

LEGISLATION AND LEGAL NORM DEVELOPMENT IN JEWISH LAW

Judaism does not speak in one voice, not merely as a matter of historical fact – it is of her very essence. Judaism is polyphonous, certainly in her inner dialogues – just how polyphonous, we shall have chance to see in a moment. Nonetheless, it is rare that Judaism officially presents herself thus to others. Spokespeople on her behalf tend all too often to play down her inner disputes and divisions and present her as far more systematically univocal than she really is. It is, therefore, I think, a sign of trust and intimacy that we spokespeople for Judaism who have assembled here at the Gregorian for this 1st Roman consultation on Jewish and Canon law do not speak in one voice, but rather engage in inter-faith dialogue with our Catholic hosts by bringing to the table some of the rich diversity of our intra-faith disputes and discussions. So let me take this opportunity on behalf of the Jewish contingent to warmly thank and applaud all involved in thinking up, planning and bringing to fruition this splendid and promising meeting.

All longstanding functioning systems of law are by nature to some extent traditional and to some extent innovative; combining in varying measures both faithfulness to the past and responsibility to meeting the challenges of the present. Even the most

rigidly conservative systems of law preserve some sense of their historicity, some sense of being the products of time-bound processes. In this respect *halakha*, Jewish law, is no exception. But even here, Judaism's formative documents of late antiquity – on which my comments will focus – do not speak in one voice, and harbor a profound disagreement as to their understanding of the very halakhic project they purport to establish. I am not talking about first-order disputes about specific matters of law, but about a deep-reaching disagreement as to the nature of the dynamics of norm-making and changing, which I take to be our main topic for discussion.

A useful, and more legalistic way of conceptualizing the trade-off between a system's traditional and creative commitments is to view it in terms of the legislative, as opposed to the judiciary responsibilities with which it charges its official institutions – the wider their legislative authority, the greater their innovate potential. In this respect, the earliest tannaitic stratum of halakhic texts, dating from the early 3rd century of the common era, presents us self-consciously with two well-defined and profoundly opposed schools of thought. The opening sections of the two tannaitic renditions of tractate *Eduyot*, Testimonies – that of the Mishna and that of the Tosefta – raise and answer the same question. Both ask why, given that the *halakha* is always decided according to majority vote, do we insist on keeping explicit record of the rejected minority opinion? And both the Mishna and Tosefta offer the same two contrasting answers: presenting the one they adopt as that of the majority, and the one they reject as that of the dissenting minority opinion of one Rabbi Yehuda b. Ilai.

One answer, which for obvious reasons I shall dub "traditionalist", asserts that the reason for keeping the rejected minority voice on record is to ensure that it *remains firmly rejected*. If in some future point in time, both texts explain, a person should claim that the law is thus and so, we will be able to prove to him that his was a minority opinion against which the majority of rabbis had once ruled. On such a showing, the minority voice is meticulously remembered, one might say, in order to make sure that it remains firmly forgotten!

For lack of a better term, I shall dub the second answer offered by both renditions "antitraditionalist". According to this view minority opinion is also kept on record for the benefit of future generations, but for a very different reason: just in case at some point in the future, the halakhic authorities see fit to overturn their predecessor's majority opinion, and revive the voice rejected. According to this very different view, minority opinion is recorded in order to be kept alive as a viable, revivable halakhic option.

These two different answers to the seemingly innocent question of why halakhic texts should record other opinions than the ones they adopt, bespeak a profound disagreement as to the dynamics of halakhic development. The traditionalist approach views halakhic rulings as irrevocable. Once made, they are binding, absolutely binding, on future generations of halakhists. No halakhic authority, not even the *Sanhedrin*, the Jewish High Court of old, has the authority to reverse the ruling of a former court. With regard to the halakhic tradition, namely the body of all previous *bona fide* halakhic rulings, the entire system of halakhic institutions, including the *Sanhedrin*, is denied legislative authority. On a

traditionalist showing, the halakhic authorities are called upon to exercise discretion and to rule by majority vote only and exclusively with respect to new halakhic questions on which, to the best of their knowledge, no former ruling exists. From a traditionalist perspective, halakha develops and expands, but it does so exclusively by accumulation, never by dissent and revision. Halakhic innovation, and more importantly, halakhic controversy, are wholly limited to what are perceived as cases of genuine legal *lacunae*. And once a vote is taken on such a case, the new matter is considered settled once and for all.

Antitraditionalists, by contrast, consider it the halakhic authorities' religious duty not only to transmit, and to occasionally add to the system of law they inherit, but to hold it in constant review. Antitraditionalists view the halakhic authorities as charged with *legislative*, not merely judicial responsibilities even with respect to existing halakha. And as lawmakers (as opposed to judges), they are expected to apply their experience and expertise to the task of keenly reviewing their halakhic traditions with the view of legislating anew when and where they see fit. As in a well functioning parliament or scientific establishment, antitraditionalists look favourably on halakhic dispute and disagreement, which they see not as a sign of deterioration, fragmentation, or crisis, but as indicative of the health, vigour, and vitality of the system.

You can't have it both ways, of course, nor is there a third, intermediate, option – as certain of my critics have tried, over the years, to suggest. With respect to a given body of halakha, one is either a traditionalist or an antitraditionalist. Former halakhic rulings can be viewed as the legitimate objects of, or

as immune to, latter-day criticism and reform, but not as both – which is not to say that an antitraditionalist will necessarily *oppose* tradition, as some have understood me to claim. Antitraditionalists can be as conservative as physicists or parliamentary legislators are liable to be. But a conservative antitraditionalist (just like a conservative physicist or legislator) will stick to the ways of old not because he deems them to be *prima facie* binding, but because he finds them worthy of assent!

But to return to the Mishna and Tosefta's renditions of tractate *Eduyot*. As I said, both texts pose the same question – namely, why keep record of rejected minority opinion? – both texts detail both the traditionalist and antitraditionalist answers to it, and both texts decide the issue by presenting one of those answers as the majority view, and the other as the rejected minority opinion. The crucial point is that *the two tannaitic texts do so differently!* The Tosefta rules in favor of the traditionalist option by citing it as the majority view, while attributing the antitraditionalist approach to the minority-of-one opinion of R. Yehuda. The Mishna, by contrast, rules in favor of the antitraditionalist approach, presenting *it* as the majority view, while relegating the traditionalist option to the minority-of-one opinion of the very same R. Yehuda! And thus, not only do these two canonical and contemporaneous, and bewilderingly symmetrical tannaitic documents bear witness to there *being* a foundational meta-halakhic dispute between traditionalist and antitraditionalist approaches to halakhic development, which they find necessary to adjudicate, but in deciding between them differently they render the dispute, in principle, open and undecided for all time. What these canonical texts jointly present us

with, one could say, is not a firm ruling, but a *choice* between the two contrasting alternatives.

An intriguing and intriguingly different notion of canonicity seems to be at work here. In his book *People of the Book* Jewish philosopher Moshe Halbertal distinguishes between three different senses, or types of a canonical text. A canon is *normative* when it comprises texts that are obeyed and followed. Texts comprising a *formative* canon provide a society or a profession with a shared vocabulary. Finally, an *exemplary* canon comprises texts that serve as paradigms, as models for imitation. Taken together the canonicity of such texts as Mishna and Tosefta *Eduyot* defies Halbertal's tripartite definition, forming a fourth category of texts with which we are obliged, not to obey, be informed by, or emulate, but to *grapple*! They are neither normative, formative nor exemplary, in the simple sense of the term. They form what we might call a *deliberative* canon.

It was Albert Einstein, I believe, who said that if you want to understand science, don't listen to what scientists say, look at what they do. There are several corpora of tannaitic material, that like Mishna and Tosefta *Eduyot* reflect upon the nature of halakhic development. But, although they are valuable indicators of their author's self-understanding, these texts remain largely declarative; records of what the sages of old had to say about halakhic development, rather than how they plied their trade in practice. The later amoraic literature, especially the Babylonian Talmud, the Bavli for short, has much more to offer in this respect. Unlike any antecedent tannaitic document, the Bavli is fashioned as an ordered series of detailed responses to an earlier, authoritative halakhic text, namely, the Mishna. Each paragraph of the Mishna is

discussed in great detail, keenly confronted with a vast array of other tannaitic sources, and keenly deliberated in the light of an equally broad array of social, moral, political, religious and factual considerations. Unlike the Mishna and Tosefta, the Bavli is not a record of final halakhic rulings and dissenting opinion. Rather than present its readers with the halakhic *conclusions* of its discussants, it presents them with extraordinarily detailed reports of the discussions themselves. The Bavli, however, hardly poses as an innocent, unassuming chronicle. It impresses one as being first and foremost a didactic work, designed to convey to those who study it a crafted vision of Torah-study. If one seeks evidence of a Talmudic view of halakhic development *at work*, it is here, in the Bavli's narratives of reconstructed deliberation and dispute, that we should look.

However, in the light of the traditionalist-antitraditionalist dispute, the picture of halakhic ruling and reception that arises from the Bavli is vexingly ambiguous. It is not as if different portions of the Bavli appear to favor the different sides to the dispute. That would be fine, and in character with the polyphonous nature of earlier texts. The problem is that the Bavli seems frustratingly to fall neither here or there! Time will not suffice to argue this point in any detail, but to give you a sense of what I mean, if one compares the halakhic system of the Mishna from which the Bavli sets forth, to that we are left with by the time the Bavli has completed its work, the overall picture is decidedly antitraditionalist. The system of the Mishna is not merely expanded by supplementation, it is in a great part significantly reformed. In terms of their halakhic end-product, many of the Bavli's discussions are evidently the

work of sages who considered themselves charged with legislative responsibilities with respect to the tannaitic system. On the other hand, if one looks at the way the Mishna is actually discussed in the Bavli, the impression one gets is decidedly traditionalist. A Mishna is very rarely ever openly confronted, criticized, and rejected or modified in the manner one would expect of discussants who viewed themselves as legislators. In the vast majority of cases the Mishna is puzzled over, considered and interpreted in the manner Supreme Justices deliberate the law – powerless to change it, yet responsible to make good sense of it and apply it adequately. But a closer look reveals that in very many cases – too many for comfort – the interpretations offered are far-fetched to the point of disbelief. These cases are most apparent when stated amoraic positions are confronted by tannaitic halakhic sources that plainly contradict them. Let me give you one simple and wholly commonplace example. In tractate *Sanhedrin*, folio 41a the Bavli reports R. Hisda – a major early 4th century amoraic sage – as having ruled that if under interrogation the testimonies of witnesses to a murder turn out to contradict one another regarding the murder weapon – «such as if one testifies that he killed him with a sword, and the other, that he killed him with an axe», the testimonies are not to be accepted. However, if their testimonies prove inconsistent with respect to what the murderer was wearing, for example – «such as if one testifies that he wore white, while the other claims he wore black», the testimonies are to be accepted. To this ruling of R. Hisda the Bavli raises an objection in the form of a tannaitic source that claims explicitly that if one witness testifies that the murder weapon was a sword, and the other claims it

was an axe, *or* if one testifies that the murderer wore white, and the other that he wore black their testimonies are to be dismissed. To this R. Hisda responds that the tannaitic source should be understood as referring not to cases in which their testimonies differ with regard the murderers clothing, but to the very special case in which they testify that the murderer's garment happened to be the murder weapon, «such as when they testify that he strangled him with his cloak»!

It is impossible to regard R. Hisda's rendition of the tannaitic source as a feasible interpretation. If the garments mentioned in the source's second clause are supposed to be murder weapons like those in the first, the entire second clause would be superfluous. It is not a strained reading, its an unfounded one. Such renditions of former, supposedly authoritative sources are so common in the Bavli's halakhic discourse that seasoned students no longer give them a second thought. Yet, given the logical rigor of that discourse, it is because such feats of *prima facie* implausible interpretation *are* so widespread that they cannot be brushed aside as mere lapses of irrationalism.

But how can they be made sense of? From a genuinely traditionalist perspective they make no sense at all. For a culture that truly views itself as firmly and religiously bound by the rulings it inherits, and as powerless to change them, implausibly far-fetched interpretations such as these will be very rare and proposed only as a last resort. The ease and frequency with which they are used in the Bavli defies a traditionalist explanation.

The problem is that the antitraditionalist approach seems to fare no better. For a culture that truly views itself as religiously obligated to criticize

former halakha and reform it when necessary, the right thing for R. Hisda to have done would have been to explain his reasons for dismissing the former ruling and changing it the way he had. Why bother to reinterpret earlier sources to suit current opinion, if, from an antitraditionalist perspective, one is at liberty to simply set them aside? Insisting on giving them life in such a contrived and forced manner seems to equally defy antitraditionalist sensibilities, as it does traditionalist.

Or does it?

Let us backtrack a little. I said before that when the halakhic system the Bavli leaves us with is compared to that of the Mishna it is hard not to characterize the Bavli's project as antitraditionalist. Let us stay, therefore, with this assumption, and take a closer look at the antitraditionalist standpoint. On the one hand, it is a reformative position. The halakhic authorities are granted legislative power, and are urged to review and revise the system as they see fit. But as we have seen, they can never *really* reform the system. They can overturn a current ruling, but they cannot obliterate it. By exercising their legislative authority they can overthrow a ruling, but cannot declare it null and void. Old rejected rulings cannot be not erased, only demoted to the status of minority opinion, where, though not currently in force, they remain forever part and parcel of the halakhic tradition to be studied and transmitted from generation to generation, and, hence, liable of being restored at any given moment. We might call this the reformer's quandary. The legislative power with which antitraditionalism grants the halakhic authorities allows them to revise the law as

it is enforced in practice, but as strongly as they may feel against the rulings they reject, they are powerless *qua* legislators to eliminate them from the record, and render them *unviable*.

It is from this perspective, that I suggest that the Bavli's entire project, and with it its radical halakhic interpretive practices may be made better sense of.

On the face of it, one would expect traditionalists and antitraditionalists to interpret earlier halakhic sources in similar fashion. Both, one would think, will seek honestly to capture the meanings the sources were originally intended to convey – the traditionalist, in order to submit to their authority, the antitraditionalist, in order to decide whether to accept or to reject them. As noted, neither school, it seems, would ever have reason to engage in the kind of incredulous far-fetched interpreting so common throughout the Bavli. This is certainly true for traditionalists. But for antitraditionalists, the halakhic process does not necessarily end with the making of a new and different ruling. Legislation itself is often only the formal beginning of a longer and deeper reform process, in the course of which certain old rulings and old halakhic sensibilities are not merely made to cease to be the law by formal acts of legislation, but are made to cease to be live halakhic options by other means. Radical reinterpretation, I suggest, is one such means. Had R. Hisda responded to the tannaitic source with which he was confronted by arguing that yes, such used to be the halakha of old: witnesses whose testimonies failed to cohere even with respect to such minor details as the killer's attire and demeanor, were disqualified. But in view of the fact that there will always be some discrepancy between testimonies, my colleagues and I have

decided to modify that ruling and demand that the testimonies cohere only with respect to the essential elements of the case: namely the place and time of the murder, the identity of murderer, and the murder weapon – or something to that effect. Had he responded thus, future (antitraditionalist) halakhists would have inherited a halakhic tradition comprising *two* basic options, the lenient approach of R. Hisda – currently functioning as the law – alongside the stricter, more purist approach of the cited tannaitic source – currently not functioning as the law. By preferring not to openly rule against the tannaitic source, but to reinterpret in accord with his own more lenient position, R. Hisda has a good chance of achieving what no measure of legislative power is, in principle, capable of achieving within an antitraditionalist setup – namely, the *eradication* of the source's original position from the halakhic record, and hence from the halakhic tradition.

In the case before us the earlier tannaitic text is reinterpreted in the light of the explicitly stated, later amoraic position of R. Hisda. But this type of radical halakhic reform – radical in the sense that the rejected view is purged from the halakhic record – does not require an explicitly stated later ruling. Radical reinterpretation achieves the same reformative effect by leaving on record a radically transformed understanding of the earlier document. Had I had more time – a semester, say – I could have brought to the table a number of extensive and detailed Talmudic discussions of Mishnaic bodies of law, all seemingly innocent, seemingly unassuming, seemingly merely curious as to the Mishna's meaning, in which the Mishna is so radically transformed as to effect a major halakhic revolution without the

amoraic discussants ever seeming to state their own opinion on the matter. To paraphrase the name of the famous movie, in this manner, time and time again the Mishna's original positions are "lost in interpretation", as it were, lost from the halakhic record, purged from the halakhic tradition.

Interestingly, and by now I hope understandably, such acts of radical interpretation – by which the Bavli performs the lion's-share of its halakhic work – are *not* presented as the work of judges or legislators, but as that of "academic" inquisitive students of Torah. If the Bavli is read, as I suggest it can and should be read, namely, as a subtle and self-conscious, primarily antitraditionalist undertaking, then its most halakhically effective passages are those in which the meaning of tannaitic halakha is deliberated, expounded upon, and innovatively transformed, rather than those in which amoraic sages have their own explicit say. The lasting contribution of the amoraic halakhists to fashioning and transforming halakha, is performed far more by creatively interpreting the old in the guise of submitting to its judgment, than by legislating independently in the face of the old – not, I submit, because of traditionalist tendencies, as the Bavli's surface rhetoric might imply, but in order to advance an antitraditionalist, reformative agenda all the more effectively!

Because even the most avid of antitraditionalist legislator is obliged to leave on record the rulings he sees fit to replace, radically reinterpreting them is, therefore, a most effective way of erasing their original meaning from collective memory – far more effective, I have tried to argue, than by openly confronting them, and ruling them down. But it is not the only way, and at times not the most effective.

Some halakhic texts, especially those of the blatantly discriminatory variety, resist radical interpretation, and cannot be as easily “lost in interpretation” as others. More generally, even if a new and radical interpretation is made to stick, because the texts remain on record, there is nothing, in principle, to stop future generations from restoring their original import by radical re-re-interpretation, or perhaps one should say de-re-interpretation.

I would like to devote the part of this paper to briefly drawing your attention to a different, and perhaps even more radical method of purging the halakhic tradition of rulings deemed unfitting enough to merit going beyond the normal reformative reach of halakhic antitraditionalism. Here not only are the texts left on record, so are their original meanings. The idea is not to establish a tradition of reading them differently, but, surprising as this may sound in the context of a tradition of religious law, the idea is to leave them on record while questioning their morality! Here is one brief example: The Palestinian Talmud, the Yerushalmi, relates the following story about the great tannaitic sage of old, R. Shimeon b. Shatah who we are told, had to work extremely hard in the cotton business to make a living. His students decided to purchase him a donkey which could hire out and devote more time to his studies. They did so, only to find to their surprise that the Syrian from whom they had bought it had not noticed a precious gem lodged in its harness. Now, Master, they announced joyfully you will no longer have to work at all. «Did the owner know he was selling the gem with the donkey?» enquired R. Shimeon. «No», they answered, «of course not». «Then return it immediately!» he commanded. «But one is permitted by law to keep it»,

they exclaimed – for according to halakha a Jew is obliged by law to return the lost property only of a Jew, not of a gentile. «Do you take me for a barbarian?!» stormed the sage, putting an abrupt end to the discussion. Now, what's fascinating about this little yet most significant tale, strategically placed at the heart of the Yerushalmi's discussion of the laws of lost property, is the way an objectionable, yet *bona fide* halakhic ruling is not questioned, nor reinterpreted, nor legislated against – all of which would have left it on the books as a viable option of some sort. It is not even hailed a mistake. It is left on the books, but declared barbarous – a law indeed, but one that only a barbarian would follow!

Maimonides, the great halakhist and codifier of the 13th century, presents the following somewhat oxymoronic formulation:

It is permitted to work a gentile slave with rigor. However, although such is the law, it is the quality of piety and the way of wisdom that a man be merciful and pursue justice and not make his yoke heavy upon his slave or distress him, but give him to eat and to drink of all foods and drinks. [...] Nor should the master heap upon the slave physical or oral abuse and anger, but should rather speak to him softly and listen to his claims. [...] Cruelty and aggression are found among heathen idolaters, but the descendants of Abraham, The People of Israel upon whom God has bestowed the benefits of Torah with its just and righteous statutes and laws, that are merciful to all, and in this way emulate God's own attributes, as it says «And His mercy is on all His works» (Psalms 145,9).

Again, as with R. Shimeon and his students, the law permitting Jews to work their non-Jewish slaves rigorously is declared to be impious, unwise, unmer-

ciful and unjust – a law fit of heathen idolaters, a law wholly out of line both with the righteous statutes and laws of the Torah as well as with God's attributes. As before, the objectionable law is not ruled against or reinterpreted. It is made to remain on record as part and parcel of the halakhic tradition, but is rendered ineffective and as effectively as possible unrevivable by being utterly morally stained.

Over and above the keen reformatory work of antitraditionalist legislators and interpreters, the law is thus also kept in check by subjection to the kind of moral, extra-halakhic critique that we have just witnessed. But by what code, according to which values is the critique to be levelled? Both R. Shimeon, and especially Maimonides sound as if there exists an inherently Jewish set of absolute values, by means of which rogue halakhot are to be marked and purged. But there exists in the Talmudic literature another, equally fascinating approach to the moral critique of halakha.

The anonymous narrator of the story of the purchase of R. Shimeon's donkey adds an explanation of his own to the rabbi's refusal to keep the gem. R. Shimeon, he explains, «was willing to relinquish all the riches of the world just to hear people declare "blessed be He God of the Jews"». This is a different mode of moral reasoning against a given halakha than the one employed by Maimonides. According to this view, the moral standard against which halakha is to be measured is that of the gentile not necessarily that of the Jew. In developing halakha, and especially in the critique of existing halakha, the halakhist first obligation is to «Sanctify God's name» – which is the term the Talmud uses in this context to mean being open to the world, attentive to

how our normative choices appear sound and morally resonate outside the boundaries of the halakhic community. To Sanctify God's name is thus to transcend the all-too-cosy, all-too-self-assuring dialogue conducted by Jewish halakhists among themselves, not by vainly claiming to speak in the name of God's attributes or the one true timeless moral code of the Torah, but by attempting more modestly to live up to the standards of the rest of the civilized world as we find it.

From such a perspective, our participation in this conference acquires special religious significance. For there is an important sense in which by engaging in serious open and critical inter-faith dialogue about the dynamics of religious norm making and changing with as significant and important an other as the Catholic Church, the name of God is sanctified. It is sanctified not because we purport to bring to Rome His one true word, but because there is a good chance that we shall be returning home from Rome better equipped for the ongoing task of working it out for ourselves.

MENACHEM FISCH