legal system:

- 3.1 The alleged source of the system
- 3.2 The areas covered by the system's rules
- 3.3 The system's mode of operation

Let us consider these parameters one by one.

3.1 *The Alleged Source of the System*

The first parameter – the alleged source of the system – presents a relatively straightforward criterion for determining whether a legal system is a religious legal system. When a system claims to be of divine origin, it can be regarded as a religious system. But this strength is also a drawback, since such claims may be no more than empty rhetoric. To the extent that this feature of a legal system merely reflects rhetoric, it is the weakest of the three. While one should not underestimate the role of rhetoric, its impact is limited if it does not influence the operation of the system.

⁷ Lon Fuller's eight desiderata for the creation of law can serve as a core model. See Fuller, *The Morality of Law* (further explanations in footnote 21).

The claim that a legal system is of divine origin may be put forward in order to justify the assertion – made by many legal systems, secular as well as religious – that it is superior to all competing normative systems. Indeed, all legal systems claim superior status vis-à-vis competing systems, as this is of the very nature of a legal system.⁸ Another role the rhetoric of divine origin may play is to bolster the obligation to obey the law: one is duty bound to obey the Torah because it reflects the divine will. From a religious point of view, it is pointless to ask why one is obliged to comply with God's command. The assertion that the Torah is the divine will is self-grounding.

The notion of the divine origin of the Torah is a constant in the Talmud. But the divine-origin thesis is hardly ever adduced in the attempt to ground the obligation to obey the law. Lest it be thought that divine origin is self-evidently the reason for the obligation to obey the law, and thus need not be explicitly adduced, let me point out that in the Talmud, the obligation is grounded in a moral argument with empirical premises: the nation of Israel accepted the Torah, and its acceptance is binding. This idea is expressed in various ways, the most compelling expression being the Aggadic remark:

And they stood at the nether part of the mount.

Exodus 19:17

R. Abdimi b. Hama b. Hasa said: This teaches that the Holy One, blessed be He, overturned the mountain upon them like an [inverted] cask, and said to them, If ye accept the Torah, 'tis well; if not, there shall be your burial;

and the ensuing Talmudic comment thereon: "Said Rava, yet even so they reaccepted it in the days of Ahasuerus."⁹ The reference is apparently to the fact that in the presence of the divine, as at Sinai, individuals cannot exercise free choice. Rava,¹⁰ to counter the claim that Israel accepted the law under the duress of God's very presence, cites the Book of Esther, where divine intervention is not manifest.

⁸ See Raz, *Practical Reason and Norms*, p. 151 et seq.

⁹ bShabbat 88a (unless otherwise stated, translations here and elsewhere are the author's own or adaptations of published translations).

¹⁰ Abba ben Joseph bar Hama was a classical Jewish teacher (*amora*) who lived in Babylonia in the fourth generation of rabbis. Rava, as he is exclusively referred to in the Talmud, is one of the most often-cited rabbis in the Talmud.

The idea appears in other places as well. It is significant that Onkelos¹¹ systematically translates as “accept” the verb traditionally translated as “listen” (*shama*) in verses such as “if ye shall hearken diligently unto my commandments” (*vehaya im shamoa tishmeu*) (Deuteronomy 11:13), rendering the latter, “if ye shall accept diligently” (*kabala tekablun*). In his commentary on the Torah, Rashi,¹² ever attuned to nuances of language, senses the subtle distinction being made: “any instance of hearing that is an acceptance of something, Onkelos translates ‘and they accepted’ (*vekiblu*), and any instance that is merely auditory, he translates ‘and they heard’ (*veshamu*).”¹³ On this reasoning, the verse most expressive of Jewish faith, “*Shma Yisrael*, the Lord our God, the Lord is one” (Deuteronomy 6:4) would not be translated, “Hear O Israel,” but rather, “Accept O Israel.” And indeed, in an accurate manuscript of Onkelos’ translation, the verse is thus rendered.¹⁴

The distinction is delicate, but important. According to Onkelos and the Sages, the Torah calls for acceptance rather than mere compliance. There must be a mental act of acceptance for the Torah to be binding. The obligation to obey the law is grounded in the people’s acceptance of the Torah. Hence, the binding nature of acceptance cannot be derived from the Torah, as this would be circular. Thus, in attempting to answer the fundamental question of the source of the obligation to obey the law, the Talmud assumes an ethical principle external to the Torah: acceptance of an obligation is binding. This may be the only instance where Talmudic law assumes a theory of natural law in the normative sense.

3.2 *The Areas Covered by the System’s Rules*

Let us move on to the second parameter. We can identify three central spheres that legal systems may attempt to regulate. In interpersonal relations, the system may attempt to ensure that goals set by individuals will not be achieved at the cost of harm to others. In contemporary law, this sphere is addressed, generally speaking, by the part of the law known as criminal law. Another

11 The *Onkelos* is the best-known, most literal and possibly earliest, *Targum* (Aramaic for “translation”) of the Hebrew Bible into the Aramaic language, which appeared in its final revision in the 3rd century CE.

12 Rabbi Schlomo Itzhaki (1040–1105, born in Troyes, France), referred to by his acronym Rashi, was the most influential, indispensable Bible and Talmud commentator. Around 1060, he pursued his studies – amongst others – in Worms in Germany, where nowadays the Jewish Museum is housed in the ‘Raschi House’ at Hintere Judengasse 6, on the site where his teaching house is assumed to have been located.

13 Rashi on Genesis 37:27; See also Maimonides, *Guide for the Perplexed* 1:45.

14 See Adler, *Netina Lager*.

sphere in which the system may seek to regulate behavior is that of the relationship between the individual and society; such regulation is reflected in tax law and laws governing military service and loyalty to the state. The third sphere includes laws intended to prevent individuals from self-harm, such as laws against suicide, or laws against certain kinds of sexual relations between consenting adults, even in private. Such laws are sometimes referred to as paternalistic laws. Many of the laws that are intended to secure the individual's place in the hereafter are found in this sphere. John Stuart Mill forcefully argued that a legal system should and must intervene in the first two spheres, but the third is totally outside its purview.¹⁵ A system that does not content itself with regulating the first two spheres, but spills over into the third, can be said to have a religious dimension, and in this sense, it can be argued that Talmudic law is a religious legal system.

Another important point must be borne in mind. Human legislators cannot regulate acts that are imperceptible to the outside. This point was harnessed by Thomas Aquinas to account for the need for religious law. He divides the sphere of law into four areas – eternal law, natural law, human law, and religious law – explaining why each is needed. Religious law, which we possess as the result of divine revelation, is needed, among other things, to regulate the individual's internal mental world.¹⁶ Borrowing from Aquinas, we can, therefore, add an additional feature to our criterion and say that a system that refers to the individual's internal mental and emotional world has a religious quality to it. For example, the last of the Ten Commandments – “thou shalt not covet” (*Exodus* 20:14) – refers entirely, so it would seem, to the individual's mental state, and as such, lies beyond the reach of the human legislator.

Let us consider the argument from paternalistic laws. This is a relatively weak argument, since the prevailing view today is that most paternalistic laws can be justified by citing considerations that belong to the first two spheres delineated above. Society as a whole benefits if its members care for themselves and do not become a burden on it. This societal interest justifies the regulation of the individual's conduct even where violations do not harm any other individuals directly. Conceived of as laws protecting society, these laws are justified on Mill's own terms. For example, minimum-wage laws that cannot be waived even by a consenting individual are meant to ensure a certain societal standard of living, not merely the well-being of individual workers. The social interests deemed worthy of protection will, of course, vary according to the worldview of the society in question. Since they all regulate the relations

¹⁵ See Mill, *On Liberty*, pp. 69–85.

¹⁶ See Aquinas, *Summa Theologica* II, q. 91, a. 4.

between individual and society, however, the various regimes all fall within the conceptual umbrella of Mill's framework. In a society committed to a religious ideology, transgression of religious precepts endangers the whole community, and therefore rules enforcing observance of precepts are in the public interest. The following quotations express this idea well:

R. Eleazar son of R. Shimon said: Because the world is judged by its majority, and an individual [too] is judged by his majority [of deeds, good or bad], if he performs one good deed, happy is he for having moved himself and the whole world to the merit side [of the scale]; if he commits one transgression, woe is to him for having moved himself and the whole world to the demerit side [of the scale], as it is said: "but one sinner," and so on (*Ecclesiastes* 9:18) – on account of the one sin that this man commits, he and the whole world lose much good.¹⁷

"Shall one man sin and wilt Thou be wroth with all the congregation?" (*Numbers* 16:22). It was taught by R. Shimon b. Yohai: It is analogous to people who were on a boat and one of them took an auger [a hand drill] and started to bore a hole under him. His fellows said to him: What are you doing? He said to them: What do you care? Am I not doing it underneath myself? They said to him: [We care] because the waters are rising and flooding our boat.¹⁸

"And they shall stumble one upon another" (*Leviticus* 26:37). "One because of the iniquity of his brother. This teaches us that all Israel are sureties one for the other."¹⁹

These quotations reflect the conception that an individual's sin is not merely his own private matter, but has far-reaching consequences for the entire community. Communal involvement in preventing the individual from transgressing does not seek to secure the individual's spiritual perfection – though this is a bonus – but to protect the community as a whole.

Furthermore, even if we reject the reductive argument, it is almost impossible to envision a legal system that remains faithful to Mill's ideal of regulating only the first two spheres. And if all legal systems do in fact regulate the third sphere, it will be of little use in distinguishing religious from non-religious systems.

¹⁷ bKidushin 40b.

¹⁸ Leviticus Rabbah, Parasha 4.

¹⁹ bShevuot 39a.

Regarding the argument from laws addressing the individual's internal mental and emotional disposition, we must distinguish between the prohibition of acts that are accompanied by specific mental dispositions and the prohibition of certain mental dispositions – which are, of course, imperceptible – themselves. Though in both cases proving the existence of the mental disposition is problematic, there is a significant difference. The former situation is common in criminal law – for most criminal offenses, conviction requires the existence of a specific mental disposition (*mens rea*). But in focusing exclusively on the internal sphere, without specifying any external manifestations, prohibitions relating to mental states alone are indeed indicative of religious legal systems.

To the extent that such norms are found in Talmudic law, it is a religious legal system. Yet even here, we see that on occasion, the Talmud subtly transforms prohibitions addressing the mental sphere into prohibitions addressing visible behavior. The Biblical commandment “thou shalt not covet” is explained by the Sages as referring to coveting that involves an element of theft.²⁰ This example should not blur the fact that the mental realm remains relevant in other legal contexts, especially in matters of ritual (for example, *kavana*, the mental disposition required for discharging the obligation to observe certain precepts; *mahshava* in the laws of sacrifice; and conversely, the mental disposition that generates sacrilege, *meila behekdes*).

In concluding this section, let me remind us of what was stated at the introductory remarks of this paper, namely that every ideology is likely to affect the content of a legal system that is put in place to promote it. Therefore, we can expect to find substantive legal arrangements that echo the prevailing religious and political ideology of the place and time in question. Legal systems are tools to advance the ideology of the ruling body.

It is however, much more significant to identify functional legal instruments and techniques that are generated by a religious ideology, than to identify elements that are simply reflections of that ideology in the substance of the law. That is to say, it is the practice of the law that we have to look at in order to assess whether, and to what extent, the system nature is religious. In addition,

²⁰ See *Mekhilta de-Rabbi Ishmael*, p. 235, a classic collection of midrash (biblical exegesis) on the book of Exodus, which was composed in Talmudic Israel/Babylon (135 CE) and compiled around the third century in Israel. It contains commentaries on a large part of the Book of Exodus (chapters 12 to 23) representing the two main modes of interpretation, the *halakhah* (legal doctrine), and the *aggadah* (moral and religious teachings). It interprets only about a quarter of the chapters in Exodus, beginning from the first commandment in the book. The work is often quoted in later rabbinic literature and is also referred to as *Mekhilta*.

we must keep in mind that not every substantive law found in a legal system affects the system's functioning.

A legal system that attempts to promote a religious ideology is likely to include a realm of norms that deal specifically with the relations between the Divine and human. In the context of Talmudic law this realm is known as precepts between the Creator and human. It should come as no surprise that the operation of norms within that realm might be different from the operation of norms outside that realm. Consider modern criminal law. The operation of norms here differs in many ways from the operation of norms in civil law. The nature of criminal law does not characterize the system as a whole. In similar way, the nature of the religious realm within Talmudic law does not characterize the system as a whole.

3.3 *The System's Mode of Operation*

In the spirit of the well-known adage, ascribed to William James, "A difference has to make a difference to be a difference," which I take to refer to real rather than nominal differences, I will devote the rest of this paper to possible operational elements that enable us to distinguish between legal systems that incline toward the religious end of the spectrum, and those that incline to the non-religious end. Let us, then, proceed to the third parameter, the system's mode of operation. Here, I will assess the tools that legal systems employ to advance their agenda – namely, legislation, adjudication and interpretation – without going into the specific content of the laws. The tool-content distinction is parallel to the distinction between the notion of a religious legal system discussed in this paper, and religious law understood as the branch of the law that deals with religious matters such as rituals and precept-observance (just as criminal law is the branch of the law that deals with criminal matters, and contract law is the branch that deals with contracts).

This parameter is itself a cluster concept, consisting of numerous elements, various combinations of which may exist in actual legal systems. Each element presents, from the perspective of a religious legal system, a desideratum (to use Fuller's term) that the system aspires to realize. To the extent that all the desiderata are realized to the fullest, the system is a religious legal system par excellence. Most religious legal systems fall short of the paradigmatic religious legal system.

3.3.1 Law Is Eternal and Immutable

There is a fundamental difference between legal systems that conceive of the law as static and permanent, without any agreed-upon procedure for instituting changes or adapting the law to changing circumstances, and legal systems

that conceive of the law as dynamic and subject to amendment by means of a simple and readily implemented process. The former are those that have a pronounced religious dimension.²¹

A Biblical injunction states clearly, “All this word which I command you, that shall ye observe to do; thou shalt not add thereto, nor diminish from it” (*Deuteronomy* 13:1). However, in the Talmud, the prohibition against adding to and subtracting from the laws of the Torah is accorded minimal significance and is not applied to the Sages’ legislative activity. The Sages show no fear of uprooting Torah commands²² and introducing new ones. Indeed, the intense human creativity in the ongoing exposition and evolution of the law generated the important distinction between that which is Biblical (*deoraita*) and that which is Rabbinic (*derabanan*). Yet even those parts of the law deemed Biblical were not exempt from Rabbinic intervention. While the idea of precepts originating in divine revelation – though nonetheless subject to human intervention – is vigorously upheld, the corpus of laws perceived as the product of human reasoning grows. Maimonides articulated the Talmudic approach:

However, the court, even if it be inferior (to the former), is authorized to dispense for a time even with these measures. For these decrees are not to be invested with greater stringency than the commands of the Torah itself, which any court has the right to suspend as an emergency measure. Thus, the court may inflict flagellation and other punishments, even in cases where such penalties are not warranted by the law, if, in its opinion, religion will thereby be strengthened and safeguarded, and the people will be restrained from disregarding the words of the Torah.²³

A more limited aspect of this principle is seen in the phenomenon of consensual opting out of what is written in the Torah. Religious legal systems will tend

21 If we attempt to correlate Fuller’s eight desiderata with the eleven elements discussed in this section, we find that some of the former are either extreme cases of the latter, or their polar opposites. Specifically, the element of immutability is the limiting case of Fuller’s desideratum that “the rules must not be changed so frequently that the subject cannot rely on them,” whereas my “restricted access to sanctified texts” criterion is in direct contrast to Fuller’s “public promulgation” desideratum, and also conflicts with the goal underlying his “Understandable terms” desideratum. Most importantly, a similar contrast exists between Fuller’s last desideratum, namely, that the rules must be administered in a manner consistent with their wording, and my last element, namely, that decisions need not necessarily be reasoned or based on a pre-existing set of rules. See Fuller, *The Morality of Law*, p. 39.

22 See Gilat, *A Rabbinical Court May Decree the Abrogation of a Law of the Torah*.

23 Maimonides, *The Code*, Laws concerning Rebels, 2:4.

to regard interpersonal-relationship laws mandated by the system as compulsory (*ius cogens*), and will not allow consensual opting out. Above, I spoke of the immutability of the system as a whole, here I am referring to a lack of power, on the part of individuals, to arrange their private affairs as they see fit. Secular law, on the other hand, tends to grant individuals freedom of contract.

In the Talmudic sources, a sharp divide can be detected between two kinds of opting out: on the one hand, unilateral declarations by individuals made in the attempt to gain exemption from a legal obligation,²⁴ and on the other, agreements between two parties that a legal obligation of one of them toward the other will not be met, with the consent of the said other party.²⁵ Both categories are referred to using the expression “contracting out of a law written in the Torah” (*matne al ma shekatuv batora*). The distinction between the two categories was never formally articulated, and has eluded many students of the Talmud. With regard to the former category, the undisputed Talmudic view is that one cannot exempt oneself from legal obligations unilaterally. This is true with regard to monetary and non-monetary obligations. But as concerns the second category, namely, consensual agreements, which also covers both kinds of obligations, there is a controversy among the Sages, some arguing that such an agreement is valid (though this is not a blanket dispensation – some spheres are off-limits to such maneuvering), others denying this altogether. It appears that the Talmud never arrived at a comprehensive and consistent treatment of consensual opting out. However, the dominant Talmudic view is that such a stipulation is legally valid. At least as regards monetary matters, this is the default position: unless it is specified that consensual opting out is not valid in a given area, it is valid. This approach is expressed in terms of a general principle, rather than by enumerating the cases where opting out is allowed.

The *halakhic* system thus recognizes the possibility of its own circumvention. The political significance of this is that the halakhic establishment is willing to forgo its control over interpersonal affairs and allow the parties themselves, on an individual basis, to arrange their affairs as they see fit, within limits, of course. To the extent that opting out is indeed valid – and this extent is considerable – Talmudic law manifests a secular bent.

3.3.2 Access to Sanctified Texts Is Restricted to a Limited Circle

Legal systems that conceal their norms, revealing them only to a select few (either officials or those with special attributes), are very different from systems that are open and accessible to all. By the time of the Talmud, study of the

24 See tNazir 2:2; jPeia 6:8 (19d).

25 See mBaba Metzia 7:10–11; bBaba Metzia 51a.

Torah had become accessible to the public. All those interested in Torah study are welcome to pursue their interest, as is evident from the description of the radical changes in the function of the study hall (*beit hamidrash*) in bBerakhot 27b–28a.²⁶ Although this accessibility is well documented and almost universal, there are minor exceptions. Some laws are not made public (bShabat 153b); some passages of the Bible are not read publicly and others are not translated into the vernacular (bMegila 25a–b; bHagiga 13a); certain laws are vouchsafed only to the pious, others are not implemented (bShabat 12b; bBaba Kama 30b; bAvoda Zara 37b); the reasons for new legislation (*gzeirot*) are kept hidden from the public for one year, lest they be criticized (bAvoda Zara 35a). As I said, however, with respect to accessibility in general, the secularizing tendency is far more evident than the religious.

3.3.3 Officials Are Selected on the Basis of Lineage Rather Than Acquired Skills

Legal systems in which officials, judges in particular, belong to a certain tribe or have a specific lineage, and in which judgeship is not open to all, are very different from those in which judges are appointed on the basis of acquired skills. The former feature is exemplified by the Biblical legal system. In the Bible, adjudication is entrusted to those of superior status, as determined by lineage, that is, to the priests (*kohanim*), who have important religious functions. Adjudication is thus associated with religious ritual, implying that the very act of judging has a sacred aspect. Only those qualified for this ritual function can serve as judges. On the other hand, in Talmudic jurisprudence, while judging is a precept, the judge is a sage and not necessarily a priest, and all are eligible for judgeship. The reduced status of priests is manifested, for example, in the fact that they are omitted from the *masoretic* chain as set out in mAvot 1:1, and in the fact that the last Mishna in tractate Horayot states that “the learned *mamzer*²⁷ takes precedence over the ignorant High Priest.”

3.3.4 Judges Are Infallible

A judicial process premised on the assumption that judges are infallible – their rulings are always correct – is very different from one that sees judges as subject to error. The notion that judges never err is rooted in the view that judges operate under divine providence, which protects them from any possible

²⁶ See Funkenstein/Steinsaltz, *The Sociology of Ignorance*.

²⁷ One born of an incestuous or adulterous relationship and hence deemed ineligible to marry into the community.

mistake. Such a view is expressed, for example, in Nahmanides' *Commentary on the Torah*:

God will not let the righteous judges who stand before Him spill innocent blood, because "the judgment is God's" (*Deuteronomy* 1:17) [...] this is a great virtue of the judges of Israel, and indicates approval – the Holy One, blessed be He, approves of what they do [...] and "He will direct them regarding the truth."

11 Chronicles 19:6²⁸

This approach, which regards judicial decisions as ipso facto true, is very different from the approach that regards them as valid, though possibly erroneous. The former is indicative of religious law, the latter is not.

The idea that God would not allow the pious to bring about harm is indeed voiced in the Talmud, but overall, Talmudic jurisprudence is premised on the assumption that judges can and do err, and many Talmudic passages discuss how to handle such a situation.

3.3.5 Reliance on Miracles in Decision-Making

The Bible recounts a number of instances where intervention by supernatural forces – such as the *Urim* and *Thummim* (*Numbers* 27:21) and the water of bitterness (*Numbers* 5:11–31) – is both expected, and accepted, as a means of decision-making. This is obviously indicative of religious law. Talmudic jurisprudence, on the other hand, systematically rejects such intervention, sometimes directly, as in the famous story of the oven of Akhnai,²⁹ and sometimes indirectly, by strictly delimiting the applicability of the Biblical procedure. The following is a typical example:

How then do I interpret the words, "Koheleth sought to find out words of delight" (*Ecclesiastes* 12:10)? Koheleth sought to pronounce verdicts from his own insight, without witnesses and without forewarning; a heavenly voice (*bat kol*) went forth and said, "that which was written uprightly, even words of truth" (*Ecclesiastes* 12:10) – "at the mouth of two witnesses," and so on.

Deuteronomy 17:6³⁰

²⁸ Nahmanides on *Deuteronomy* 19:19.

²⁹ See bBaba Metzia 59a–b.

³⁰ bRosh Hashana 21b.

Note the move the Talmud is making here in invoking a supernatural element, the heavenly voice, in the course of insisting on rational procedures.

3.3.6 Modes of Punishment

Legal systems that remove socially harmful behavior from the jurisdiction of human courts, consigning it to divine justice, are fundamentally different from legal systems that rely exclusively on human courts to punish such misconduct and thereby preserve social order.

In Biblical law, some offenses fall under the jurisdiction of the heavenly court alone. For example, the punishment of divine extirpation (*karet*) is not administered by human courts, and offenses incurring this punishment are relegated to divine justice.

The Sages of the Mishna instituted the visible punishment of lashings for offenses for which Biblical law imposed the punishment of divine extirpation.³¹ The explanation offered by the Talmud is that this punishment cancels out that of divine extirpation, because the offender, while enduring the lashing, engages in repentance. Be that as it may, here we see a clear tendency to convert divine punishments imperceptible by mortals into concrete human ones.

The Sages of the Talmud continue, formally speaking, to recognize punishments that can only be effected by divine intervention, but only for minor infractions, and even in these cases the punishment is administered through human courts; for example, the declaration by the court: "He who punished the generations of the Flood and the Dispersion, the inhabitants of Sodom and Gomorrah, and the Egyptians at the [Red] Sea, will exact vengeance on one who does not stand by his word".³² Nevertheless, the belief that we are responsible before heaven for conduct that goes unpunished by human courts remains in place.³³ Talmudic legal philosophy, as distinct from Talmudic legal practice, assumes that offenses that are not detected, or go unpunished for technical reasons, will be dealt with by divine justice.

3.3.7 Atonement as an Objective of Punishment

Atonement is a religious concept, and invoking it in the context of theory of punishment is indicative of a religious legal system. Indeed, in the Bible, one of the main justifications for punishment is the need for atonement. Punishment is a means of eliciting individual or communal penance for wrongdoing. In the former case, the punishment seeks to foster the individual's well-being, and as

³¹ See mMakot 3:15; bMakot 13b.

³² bBaba Metzia 48a.

³³ See tShevuot 3:2; bBaba Kama 55b.

such is a matter of religious law. But as we saw earlier, offenses carried out by individuals may endanger the entire community, and hence the individual's repentance is a societal interest. In this case, though the overt justification of the punishment is couched in religious terms, the punishment itself serves a social interest.

The tendency to move away from the atonement dimension of punishment is salient in Maimonides' penology. For Maimonides, deterrence takes precedence over the offender's atonement. This position explicitly reflects non-religious considerations vis-à-vis the justification of punishment.³⁴

3.3.8 Personal v. Territorial Law

Consider the following four propositions:

- a. The law applies to everyone within a given territory.
- b. The law applies to every member of a given group within a given territory.
- c. The law applies to all humanity.
- d. The law applies to every member of a given group, wherever they might be.

Some say that propositions a and d describe non-religious and religious legal systems, respectively. The fact is, however, that in most legal systems, some or all four of the propositions are true of different areas of the system. For example, part of Talmudic law applies to all members of the Jewish faith wherever they are d), part applies to members of the Jewish faith in the land of Israel b), part applies to all humanity c). Similar combinations can be found in other legal systems, past and contemporary. One example should suffice. Many countries have, in addition to laws governing their own residents a), universally applicable laws c) governing crimes against humanity. The characterization of legal systems as religious and non-religious on the basis of this feature is therefore unhelpful, though of course it could be made useful if the proportion of laws falling into the various categories was taken into account.

3.3.9 Formalistic Considerations v. Policy Considerations in Interpreting the Law

It is sometimes claimed that in developing the law, religious legal systems are characterized by frequent use of conceptual and formalistic considerations, whereas non-religious legal systems invoke policy and pragmatic considerations. This claim rests on the following reasoning. If we perceive the law to be of divine origin, it can be assumed to be complete, that is, to cover any contingency that may arise. Changing circumstances can be addressed by seeking a solution within the law itself, hence conceptual and formalistic analysis of the

34 See Maimonides, *Guide for the Perplexed*, III:41.

law. Man-made law, on the other hand, is likely to be found wanting when new circumstances create legal problems not envisioned by the original law. Here, policy and pragmatic considerations must be invoked to fill the lacunae.

Nevertheless, this criterion is problematic, since most legal systems invoke both types of considerations. Indeed, in response to this argument, it could be claimed that most legal systems do exhibit some qualities of religious legal systems.

In Talmudic jurisprudence, the most pronounced example of formalistic considerations is the use of the thirteen exegetical principles, but recourse to this device is characteristic of the Tannaitic period, and almost totally absent from the Amoraic development of the *halakha*.³⁵ Recourse to policy and pragmatic considerations, on the other hand, is much in evidence, as exemplified by the following passage.

One who is half slave and half free works a day for his master and a day for himself. This is the view of the house of Hillel. The house of Shammai say, You have made matters right for the master, but you have not made matters right for the slave. It is impossible for him to marry a bondwoman because he is already half free, and it is impossible for him to marry a free woman because he is half slave. Shall he, then, remain unmarried? But was not the world created solely for being fruitful and multiplying!? Therefore we compel his master to free him, and he [the slave] undertakes to pay him half the value of his purchase price. And the house of Hillel retracted their view and ruled in accordance with the view of the house of Shammai.³⁶

3.3.10 Law in the Service of Moral Perfection

Some commentators maintain that religious legal systems have educational aspirations over and above the imposition of social order, such as helping their

35 The period of the Tannaim ("Teachers" in Aramaic) lasted from 10–220 CE, and is generally divided by Jewish scholars into five or six sections or generations, the purpose of such division being to show which teachers developed their principal activity contemporaneously. Some of the tannaim, however, were active in more than one generation. The Amoraim ("expounder") were influential scholars and teachers who were active in community life, from the completion of the Mishnah around 220 CE to the end of the Talmudic period with the completion of the Jerusalem and Babylonian Talmuds in the fourth and fifth centuries. Far outnumbering the Tannaim, they clarified and interpreted the teachings of the Tannaim, but were not permitted to dispute or contradict their authority.

36 bGitin 41a–b.

adherents advance toward moral perfection. A good example of this approach is found in Maimonides:

You will find that the sole object of certain laws, in accordance with the intention of their author, who well considered their effect, is to establish the good order of the state and its affairs, to free it from all mischief and wrong; these laws do not deal with philosophic problems, contain no teaching for the perfecting of our logical faculties, and are not concerned about the existence of sound or unsound opinions. Their sole object is to arrange, under all circumstances, the relations of men to each other, and to secure their well-being, in accordance with the view of the author of these laws. These laws are political, and their author belongs, as has been stated above, to the third class, viz., to those who only distinguish themselves by the perfection of their imaginative faculties. You will also find laws which, in all their rules, aim, as the law just mentioned, at the improvement of the material interests of the people; but, besides, tend to improve the state of the faith of man, to create first correct notions of God, and of angels, and to lead then the people, by instruction and education, to an accurate knowledge of the Universe: this education comes from God; these laws are divine.³⁷

Now, it cannot be disputed that religious legal systems may have such aspirations, but this proves little, since, given that the very conception of social order depends on moral convictions, there are hardly any legal systems that do not have educational objectives. Furthermore, some think that education is the most basic function of law:

But it is difficult to get from youth up a right training for virtue if one has not been brought up under right laws; for to live temperately and hardily is not pleasant to most people, especially when they are young. For this reason, their nurture and occupations should be fixed by law; for they will not be painful when they have become customary. But it is surely not enough that when they are young they should get the right nurture and attention; since they must, even when they are grown up, practice and be habituated to them, we shall need laws for this as well, and generally speaking to cover the whole of life; for most people obey necessity rather than argument, and punishments rather than the sense of what is noble.

37 Maimonides, *Guide for the Perplexed* 11:11, p. 233 et seq.

This is why some think that legislators ought to stimulate men to virtue and urge them forward by the motive of the noble, on the assumption that those who have been well advanced by the formation of habits will attend to such influences; and that punishments and penalties should be imposed on those who disobey and are of inferior nature, while the incurably bad should be completely banished. A good man (they think), since he lives with his mind fixed on what is noble, will submit to argument, while a bad man, whose desire is for pleasure, is corrected by pain like a beast of burden. This is, too, why they say the pains inflicted should be those that are most opposed to the pleasures such men love.³⁸

Aristotle goes on to lament that most legal systems do not concern themselves with education, and declares that “the best system” is one that addresses these matters. It should be noted that even a system based on a libertarian ideology that upholds minimal interference with education is nonetheless promoting a philosophy of education.

3.3.11 Studying the Law as a Religious Precept v. Knowledge of the Law Is the Business of Legal Experts

Another consequence of the alleged divine origin of the law is the obligation imposed upon every individual, young or old, learned or not, to study the law on a regular basis. Torah keeps repeating variants of the precept “you shall speak of [the Torah ...] when you lie down and when you rise up” (Deuteronomy 6:7; 11:19), or “you shall contemplate it day and night” (Joshua 1:8). This obligation covers all area of law whether practical or not and its rationale is based on regarding the law as the “words of the living God”. This approach stands in direct opposition to secular approach, conceiving knowledge of the law as the business of legal experts. We might have expected that, given the obligation to study the law, if someone did not know the law and hence committed a transgression, Talmudic law would not deem their ignorance of the law an acceptable legal excuse. However, despite its insistence on the obligation to study the law, Talmudic jurisprudence does see ignorance of the law as an excuse.

In Western culture, knowledge of the law is the business of legal experts. Unless one goes to a law school, most members of the community never study the law or have only very vague idea of legal material. Yet, secular legal systems, such as American law, while not upholding an obligation to study the law, do

³⁸ Aristotle, *The Nicomachean Ethics*, x:9.

uphold the fiction that everyone is aware of the law and ignorance of the law is no excuse.

3.3.12 Multiple Legal Arrangements v. One Unique Legal Arrangement
If secular law contains contradictory arrangements to a given factual setting, it is considered pathological and calls for judicial intervention.

The perception of the law as a manifestation of the divine will leads to numerous controversies as how to translate the divine will to daily life. If the Sages' enterprise is to articulate the divine will, all views regarding a controversial matter must be taken seriously, for we do not know which side got it right. The concern is not vagueness per se as to the law, but rather, finding adequate solution for cases where there is a legal disagreement. One approach is the principle that "both are the words of the living God".³⁹ The policy of taking all views seriously and not being able to reach a definitive position – to the extent that it is followed – clearly has functional impact on the administration of the law.

However, most Talmudic controversies are resolved, practically speaking, by following a complex code for resolving halakhic disputes, rendering the "both are the words of the living God" principle merely theoretical.

3.3.13 Judicial Decisions Are Not Necessarily Reasoned, Based on a Pre-existing Set of Rules, Predictable, or Subject to Appeal

It is an accepted truism in Western legal thinking that the ruling of a judge must accord with the law. It must be presented as grounded in a well-defined body of norms supplied by the system, known in advance, and applied to the case at hand. The jurisprudential approach that emerges from the Babylonian Talmud does not fit this model.⁴⁰ The Talmudic judge has the power to deviate from the law and base his ruling on extra-legal considerations. While judges are not always at ease deviating from the law, their authority to do so is never questioned.

This characteristic of the judicial process is documented in a series of precedents, and anchored in a seminal legal tradition, reported in the name of R. Eliezer b. Jacob: "I heard that the court [...] punishes [in a manner that is] not in accordance with the Torah."⁴¹

39 bEruvin 13b.

40 See Ben-Menahem, *Judicial Deviation in Talmudic Law*.

41 bSanhedrin 46a. Rabbi Eliezer b. Jacob was a Tanna (Aramaic for "teacher") in the second century CE among Rabbi Akiba's younger disciples.

The prohibition against partiality exemplifies a context where such judicial deviation can be found. Taking into consideration the impoverished economic status of a litigant is explicitly prohibited by the Torah. Despite this normative prohibition, however, in the Talmud, a litigant's lesser economic status is, in fact, taken into account; a well-known example is the often-cited case of the porters in tractate *Baba Metzia*.⁴²

Obviously, for the most part, there will be no discrepancy between the general law and the ruling in an actual case. What is significant, for our purposes, is not the frequency of deviation, but the very fact that it is an option. In the tradition of the Babylonian Talmud, the judge does not see himself as constrained by the legal rules, and if, in his eyes, the circumstances of the case justify deviating from the law, he does not hesitate to do so. We are not speaking, of course, of arbitrary, unreasoned deviation. When a judge deviates from the law, he does so in order to impose the spirit of the Torah, as he perceives it, for the halakhic system refuses to reduce the spirit of the Torah to a set of rules.

A judicial process based on fixed decision-making rules, invoking a pre-existing set of norms, and exposing its rulings to institutional and public scrutiny (the Western model), differs markedly from a system in which the decision-making process is impervious to appeal and non-transparent. The justification for the latter type of legal system might be that the role of the judiciary is to rule in accordance with a transcendental will that cannot be reduced to articulated propositions. A judicial process that purports to reflect such a transcendental will is indicative of a legal system with a marked religious quality. The reasoning here is that the law, sacred though it might be, has to be communicated via human language, a medium that, due to its inherent limitations, cannot convey the transcendental message in all its profundity. To free itself of these limitations, and adequately convey the divine will, the judicial process must go beyond language. Hence a positivistic, rule-based legal system is unsuitable.

My claim that Talmudic law cannot be described in terms of the positivistic model may seem puzzling, and is certainly contrary to the received view among scholars of Talmudic law. Indeed, Talmudic law generally speaking has a bad reputation. The charge most frequently leveled against it is excessive formalism. For centuries, beginning, perhaps, with Paul the Apostle, and continuing to the present, the Talmudic jurist has been presented as pedantic, formalistic, and detached from the personal and emotional aspects of the issues

⁴² *Baba Gatzia* ("Middle Gate") was composed in the Talmudic Babylon (c.450–c.550 CE). This tractate belongs to the fourth order, *Nezikin* ("The Order of Damages") and discusses civil matters – mainly torts and property law.

he is treating. Without going into a detailed analysis of formalism, let me state what it is usually taken to mean, the sense in which I use it here. Formalism is the policy that rights and obligations are determined not on the merits, but by a set of rigidly applied rules.

As an example of contemporary condemnation of the excesses of Talmudic formalism, and its alleged negative consequences – condemnation that echoes the Pauline critique – let me quote from a section, entitled “A Parable: The Jews and Their Law,” of Roberto Unger’s *What Should Legal Analysis Become?* (Overall, I am sympathetic to Unger’s argument, but I take issue with his understanding of Talmudic law.)

No religion gives a more central place to law in its system of beliefs than does Judaism [...]

[...] However, people may begin to believe that if only they follow the rules to the hilt, they will be spiritually as well as socially safe. They may put conformity to law in the place of responsiveness to people and to God, holding God and people alike behind a screen of routinized practice. Thus, the ritual obedience to the law may itself become a form of idolatry, preventing Jacob from wrestling more directly with God.⁴³

The point Unger is making here is not that the law as such prevents closeness to God, but rather that Talmudic law, with its detailed and exacting instructions, leads us astray, directing us to focus on routinized practice rather than ideals and values.

In his campaign against legal formalism, Unger invites us to be engaged in “religious criticism of religion.”⁴⁴ He takes this invitation to be necessary because the religious mind regards this type of criticism as taboo. His argument seems to be that using religious ideals – as distinct from moral ideals – to critique religious rules implies that the rules are a failure from the religious perspective itself. This conclusion is unbearable for adherents of the religion, he appears to claim, and thus such critique is taboo.

But if religious criticism of religion is indeed a taboo, the Talmudic mind has no qualms about violating it. When we look at the Talmud, we find, as I said, that there are categorically stated rules – black and white rules – that are nonetheless questioned, found wanting, and in practice sometimes even ignored. These rules are objected to, not on the grounds that they have formal deficiencies, but on the grounds that they have religious deficiencies. This

43 Unger, *What Should Legal Analysis Become?*, pp. 186–188.

44 Unger, *What Should Legal Analysis Become?*, pp. 186–188.

surely attests to a profound desire to reach out and transcend the formalistic dimension of the law.

To a significant extent, the misreading of Talmudic jurisprudence as formalistic may be due to the fact that those who make this claim focus exclusively on the *formalistic expression* of many Talmudic rules. The use of exact measurements and precise formulations (*midot veshiurim*), the meticulous phrasing of laws, and the avoidance of such abstract, vague formulations as *reasonable behavior* and *bona fide conduct*, create the impression that Talmudic law is a dry legalistic system within which rights and obligations are decided pedantically.

A more *holistic* view, however, reveals enormous variability in the application of the law. I will even go further, and claim that formalism in the exposition of the law is intended to ensure a sense of stability, evenness and commonality in the face of this enormous variability. While I certainly do not dispute the meticulous formulation of Talmudic rules, my claim is that its role and function has been overlooked.

But how are the aforementioned features of Talmudic law – formalistic formulations, freedom to deviate from the law, and the idea that the law transcends its finite written expression – balanced and yoked together into a workable legal regime? The solution is *governance by judges rather than rules*. In this model, the judge embodies the law, and is likely to reach the proper legal outcome, namely, the ruling that accords with the transcendental will, even if he deviates from the articulated law. Such deviation is not merely condoned by the system, but built into it and reflected in its rules.

The absence of an appellate system in Talmudic law calls for further clarification. Some have argued that the Talmudic principle of non-finality of judgement makes courts of appeal redundant, since legal issues can always be re-opened by the court that decided them originally, on the basis of either factual or legal claims.⁴⁵ But the doctrine of non-finality of judgment only partially explains the absence of courts of appeal. For as I just said, the proceeding can be reopened, and the decision reversed, only by the court that handed down the original ruling. An important rationale for courts of appeal, however, is that the decision will be reviewed by a different court, which may evaluate the case differently. This objective is not served by the halakhic doctrine of non-finality, and hence the justification for the absence of courts of appeal must lie elsewhere. I submit, therefore, that the absence of appellate courts rests on a conscious theory of adjudication. Except in the case of a mistake caused by ignorance of the law on the part of the judge, who must himself admit it, legal decisions are not subject to review, since the judge is an embodiment of

⁴⁵ See mSanhedrin 3:5.

the law, and his ruling is ipso facto part of the law. The concept of a courts of appeals is thus out of place in a system that upholds the *governed by judges, not by rules* approach.

4 Conclusion

In my view, governance by judges rather than by rules is the primary feature of the Talmudic legal system. Of the various elements of the judicial process that, as we have seen, may attest to the religious nature of a legal system, it is by far the strongest. The conclusion that emerges from this analysis, namely, that Talmudic law is a religious legal system because of the unlimited authority it delegates to human judges, may seem paradoxical. But we have to remember that the secularization process that legal culture has undergone was precisely the attempt to discipline the system's officials by imbuing in them a sense of accountability to the citizen. This was, in essence, the dawn of the notion of *the rule of law*.

The aforementioned account is an internal description of the judiciary as seen from within: Judges fulfil a religious precept of judging and implementing divine will, and in so doing, they occasionally, must go beyond the language in which the divine will is caged.

Thus, the freedom granted to judges to deviate from the written law is in accord with the religious ideology of Talmudic jurisprudence. Looked upon from the outside, however, the thesis of governance by judges not by rules, this self-conferred power, might be seen as an attempt to seize unlimited power of control. Here is how an external critic regards the judge who speaks on the authority of the divine:

[...] this is the price of his (the priest) existence – Disobedience to God, which is to say to the priest, to 'the law' now acquire the name 'sin'; the means of 'reconciling yourself with God' are, as expected, the means of guaranteeing an even more fundamental subjugation to the priest: the priest is the only one who can 'redeem' [...] ⁴⁶

In his polemic against Jewish religion, Nietzsche regards judges or priests who claim to speak on the authority of revelation and the divine as mobilizing this authority to enhance their own power. This charge is presently made against American judges who now speak on the authority of the constitution.

⁴⁶ Nietzsche, *The Anti-Christ*, § 26; See Ben-Menahem, *Nietzsche on Law*.

The retention by judges of authority to definitively articulate and regulate the basic normative rules by which society is ordered suggests a transference of sovereign capacity within the state from the people and their political institutions, to the judges.⁴⁷

Since this move can hardly be justified on democratic principles, it has been claimed that

the stability of the authority of the judge in American society suggests a religious, rather than a political, normative basis. It is well understood that the relationship between constitution and judge is often compared to that between scripture and priest. [...] In the United States, this relationship is usually tied to the idea of the federal Constitution as divine text.⁴⁸

The frequently-voiced charge that contemporary Western law has become the business of an elite – a cult, even – who decide the rights and obligations of those standing before them as they see fit, without being bound by pre-determined law, is in essence the charge that contemporary Western law has acquired a salient characteristic of religious legal systems. Indeed, in this context we often find judges disparagingly described as priests, and the entire legal enterprise derided as the *religion of law*. Significantly, Talmudic legal culture does not appear to elicit aversion to this aspect of its judicial process.

Biography

Hanina Ben-Menahem is Montesquieu Chair in Comparative Law and Legal History at the Hebrew University of Jerusalem's Faculty of Law, and has been Gruss Visiting Professor in Talmudic Civil Law at Harvard Law School from 2000–12. He completed his law studies at the Hebrew University of Jerusalem, receiving his license to practice law in 1970. In 1978, he completed a doctorate at Oxford University and began to teach at the Faculty of Law of the Hebrew University. He served as the Head of the Institute for Research in Jewish Law at the Hebrew University. He went on to serve as a guest professor at several academic institutions around the world, including Stanford and Harvard. Ben-Menahem's fields of research are Talmudic law, the philosophy of Jewish

47 Backer, *Retaining Judicial Authority*, p. 120.

48 Backer, *Retaining Judicial Authority*, p. 123.

law, Maimonides' legal thought, the writings of Nietzsche, and law and theater. Ben-Menahem has published numerous books and articles. He is a leading critic of the dominant positivist approach in Jewish law.

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