It was a pleasure to participate in the UCL colloquium on ‘Law and Michael Freeman’ (a truly global oral Festschrift) in tribute to a friend, colleague and collaborator¹ for more decades than either of us might wish to recall.

Over the years, our interests have overlapped significantly in jurisprudence, family law and law and religion (especially Jewish law). In what follows I offer a reflection on the interaction of these three areas, in the light of a number of recent controversies.

1. The Application of Positivist Jurisprudential Models to Religious Law²

Secular jurisprudence, particularly in the positivist tradition, has paid relatively little attention to the phenomenon of religious law, but both the exceptions and the silences can prove instructive.

For Austin (see now Freeman and Mindus, 2013), ‘divine law’ fell within the genus of law ‘properly so called’ (‘A law, in the most general and comprehensive acceptation 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’ (Austin, 1954:10)), since God was conceived as an intelligent being with power over humanity. Indeed, Austin was quite explicit on this: ‘Of laws properly so called, some are set by God to his human creatures, others are set by men to men’ (Ibid: 122. Cf. ‘The divine laws and positive laws are laws properly so called’, ibid: 1). Divine law failed, however, the test of the narrower species of ‘positive law’, not being ‘set by political superiors to political inferiors’ and failing the test of sovereignty:

¹ Not least in his 30-year involvement as Vice-Chairman (to Lord Lloyd of Hampstead's shadow chairmanship), then Chairman of the Jewish Law Publication Fund, which initiated and supported a series of significant scholarly books on Jewish law.

² See further, Jackson, 2002:75-83.
If a *determinate* human superior, *not* in a habit of obedience to a like superior, receive *habitual* obedience from the *bulk* of a given society, that determinate superior is sovereign in that society, and the society (including the superior) is a society political and independent (Austin, 1954:194).

The test, notwithstanding its fuzzy edges, is widely regarded as reflecting Austin’s commitment to philosophical (empiricist) positivism, designed to construct a jurisprudence which could stand up to scientific scrutiny.

Kelsen also accepted the possibility of a “religious norm system” which did not, however, pass his test for positive law. Such a system would have a *Grundnorm*: “The basic norm of a religious norm system says that one ought to behave as God and the authorities instituted by Him command” (Kelsen, 1946:115), where the source of authority was not the *fact* (real or supposed) of divine command but rather “the tacitly presupposed norm that one ought to obey the commands of God” (Kelsen, 1967:193-94). Kelsen’s radical separation of fact and norm allowed him to avoid any empirical questions about the actual existence of either God or divine command. Nor did the *Grundnorm* depend on conscious acceptance by either the community or its officials, or even conscious knowledge of it on their part. It was, in his view, a logical presupposition of which they might be wholly unaware, but which provided the logical basis of their *experience* of legal validity (applying the Husserlian understanding of Kelsen’s *Grundnorm*) (Kelsen, 1967: 202; Jackson, 1985: 238-234; 1996: 111-112, 127). However, such a system of religious law would not be a system of *positive* law, since the latter must use socially immanent rather than transcendental sanctions, i.e. “those that according to the faith of the individuals subjected to the order originate from a superhuman authority”, which Kelsen appears to understand (only) in terms of “punishment by a superhuman authority”, an example of which is given as “the illness or death of the sinner or punishment in another world” (Kelsen, 1947: 20-21). Kelsen does not appear to envisage a religious legal system in which authority is delegated to human agencies to apply socially immanent sanctions. To the extent that religious legal systems do so, they would appear to fulfil his definition of positive law. Of course, he would apply here the same argument which he uses in relation to the position of a Marxist within a capitalist legal system. The subject within a religious legal system

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3 Smith, 2011, says: “Logic studies objective ideas, including propositions, which in turn make up objective theories as in the sciences. Psychology would, by contrast, study subjective ideas, the concrete contents (occurrences) of mental activities in particular minds at a given time. Husserl was after both, within a single discipline ... For Husserl, then, phenomenology integrates a kind of psychology with a kind of logic. It develops a descriptive or analytic psychology in that it describes and analyses types of subjective mental activity or experience, in short, acts of consciousness. Yet it develops a kind of logic – a theory of meaning (today we say logical semantics) – in that it describes and analyzes objective contents of consciousness...”

4 “A Communist may, indeed, not admit that there is an essential difference between an organization of gangsters and a capitalistic legal order which he considers as the means of ruthless exploitation. For he does not presuppose – as do those who interpret the coer-