

Studies in the History of Law and Justice 2

Joseph E. David

Jurisprudence and Theology

In Late Ancient and Medieval
Jewish Thought

 Springer

Studies in the History of Law and Justice

Volume 2

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To my Parents Chava and Abraham David

Acknowledgements

The backdrop of the studies of this book is my engagement in rabbinic literature and legal philosophy. While studying philosophy and law, I acknowledged the limited relevancy of modern jurisprudence to pre-modern, non-western, religious legal systems. That and my exposure to the jurisprudential writings of medieval Muslim jurists pushed me to concentrate on systematic reflections on the law within medieval theological contexts. Against the common view among contemporary legal philosophers, I subscribe to the possibility to broaden the jurisprudential scope to include pre-modern and religious legal systems.

The studies of this book originated in my Ph.D. dissertation ‘Knowing the Word of God: Error, Analogy, Memory and Transmission in Early Medieval rabbinic Thought’ that was written under the supervision of Professor Moshe Halbertal at the Department of Jewish Thought (Hebrew University of Jerusalem).

Over the years I was privileged to present and discuss my ideas in various forums. Among them the Herbert D. Katz Center for Advanced Judaic Studies (University of Pennsylvania), the Hauser Scholars Program (New York University, Law School) and the Faculty of Oriental Studies (University of Oxford). These institutions provided me with intellectual environments to rethink and rearticulate my thoughts. I am also grateful to The Memorial Foundation for Jewish Culture and The Leverhume Trust for their generous fellowships which enabled me to further pursue my research.

Some of the studies in this book have been published in different venues. The analyses of chapters two and three appeared previously in *Toleration within Judaism*, of which I had the honor to collaborate with Martin Goodman, Corinna Kaiser and Simon Levis Sullam. I thank the Littman Library of Jewish Civilization for permitting its revised publication. Likewise, chapter five was published as “‘The One Who Is More Violent Prevails’—Law and Violence from a Talmudic Legal Perspective” *Canadian Journal of Law and Jurisprudence* 19:2 (2006), 385–406.

It will be impossible to list the many friends and colleagues who read and listened to my ideas during the years. Above all and most of all is my beloved wife Noga Aumann-David and our incredible children Orr, Naveh and Hallel, whom I cannot imagine any accomplishment without their presence and support.

Joseph E. David
Jerusalem, 2014

Introduction

Legal Theory Reconsidered

The last two decades have witnessed a growing interest in the relationship between law and religion. Law is increasingly a component of religious studies, the religious content within political thought is a focus of academic attention, and ‘law in religion and religion in the law’ is a subject of contemporary scholarship. These trends have given rise to a fundamental re-thinking of concepts and perceptions within both law and religion.

Contrary to predictions, the secularization, rationalism and individualism ushered in by the nineteenth century Enlightenment neither paralyzed nor marginalized the impact of religion as a vital source of meaning in the public sphere. The deconstruction of traditional oppositions concerning the universal aspects of the concept of law and its rule, and the elusiveness of the public/private distinction, stand at the basis of the need to reevaluate traditional assumptions in the field of legal theory. In light of criticism targeted at Western-centered legal perceptions and given the current interplay between law and theology the terms *Post-Secular*¹ or *Theological Turn*² could reasonably be applied to revisionist trends within the field of legal theory.

The revisionist spirit relies on an acknowledgment that traditional definitions of law and religion are culturally-dependent and that projecting them on non-Western legal systems is no simple matter. Present-day multiculturalism emphasizes the fact that some of the commonplace assumptions about constitutional freedoms of, and from, religion are in fact rooted in the peculiar European experience and therefore less relevant to the religious praxis of believers other than Christians.³ The more we struggle to provide conditions to accommodate religious minorities in Western

¹ See Blond (1998).

² The Theological Turn reflects the insertion of metaphysical, biblical, theological, and mystical elements into the philosophical discourse of Phenomenology. This trend is initially ascribed to the French thinkers Emmanuel Levinas, Jean-Luc Marion, Michel Henry, and Jean-Louis Chrétien. See Janicaud et al. (2000), Horton-Parker (2007).

³ Williams (2008).

countries, the more we realize the limited viability of our concepts of law and religion.⁴

The lack of consideration of non-Western or non-Christian conceptions of law and religion is also manifest in intellectual and theoretical discussions. Textbooks and academic curricula of legal theory and philosophy describe ideas and conceptions ranging from Plato to Dworkin, through Thomas' *Summa* and Hegel's *Grundlinien der Philosophie des Rechts*, whereas thinkers such as Al-Farabi, Ibn Rushd, and Maimonides are largely ignored.

Religious Nomocentrism

Recognizing the significance of the distinction between *rights-based* and *duty-based* jurisprudence, and the limitations thereby imposed on Western legal theories, is constitutive to the revisionist trend.⁵ Duty-based jurisprudence has recently been articulated and analyzed through the concept of *nomocentrism*. As described by Thomson,⁶ nomocentrism is more than a doctrine. It is a 'paradigm of ethical life' that presumes the heteronomous nature of the individual and imposes ethical categories for action from without. Contrary to the *rights-based* moral paradigm which emphasizes the autonomy of ethical subjectivity, nomocentrism orients the ethics of individuals towards predefined and external concepts of ethical life and forces conformity to those moral concepts.

On account of the central roles of divine law and divine command in Judaism and Islam, it is commonplace to view both as nomocentric religions. As such Islam and Judaism are not considered in terms of the distinction between law and faith, state and church, Caesar and God, *lex humana* and *lex divina*—crucial dichotomies in Western legal and political thought that developed in the history of European Christendom. In both nomocentric religions these dichotomies are problematic.⁷

Religious nomocentrism is underlain by the identification of the 'Word of God' with the law, and more precisely with divine law.⁸ Consequently, obedience to law

⁴ Contemporary efforts to rearticulate these arrangements in terms of 'public reasons' (see Rawls 1997) and neutrality, divorced from any 'comprehensive doctrines' (Rawls 1993, p. 13), illustrate the endeavors to accommodate non-western forms of legality and non-Christian religious views and practices.

⁵ Cover (1987).

⁶ Thomson (2010).

⁷ Asad (2001).

⁸ Indeed, one can find either Jewish or Islamic views that embrace the distinction between human and divine law, but due to the identification of the 'Word of God' with the law, such distinctions require justification. In fact, both religions exclude the validity of any law other than divine law. The late inspirational leader of the Islamic Brotherhood, Sayyid Qutb argues that 'religious nomocentrism' is an indispensable outcome of 'theological monotheism': '(*hakimiyyah*) is the most exclusive prerogative of godhood. Therefore, whoever legislates to a people assumes a divine role among them and exercises its privileges. Men become his slaves, not the slaves of Allah; they accept his religion, not the religion of Allah ... This issue is extremely critical for the faith, for it is

in religious nomocentric contexts is not only a matter of loyalty and conduct in accordance with socially-condoned values, but rather the fulfillment of divine commands imposed on believers. Law within religious nomocentrism is not merely a vehicle for creating and maintaining social order, or for resolving interpersonal conflicts, but rather an expression of divine will.

Embodiment of the Word of God

Identification of the law with the ‘Word of God’ is at the core of our discussion of the epistemological and theological aspects of the halakhah. While Biblical literature employs the phrase ‘Word of God’ almost universally as the prophetic voice and not as a legal term,⁹ in Chronicles the ‘Word of God’ refers to the entire Mosaic legislation.¹⁰ This semantic transformation reflects an essential change: the ‘Word of God’ is no longer just the spoken word of the prophets, but also the written word of the scribes, i.e. legal stipulations.¹¹ Following the deuteronomistic depiction of Moses as both prophet and lawgiver, the Chronicler merges the prophetic oracles and Mosaic Law under the broader category of the ‘Word of God.’¹²

The process by which the divine word is objectified as communicable content is apparent in post-Biblical literature. The embodiment of the ‘Word of God’ introduces a tension between the meaning of the divine content as law or as wisdom. The tension between those meanings in the Second Temple period is well demonstrated in the two commonplace Greek translations of the term *Torah*—*logos*¹³

an issue concerning godhood and worship ... an issue concerning freedom and equality, an issue regarding the very liberation of man—nay, the very coming into being of man! And thus, due to all this, it is an issue of infidelity or faith, an issue of *jahiliyya* or Islam.’ (2007, vol. 2, pp. 888–889).

⁹ The term occurs about 240 times in the Bible, only six times in the Pentateuch (Gen. 15.1, 4; Exod. 9.20, 21; Num. 15.31; Deut. 5.5), and it is conspicuously absent in wisdom literature. See Grether (1934), 67–8, for a complete listing of the occurrences and variations of this formula.

¹⁰ The term occurs fifteen times in the books of Chronicles (1 Chron. 10: 13; 11: 3, 10; 15: 15; 22: 8; 2 Chron. 11: 2; 12: 7; 18: 4, 18; 19: 11; 30: 12; 34: 21; 35: 6; 36: 21, 22). Three of the fifteen cases are directly dependent on the book of Kings and refer to the prophetic word. In six of the remaining twelve cases, it refers to the prophetic word. But in the other six cases it refers to the Mosaic Law.

¹¹ This change is explicitly exemplified when the Chronicler identifies the phrase ‘the words of this scroll’ (2 Kgs 22: 13) in his Vorlage with the ‘Word of God’ (2 Chron. 34: 21). The former term refers to the legal stipulations of the covenant, thus the latter is explicitly equated with the Mosaic Law written in the scroll.

¹² This change probably reflects a conceptual transformation of prophecy and the prophetic office in the post-exilic period. Torah as existing content replaced the prophetic revelation and prophecy as an office became unnecessary.

¹³ The term *logos* (λογος) was first used as a philosophical notion by Heraclitus of Ephesus and later became a central concept in Stoicism. For the Stoics the *logos* was the prime principle that determined the inner-coherency of the cosmos. Before Philo *logos* was used in the Septuagint as the Greek parallel to the Biblical Hebrew term ‘דבר’ (For example: Gen. 1:3, 6, 9; 3: 9, 11; Ps. 32: 9) Philo aimed to provide a Platonic interpretation to the Scriptures by reducing the Biblical

and *nomos*;¹⁴ two notions that fuelled inter-religious polemic and intra-religious debate.¹⁵

Our study is not an historical survey, but rather a conceptual analysis of ideas and intellectual trends. It aims to reconstruct the ideas and concepts used and developed in the process of designing the scholastic ideals of the Rabbis. For this reason, our analysis should be read as an outline of rabbinic intellectual history of jurisprudential thought, rooted in Talmudic literature and filtered into post-Talmudic scholasticism through the Geonic period and thereafter by the early Andalusian rabbis.

Our analysis narrates the story of reflective thinking upon the halakhah and halakhic activity within the rabbinic tradition. While Talmudic literature is only rarely troubled by epistemological concerns and lacks reflection about the methods employed, the early buds of reflective thinking are apparent in post-Talmudic literature. Systematic and reflective thought about the halakhah is traceable from the eighth century. Initially, such reflections appear as *ad hoc* aphoristic expressions, like the principles of adjudication formulated by R. Yehudai Gaon (mid eighth century) or the methodological rules listed in *Seder Tannaim ve-Amoraim* (late ninth century). Nevertheless, from the tenth century on we come across systematic reflections on the halakhah in addition to intellectual endeavors to evaluate the soundness of halakhic methods.

Central to our discussion is a comparative perspective which exposes us to features of our subject matter more often hidden. For example, our study reveals that unlike legal professionalism—*prudentia juris*—developed by ancient Roman jurists, or the systematic study of jurisprudential principles of *usul al-fiqh* (أصول الفقه) by medieval Islamic jurists, the Rabbis avoided a comprehensive reflective account of the legal content and reasoning in the halakhah.¹⁶ Secondly, a comparative

terms to Hellenic-philosophical terms and approximates the *logos* and *nomos*. He terms Ten Commandments sacred *nomoi* (ἱεροὺς νόμους) which are practically God's *logoi* (λόγοι θεόσι) (Philo, *De Decalogo* II, 10–3). Preceding the Johannine usage of this term the *logos* also played a central role in the worldviews of Hellenic and Palestinian Judaism and in Hermetic literature (Davis 1995, chapter 7).

¹⁴ The original meaning of *nomos* (νόμος) is 'to allocate' and from that it was related to appropriateness. *Nomos* signified the norms that determine the social order—commands, customs or traditions—and with the development of social order in ancient Greek it was attached to the legal meaning (Kleinknecht, *nomos*). As mentioned above, the legal meaning of the term Torah is very common in the Priestly and Deuteronomist sources of the Pentateuch and hardly appears in its Elohistic (E) and Jahwistic (J) sources (Gutbord, *nomos*). The Septuagint consistently translates the term Torah as *nomos*, and likewise the terms 'קק' (Josh 24: 25; Jer 31: 38), 'קקה', (Ex 12: 43; 13: 10; Lev 19: 19) 'משפט' (Jer 49: 11) and 'רת' (Esth 1: 8; 3: 8; Dan 7: 11) are translated to *nomos* (*Arukh Completum*, s.v. 'ט.מ.ג.'). On the two meanings of the term Torah in the Gospels See John (1984).

¹⁵ While Paul represents the view according to which the Mosaic Law is either a problem or an enemy for Christians, John (John 1:17) treats the Law as something that has been superseded by divine grace (χάρις) and truth (ἀλήθεια). Scott's analysis sharpens the insights regarding the first century Jewish-Christian polemical drift that contrasts the perception of Jesus as 'Sophia incarnate' and the Torah as 'Sofia contained'. See Scott (1990, pp. 185–9).

¹⁶ It might well be speculated that a transparent systematization would have threatened their uncontested commitment to the Talmud, and forced them to conceal their inspirational relations

perspective contextualizes developments within a broader legal, theological and intellectual framework. Thirdly, it allows us to cross disciplinary boundaries that would limit our scope. We venture across time periods (ancient-medieval), literary corpora (Talmudic, post-Talmudic and mystical material), intellectual discourse (theology, philosophy, legal and homiletic essays) and religious affiliations.

The Book

Our study looks at two aspects of the concept of halakhah as the ‘Word of God’—the question of legal reasoning and the problem of knowing and remembering. The book is structured around these two foci.

The first section deals with several topics fundamental to halakhic legal reasoning. It traces the various meanings of judicial error and describes efforts to provide definitive categories that encompass the conceptual complexity of error and toleration. Analysis of the different ways of coping with uncertainty and confusion, within the domain of authorized ‘right answers’, yields a variety of responses corresponding to the different jurisprudential worldviews. Likewise, the studies in this section cover various aspects of the use of judicial discretion and legal reasoning in adjudication. Relations between legal and extra-legal resolutions test the limits of the law and justiciability in relation to the court’s self-interests and legitimacy. Additionally, the connections between legal theory and legal reasoning, as well as the conditions for using legal analogy, are thoroughly examined.

The second section deals with reflections on the problem of knowing and remembering the divine law. Our discussion demonstrates the interconnection between knowing and the formulations of known content.

Typical for the pre-print era, the challenges of knowing are formulated through the problem of memory. Our analysis shows that besides the actual mnemotechnical challenge, on the reflective level memory in ancient Jewish and Christian circles was treated as a theological problem.

Our analysis of the theological aspects of memory draws the reader’s attention to trends and approaches to memory as a theological theme. As such, the theology of memory illustrates the powerful perceptions of covenantal memory, across different religious and cultural contexts, and its deep connections to social outlook and political ideology. It demonstrates the intellectual continuity between the Sages of the Talmud and the *Hekhalot* literature in stressing the heteronomous character of memory. And finally, it allows for a theory of knowledge as an historical account of the halakhic canonical literature, by the late Geonim—R. Sa’adyah and R. Sherira.

with the *usul al-fiqh* literature. Conversely, the Karaites, who were officially liberated from tradition, didn’t hide their enthusiastic identification with the methods and concepts of the Islamic *usul al-fiqh*.

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Abbreviations

BJS	Brown Judaic Studies
IPTS	Islamic Philosophy, Theology and Science
NBS	Numen Book Series, Studies in the History of Religions
SJLA	Studies in Judaism in Late Antiquity
SSJP	SUNY Series in Jewish Philosophy
SSMES	SUNY Series in Middle Eastern Studies
TDOT	Theological Dictionary of the Old Testament
SVT	Supplements to Vetus Testamentum

Part I
Legal Reasoning

Chapter 1

Halakhic Comparative Jurisprudence

... to the historian of religion, chasing origins is of doubtful value because locating a 'source' tells us next to nothing... Rather than asking: Where did it come from? It is more fruitful to ask: What is it about this question that fascinated? And one might also ask: What aspects ... made this an interesting question?

Kevin Reinhart (1995, p. 10)

Abstract This chapter lays the theoretical ground for our comparative perspective by describing the history and jurisprudence of the Jewish Law. It addresses the problem of comparability in legal history in light of modern comparative theories and methodologies. The test-case in this theoretical prolegomenon is the tendency of legal historiographers and religious scholars to study Jewish halakhah and Islamic Shari'a comparatively.

Comparative studies of cultures, religions or praxis involve much more than applying a method. They are not just about confronting similarities and underlining differences. Behind such projects is the belief that a comparative perspective would provide both a better understanding of the compared systems and contribute knowledge that would not otherwise be attained. Nevertheless, the nature of the 'additional knowledge,' and the extent to which such knowledge is a unique outcome of the comparative study, are still to be explained. Furthermore, comparative projects also run the risk of being held hostage to biased paradigms, simplistic preconceptions, preoccupations with self-understanding and even unconscious commitments to a political agenda. A comparativist should be alert to hidden traps along the way and anticipate stumbling across them throughout her study.

A comparativist should also be simultaneously mindful of both the inducements of the project and the comparability¹ of the subject matters. In the context of comparing legal systems, those problems commence with two inquiries: (1) what cu-

¹ We distinguish between 'comparability' and 'commensurability.' While commensurability, as used by legal economists and choice theorists, denotes the proposition that all options or choices can be compared by reference to an external ranking scale, comparability is gained due to an

riosity and premises are motivating the comparison; and (2) what type of justifications, preconditions, constraints and limitations apply to such a comparison? *A fortiori*, if we accept the conventional jurisprudential assumption that the law, as a unique social-political phenomenon, has universal characteristics, then comparing legal systems, either diachronically or synchronically, is like comparing fruits.² Our below discussions will address these questions by referring to various topics in which the jurisprudential thought of Jewish, Islamic and Christian legal traditions correspond. Our comparisons of the halakhic thought will vary from Christian to Islamic legal thought according to the issues under discussion. Nevertheless, the proceeding methodological comments refer to Jewish-Islamic comparison only. The same analysis, more or less, is applicable also to Jewish-Christian comparisons.

1.1 The Comparability of Jewish-Islamic Jurisprudence

The comparison of Jewish and Islamic legal traditions has attracted scholars since the very early stages of Oriental studies in Western academies.³ The Jewish-Islamic comparative perspective has also played a major role in various areas of Islamic studies and consequently shaped the leading scholarly paradigms. Nevertheless, only recently have scholars begun to demonstrate sensitivity to the methodologies of these comparative studies.

The intellectual motives that have typically guided such comparative projects can be classified into three distinct categories. The first seeks to discover or locate influences; the order of influence, or other consequential exchanges such as the borrowings or adoptions of ideas between the two legal systems. Underlying the exploration of influences, however, are often aspirations to claim originality or to demonstrate how later ideas and praxis were derived from earlier sources. Such a comparative approach, even when undertaken *bona fide*, is not free of suspicion concerning its objectivity, viz, that it serves agendas that celebrate the originality and thus the superiority of the source over its descendants. In the case of Islamic studies, such a conception has often been adopted by those who view of the formative period of Islam as best understood by reference to Jewish, Christian and other environmental influences upon the Prophet Muhammad and his believers.⁴ Such a conception is explicitly evident in the work that is considered the cornerstone of modern Oriental scholarship—A. Geiger's (1810–1874) *Was hat Mohammed aus dem Judenthume aufgenommen?* This pioneering study, and many others like it,

isomorphous relation between the two systems with no reference to an external scaling procedure. See Schroeder (2002).

² Contrary to the popular adage, apples and oranges are in fact comparable. While apples and spaceships, for example, or apples and liberal values, are much more distinct and thus much less comparable, there is a lot of sense in comparing the two fruits in terms of their price, sweetness, color, weight, nutritional value and so on. On the necessity to presume the existence of 'universals' for a comparative project, see Jensen (2001).

³ Sa'id (1978), Kramer (1999, pp. 1–48).

⁴ Crone and Cook (1977).

illustrates the prevalence of the vocabulary of ‘influence’ and ‘borrowing’ in supporting political and ideological efforts to reinvent the image of Jews and their civic conditions in modern Europe.⁵ However, tracing the influences of the Jewish legal tradition on the Islamic one is not always asymmetrical. Alongside the efforts to situate Islam as a daughter-religion⁶ against the Judeo-Christian backdrop, many studies concerning early medieval rabbinic literature are motivated by a desire to demonstrate the considerable impact of Islamic law and legal thinking on Jewish legal literature, either rabbinic or Karaite, of that period.⁷ Generally speaking, the ideological motives for exploring influences and for seeking original sources were obviously related to the nineteenth century philological *zeitgeist*, the diachronic focus on historical developments and the endeavor to reconstruct the ‘original’, either the text or the author’s intention.⁸

A second motive is related to the nostalgic image of the scholastic environment in which Jewish thinkers and jurists jointly collaborated with their Islamic counterparts. Inspired by the historical image of the ‘Golden Age’ in which medieval Jewish learning centers in Iraq, Iran, the Maghreb and Andalusia were highly respected and coexisted peacefully under Islamic regimes, the aim of such a perspective is to reaffirm such dignified historical realities and perhaps even encourage similar visions in the present time.⁹ Pastoral accounts of this type are very common in descriptions of medieval philosophy and mysticism, in which those subjects are portrayed as identity-blinded disciplines with the capacity to transcend divisive elements and religious borders. Affected by the spirit of the European Enlightenment, these disciplines were taken as a common foundation for universal reflections of a higher order and as a means to bridge the particularities of each religion. The extent to which such collaborations truly took place, or rather have been projected by modern scholars, should be examined in relation to each case independently. Against this background, the discussion below indicates that collaborative milieus shared legal, as well as theologico-legal perceptions. As we shall see, alongside the kindred theological principles underlying both legal systems, Jewish and Islamic jurists often felt they were participating in the very same projects. Hence, the distinctive positive contents of the two legal systems did not stop them from developing unified conceptual language and similar self-understanding. However, this perspective implicitly presumes a political vision as well. By highlighting images of collaboration and shared knowledge, the relatedness and common ground between both communities are stressed by ignoring the hierarchical relations as an essential component.¹⁰

⁵ Hughes (2005), Heschel (2001), Pregill (2007).

⁶ Idinopulos (2006).

⁷ Goitein (1980), Kraemer (1996) Libson observes opposite directions of influence in the formative period of Islam from the tenth century on, see Libson (1989).

⁸ The philological method illustrates ‘external epistemology’ according to which the validity of textual content is determined with reference to the history of the text’s transmission and the reconstruction of its originality.

⁹ Hughes (2007), Cohen (2008).

¹⁰ Wasserstrom (1995) contrasts the notion of ‘cultural borrowing’ with that of ‘creative symbiosis’ and advocates the latter. Lazarus-Yafeh (1992) takes on a similar comparative project though

Contrary to the previous motives, the third aim is to increase sensitivity towards essential differences within the compared legal systems and to underline the peculiarities of each. As such, comparison serves as a methodological tool by which particular features of each legal system are revealed. The comparative perspective makes it easier to observe latent and marginal features. A better understanding of both legal systems is achievable through a conceptual analysis of their notions, institutions and practical solutions. While the previous motives focused on the common ground between the two systems, the current comparative perspective, sometimes described as ‘new comparativism’,¹¹ seeks to develop self-understanding and to increase awareness of their essential variations. Such a perspective is indifferent as to whether an actual encounter between the traditions occurred. The comparative method is likely to be an imaginary set-up by which a certain legal system is more clearly reflected. In that respect a comparative perspective might be evaluated as a kind of thought experiment.

In fact, referring to actual encounters and common ground is entirely justified when addressing medieval Jewish and Islamic jurisprudential thought. Moreover, since actual interactions between Jews and Muslims took place on various stages, both deliberately and unconsciously, it would be wrong to avoid descriptions of influence or borrowing. Even a strong commitment to a critical postcolonial approach should not *a priori* avoid the vocabulary of influence. Such a restriction would artificially limit the investigational scope and thus be unjustified.

Against the above approaches, our following analysis will refer to jurisprudential consciousness as the object of our comparative study and as its source of justification (henceforth: comparative jurisprudence). We will concentrate on the conscious ideas, principles, concepts, beliefs and reasoning that underlie the legal institutions and doctrines. More precisely, we will examine the jurists’ self-understanding and the ways it reflects the relationship between Jewish and Islamic legal systems.¹²

The comparative jurisprudence approach not only favors jurisprudence as an appropriate lens for comparing legal systems, but also defines jurisprudence with a focus on consciousness—i.e. on the agent’s internal point of view. In contrast with the common conceptions of law, by either naturalists or positivists, it proposes to consider the perceptions of the law as relevant factors. In terms of historical observations of Jewish and Islamic legal traditions, the organizing questions would go

rejects the aversion of the language of borrowing. Other attractive and meaningful metaphors are of ‘confluence of rivers’—Stetkevych (1973); ‘crosspollination’—Goodman (1999), or ‘whirlpool effect’—Stroumsa (2009).

¹¹ Luther (1996), Paden (1996), Hewitt (1996), Lawson (1996), Segal (2005).

¹² This approach is manifested in Ewald’s ‘comparative law as comparative jurisprudence’ thesis. Accordingly, a comparative study of legal systems should not focus merely on contextual data, nor on textual similarities and dissimilarities, but rather on the conceptual self-understanding of the participants in legal theory and praxis. This thesis suggests viewing jurisprudence as the pivotal mean by which an accurate understanding of foreign legal system is to be achieved. The object of legal comparative studies therefore is neither the ‘law in books’ nor the ‘law in action’, but rather the ‘law in the minds’—the consciousness of the jurists’ in particular legal reality, see Ewald (1995a, b).

beyond influences or borrowing to inquire how the jurists, judges or law-makers understood their engagements with the corresponding legal system.¹³

1.1.1 *What Justifies the Comparison of Jewish and Islamic Legal Systems?*

Many of the comparative studies of Jewish-Islamic legal traditions are largely led by curiosity about influences and borrowings, and are not necessarily troubled by wider questions of comparability. In fact, the comparison of Jewish and Islamic legal systems can be justified on various grounds—historical and jurisprudential on the one hand, and perceptual on the other hand.

Historically, the existence of medieval Jewry under Islamic political and cultural domination provided cultural and intellectual encounters and interactions of scholars of both milieus.¹⁴ The sharing of a common language, cultural codes and habits naturally served as a vehicle for exchanges of legal doctrines, institutions and perceptions. In that respect, a comparison of both legal systems is anticipated on factual grounds and part of the effort to explore past realities. From a jurisprudential point of view, the comparability of Jewish and Islamic legal systems is justifiable because of similar theological and structural apparatuses. In a way, both legal systems are committed to ‘religious legalism.’ In contrast with antinomian religiosity, often ascribed to the theology of St. Paul, both Jewish and Islamic mainstreams are nomocentric religions, i.e. law-basedness religions that acknowledge the subordination to the law as the most meaningful expressions of religious life.¹⁵ Hence in both,

¹³ ‘For a legal system to be comparable it must fulfill a dialectic relation—it must be simultaneously unified and plural.’ (Valcke 2004, p. 721).

¹⁴ A description of Jewish attendance in Muslim intellectual assemblies—*majlis*—is reported by one of the visitors: ‘At the first meeting there were present not only people of various (Islamic) sects, but also unbelievers, Magians, materialists, atheists, Jews and Christians, in short, unbelievers of all kinds. Each group had its own leader, whose task it was to defend its views, and every time one of the leaders entered the room, his followers rose to their feet and remained standing until he took his seat. In the meanwhile, the hall had become overcrowded with people. One of the unbelievers rose and said to the assembly: we are meeting here for a discussion. Its conditions are known to all. You, Muslims, are not allowed to argue from your books and prophetic traditions since we deny both. Everybody, therefore, has to limit himself to rational arguments. The whole assembly applauded these words. So you can imagine... that after these words I decided to withdraw. They proposed to me that I should attend another meeting in a different hall, but I found the same calamity there.’ (*The book of the beliefs and convictions* 1970).

¹⁵ Obviously, it is associated with common identification of the Law with the ‘Word of God’, the image of God as legislator and the metaphor of the law as the ‘right path.’ The metaphor of the law as the ‘right path’ is well illustrated in the Hebrew term *halakhah* (הלכה) derives from the root of motion (ha.la.kh, lit. went). *Halakhah* thus captures the idea of a path and walking after the king or leader implies loyalty and the walking by statutes or laws seems to be a particularly Hebrew appropriation of the metaphor. See Abush (1987), Helfmeyer (1979, pp. 391–2). Likewise the Arabic term *Shari’a* which means ‘path’ or ‘way’ to go within. However, for various trends in the Jewish Law tradition *Halakah* is not necessarily associated with social order, but rather with morality or

theology was essentially intertwined in legal theory.¹⁶ Consequently, the implementation of the divine/earthly distinction within a legal system, according to which the law as the articulation of divine imperatives is also subject to human manipulation, invited a dualist conceptualization of the law. Therefore, both systems are structured in various dualistic fashions, either as a dual stratum (vertical dualism) or as a bipolar scheme (horizontal dualism), which provides coherent meaning to the seemingly oxymoronic idea of ‘divine law subject to human reasoning.’

Against the historical and jurisprudential understandings for comparing Jewish and Islamic laws, their comparability could also be reasoned in reference to the self-understanding of the jurists who acted within these legal systems. Indeed, throughout the ninth to the twelfth centuries, Jewish jurists were largely inspired by Islamic jurists, their literature, doctrines and institutions. The extent to which this inspiration was acknowledged or covered by their rhetoric is an interesting question that has much to do with the aim of presenting the Jewish legal legacy as ancient and purely transmitted. But even when the analogies to Islamic law are not emphasized, the Jewish references to a similar legal vocabulary indicate the acknowledgment in a comparative perspective. Therefore, the comparability of Jewish and Islamic law systems also rests on the comparative consciousness of the Jewish jurists when they reflected on their own system.

All this indicates that the examined jurists not only were well-acquainted with the adjacent jurisprudential language and literature, but also represent a comparative consciousness, i.e. awareness of the comparability of those legal systems. Accordingly, the comparison of Halakhic thought and other legal theories from an etic perspective is justified by the comparative consciousness at the emic level.¹⁷ Additionally, our analysis will demonstrate how the modes which a jurist uses to view a legal system as comparable and comparison as a cognitive procedure are crucial to understanding his perspective. To comprehend better the nature of the comparative consciousness we suggest the distinction between two comparative attitudes—‘substantiating comparison’ and ‘incorporating comparison.’ The first views comparison as a means to confirm the uniqueness of the compared object by underlining the differences between the objects. Thus, the aim of comparison is to reveal the peculiar aspects of the compared objects. Conversely, incorporating

spiritual achievements. In fact, treating *Halakhah* and *Shari'a* as legal systems is already a reductionist projection of alien notions. See Kozlowsky (1989).

¹⁶ Although Islamic scholasticism used to distinguish between the two reflective disciplines—*usul al-din* (i.e. theoretical theology, lit. the roots of the faith/religion) and *usul al-fiqh* (i.e. legal theory, lit. the roots of the law)—theological presumptions are indispensably considered within the jurisprudential discussions. On its parallels in the western legal traditions, see Evans (2002, pp. 1–5, 27–46).

¹⁷ The etic/emic distinction suggests two perspectives in the study of a society’s cultural systems, parallel to the two perspectives used in linguistics studies. Accordingly, the emic perspective focuses on the intrinsic cultural distinctions that are meaningful to the members of a given society. Thus, the native members of a culture are the sole judges of the validity of an emic description, just as the native speakers of a language are the sole judges of the accuracy of a phonemic identification. The etic perspective relies upon the extrinsic concepts and categories that have meaning for scientific observers.

comparison is taken as a tool to establish or to expose cross-references between the compared objects.

These distinctive attitudes can be demonstrated through two different accounts on the hybrid background of the Halakhic literature. Those accounts are provided by two inspiring Jewish thinkers who lived in two distinct historical and cultural contexts—the medieval Spanish writer Moses Ibn Ezra (1055–1140) and the modern Zionist poet Hayim Nachman Bialik (1873–1934).

H. N. Bialik, committed to a strong nationalist view, pugnaciously condemns all literary expressions of Jewish thoughts in languages other than Hebrew. In fact, presenting Jewish ideas in languages other than Hebrew is, for him, not only alien to the Jewish *volksgeist*, but rather a betrayal—an act of apostasy that threatens the nation’s very existence. Accordingly, Bialik refers to historical evidence that refutes such linguistic loyalty as rare exceptions. The three counterexamples are: (1) the Alexandrian Jewry, represented by Philo (20 BCE–50), which integrated Second Temple Jewish traditions with Hellenic cultural and intellectual values; (2) the medieval Judeo-Arabic literature; and (3) the modern Jewish Enlightenment, represented by the German Jewish philosopher Moses Mendelssohn (1729–1786), who saw in the political emancipation an invitation for a genuine integration into the European culture. While denouncing the intentional ideal of cultural integration advocated by the Jewish Enlightenment (the *Haskalah*), the cultural hybridity of ancient Jewish Hellenism and medieval Jewish Arabism is described as exceptional and marginal; historical mistakes or mere responses to communicational needs of the masses.¹⁸ Obviously Bialik explicitly embraces the nationalist worldview according to which language and law are not only outcomes of national history but also derivations of its very nature. In that respect, Bialik reflects a Zionist conviction that the two national enterprises—the revival of the Hebrew language and the parallel attempts to revitalize the Halakhic heritage to become a modern state law—manifest the essential nature of the nation. Consequently, Jewish jurisprudence was taken as self-defining project, in which the comparative perspective helped to particularize Jewish law as rooted in the nation’s soul. With such a monothetic approach the compared objects are viewed as elements of a wider holistic framework that stands as the collective identity. Therefore, comparative law is a process of reconfirming national separatist identity and mainly about stressing differences vis-à-vis other national legal systems.

¹⁸ ‘The national betrayal launched not with the weakening of religion and the decline of faith, but rather with the neglect of language: and the (sages) of Alexandria, which left no remnant in the nation, will prove. Thousands of Jews, which apostatized during the middle-ages, they were all, firstly neglectors of the language, and by that they become nationally annihilated . . . The endeavors of medieval authors to write in vernaculars should not be counted. These were only practical attempts by which the sages only meant to elucidate the people their opinions in a spoken language. Their main teachings were written in Hebrew, and (indeed) Arabic as literary expression was an exception. From the time of Ben Menachem (i.e. Moses Mendelssohn) and onwards, the adaptation has been formed as a method, because of the immense thirst for emancipation. The writers wanted to show the world their (human) worth—and so the vast danger had begun’ (Bialik 1917).

In contrast, the medieval courtier Moses ibn Ezra provides a different account of himself and his entourage as conscious assimilators into the Arabic culture. In his view his Jewish identity is absolutely consistent with the hybrid consciousness of Judo-Arabic writers:

... since our monarchy was revoked and our people spread (all over) and the nations inherited us and the sects enslaved us, we followed their patterns, lived their lives, pursued their virtues, spoke their language and tracked them and all their ways. As written: 'But they mingled with the nations and learned their practices.'¹⁹ And later on said: 'so that the holy race has intermingled with the peoples of the lands,'²⁰ apart from matters of law and religion. And because of the exile and the changes of natural climates, the master of necessity has brought us to be like them (פבטול אלמדה).

In an elegant style, Ibn Ezra neutralizes criticism of the Israelites' assimilation among the Canaanites and the intermingling of the exiled Jews with indigenous peoples. Instead he proposes viewing their acculturations as natural and necessary processes (ואכתלאף תבאע אלאקלים סאקנא קאיז אלאצטראר אלי אלתשבה בהם). Therefore we have here two contradicting views as to the medieval jurists' state-of-mind: The modern separatist disapproval of writing in the lingua franca and imitating foreign patterns, and the medieval acknowledgment that deep integration into the vernaculars is unavoidable and hence not viewed negatively. Obviously, as a matter of method, we believe that when trying to comprehend the relation of halakhah to a foreign legal system through its jurisprudence, self-accounts and their state-of-mind should be preferred to later and external interpretations.²¹

Referring back to the theoretical justifications of legal comparisons, we should emphasize another aspect typical to the Halakhic comparative jurisprudence. Comparison as an activity in legal studies proceeds from generalizations and not the other way around. It requires a certain amount of 'idealism,' as there is human intentionality built into the law as social-cultural phenomena. Legal concepts are thus recognizable by humans and as such expressed by language. A sharable legal language presupposes a more or less shared view of the implementation of the law, and entails communicability because of the generality of the concepts. In that respect, Halakhic thought is not only comparable from an etic perspective, but also from an emic perspective. Its comparability is justified and even to be expected, because the actors in these systems saw these systems as comparable, and shaped their legal thought out of this observation.²² The internal point of view, therefore, is not only a methodological tool that enables the comparison with other legal systems, but rather a comparative perspective in its own right. Halakhic comparative jurisprudence is therefore not only plausible, but in fact a necessary starting point for a proper understanding of the history of Halakhic thought.

¹⁹ Ps. 106:35.

²⁰ Ezra. 9:2.

²¹ On the scholarly biases of Jewish historians towards assimilation and essentialism, see Funkenstein (1995).

²² Andrew Jacobs provides a fascinating revisionary perspective on the early Christian hostility to the legal commitment, especially to the Jewish law, see Jacobs (2006).

Chapter 2

Error and Tolerance

Abstract This chapter addresses the conceptual relations between error and tolerance in the context of adjudicating, through crucial moments in the formulation of rabbinic legal thought. It outlines the conceptual approaches to the tolerable-intolerable boundary rooted in Biblical categories, defined differently by the Talmudic sages and further transformed by medieval jurists. While the Talmudic literature offers three articulations of the distinction between tolerable and intolerable judicial error—substantive, conventional and scholastic—post-Talmudic jurists confront the very notion of judicial error and reflect critically on the Talmudic definitions.

Since the concept of error is connoted with epistemology and that of tolerance with political philosophy, the notion of tolerable error in a jurisprudential context inhabits a territory in which two disciplines intersect, to ask under what circumstances judicial errors may be tolerated and on what grounds tolerating certain errors may be justifiable.

The concept of tolerance in modern times is labyrinthine and not easily encapsulated, despite being supposedly necessary to a multi-cultural existence; the same is true when discussing tolerance in pre-modern religious contexts. The study of tolerance may be at its most effective by following not a bivalent structure as much as a sequence, from the affirmable to the tolerable to the intolerable. Generally speaking, these three qualities represent the three possible predicates attributed to all kinds of deeds and beliefs under any theory of tolerance. At one extreme, what is affirmable includes all acts or beliefs which are totally consistent with the set of beliefs of the individual who is tolerant, and hence are fully legitimized by that belief set. At the other extreme, intolerable acts or beliefs are wrongs which one cannot accept and live with. Between the affirmable and the intolerable lie acts and beliefs with which one is prepared to live despite objections.

Two boundaries in this sequence are of great importance to the concept of tolerance and its operation. The first is the boundary between what is affirmable and what is tolerable. To understand this boundary, we must develop a clear sense of what constitutes the distinction between affirmable and tolerable: If each reflects a degree of acceptance, to what extent is this distinction tangible? Will what is tolerable ultimately become affirmable? The second is the tolerable-intolerable boundary, which invites exploration of what constitutes the difference between various opposed wrongs: what is it that allows one to tolerate one wrong but reject another?

Is what differentiates them conventional, contextual, or essential, or does it depend on other perspectives?¹

The following discussion will sketch the historical outlines of the concept of tolerable error within Jewish legal thought and examine this concept against parallel notions in contemporary Islamic jurisprudence which may have affected Jewish thinkers.² This sketch will follow a chronological order, tracing the development of notions of tolerable error as they were perceived by the rabbis. By accounting for the two boundaries of the tolerable discussed above, this discussion aims to illuminate some features of the idea of tolerance in Jewish intellectual history in this period.

The concept of tolerable error in Jewish legal tradition from the Mishnah to the Middle Ages can be traced back to the biblical distinction between inadvertent sin (שגגה) and deliberate sin (זדון). The measure of wrongdoing in this context is therefore dependent on intention, as in the standard assessment of criminal acts: in criminal law, the objective details of an act (*actus reus*) are necessary but not sufficient to judge criminality, and as long as the act is not accompanied by an intention to act wrongly (*mens rea*), some Tolerance of the act is possible. In biblical law, the standard of intention is further expanded to various types of misconduct.³ Thus, one may view the origins of the notion of tolerable error as an expansion of the concept of inadvertence to include cognitive failure as well as behavior.⁴ An expression of this expansion may be seen in the following homily of a tannaitic midrash, which expands the category of inadvertence to include cognitive fallacies:⁵

*And if (they) commit an inadvertent error.*⁶ might one suppose that they are liable solely on account of the inadvertent commission of deed? (Nay) The Scripture says: *that has erred and the matter escapes the notice of the congregation*—They are liable only on

¹ Some writers emphasize that the concept of tolerance in fact rests on skepticism, rationalism or pluralism, see McKinnon (2006). The connection between tolerance and skepticism is also evident in pre-modern and non-western traditions, see Shagrir (1997).

² The distinction between tolerable and intolerable error is rooted in the Roman legal tradition as well. The maxim *error juris nocet, error facit non nocet* (derived from the *Dig. 22.6 De iuris et facti ignorantia*) led to the distinction between ‘error of law’ and ‘error of fact’ which was traditionally perceived to reflect the distinction between inexcusable and excusable errors (hence the canonist maxim *error juris non excusat*). It was suggested by Keedy that the original rationale behind the distinction made in the Justinian’s Digest is based on the Romans’ perceptions of legal norms and their intelligibility. Accordingly, they held that ‘the law is certain and capable of being ascertained, while the construction of facts is difficult for even the most circumspect’ (Keedy 1908, p. 78). The Romans believed ‘that law can and should be fixed, whereas facts tend to be more elusive. Owing to the greater elusiveness of facts, error as to them should be excused more readily so that only supine ignorance or crass negligence should bar excuse’ (Ryu 1957).

³ In fact, the transition from ‘sin’ to ‘error’ is already hinted in biblical verses when describing the inadvertent act in cognitive terms—ignorance of the matter (‘... and that thing was hidden from the eyes of the congregation and they did’, Lev. 4:13) as opposed to knowledge of the sin (‘... and the sin which they committed was known...or his sin was made known to him’, Lev. 4:14).

⁴ Evans (2002, pp. 11–19).

⁵ *SifLev* 4:13.

⁶ Lev. 4:13.

account of something's being hidden along with an act of transgression which is performed inadvertently.

The entire project of the Mishnaic tractate *Horayot*, (הוריות, lit. decisions or rulings) which discusses norms pertaining to judicial errors in rabbinic courts, can be seen as an implementation of the biblical concept of inadvertent sin within rabbinic institutions, an exegetical move that applies the biblical theory of action to the rabbinic theory of adjudication.⁷

In the biblical system, the tolerable-intolerable boundary was thus perceived as a problem of agency determined by a human measure—the actor's state of mind, intention and mental condition—but in rabbinic law from the Talmud onwards, intention as a criterion for tolerable error was not further developed. Instead, there was a trend to seek external means of assessing which errors can be tolerated. In other words, Talmudic articulation of tolerable errors devalues the weight of the wrongdoer's intention and increases reliance on objective standards.⁸

The Talmud contains three different approaches to the phenomenon of tolerable error within the context of adjudication, each expressing a different conceptualization of the tolerable-intolerable boundary. These approaches can be characterized as follows: (1) According to the 'substantive' approach, tolerable error is defined according to the relationship between the *corpus juris*, the core body of the law, and its peripheral aspects. The concept of tolerable error thus reflects a fundamentalist perspective on the law, for which reason every deviation from the fundamentals is considered illegitimate. (2) According to the 'conventional' approach, the tolerable-intolerable boundary is determined by cases involving contravention of laws regarding religious ideas or behaviour that all Jews can reasonably be expected to share. (3) According to the 'scholastic' approach, tolerable error is related to the broad rabbinic project of rearticulating the notion of divine law and identifying it with the teachings of the sages. Of these approaches, the first finds expression in the statements of *tannaim*, mainly in the laws of the Mishnaic tractate *Horayot*, while the other two approaches are to be found first in *amoraic* literature, albeit possibly reflecting earlier conceptions.

The substantive approach to the notion of tolerable error is structured, from the perspective of the law, by a core of norms (in rabbinic terms: the essence of the law—*i'kar hadin*—or its body—*guf hadin*) and its particulars. A court's ignorance or error with regard to essential parts of the *corpus juris* constitutes an excessively serious deviation which cannot be tolerated.⁹

⁷ The characterization of tractate *Horayot* as representing an anti-Sadducee worldview is supported by the last article, which explicitly manifests an anti-priestly ideology—'A priest takes precedence over a Levite, a Levite over an Israelite, an Israelite over a bastard (גמזר) . . . this order of precedence applies only when all these were in other respects equal. If the bastard, however, was a scholar and the high priest an ignoramus (עם הארץ), the learned bastard takes precedence over the ignorant high priest.' (m *Hor.* 3:8).

⁸ If Talmudic thought was shaped in reaction to contemporary Christians, as some have argued, one might associate this with reactions to the promotion of Christian values of inwardness.

⁹ m *Hor.* 1:3.

(If the court ruled that an entire body (of the law) has to be uprooted; if they said, (for example), that (the prohibition against having intercourse with) menstruating woman is not found in the Torah or the (prohibition against labour on) Sabbath is not found in the Torah or (prohibition against) idolatry is not found in the Torah—lo, they are exempt (from bringing sin-offering).

(If, however,) they ruled to nullify a part (of a law) and a part retained, they are liable (and thus should bring sin-offering).

How so?—if they said: (the prohibition against having intercourse with) menstruating woman is indeed in the Torah but he who has sexual relations with a woman awaiting day against day is exempt, (or that prohibition against labor on) Sabbath is in the Torah but he who carries out something from private domain to public domain is exempt, (or that the prohibition against) idolatry occurs in the Torah, but a man who bows down (to an idol) is exempt,—lo, these are liable; for scripture says, ‘and a matter escapes the notice (of the assembly)’¹⁰—‘a matter’, but not the entire body.

The Mishnah, here and later on, articulates the tolerable/intolerable distinction in terms of atonable/non-atonable errors. Any grave error that relates to the essence of the law cannot be atoned, and therefore anyone who commits such a mistake is exempt from bringing a sin-offering, since it would be useless to make such an offering.¹¹ A tolerable error thus encompasses any deviation that does not violate the integrity of the entire law. The more the law is distorted by a court’s erroneous ruling, the less the erroneous ruling is tolerated. If the court’s ruling indeed rejects the essence of the law (or its entire body), the ruling is considered void and thus not subject to tolerance at all. If, on the other hand, the ruling is not in conflict with the essential components of the law but only with its particulars, that erroneous verdict can be tolerated. This conception expresses a deep concern for the integrity of the law,¹² hence the tolerable-intolerable boundary is located at that point where the erroneous ruling is likely to distort the entire law. Conversely, tolerable error extends over the realm of deviations which do not nullify the body of the law.

The conventional approach to tolerable error is expressed by reference to the alleged degree of consensus on some religious matters among Jews, including the notoriously ‘heretic’ Sadducees, in Second Temple times. The defining principle of the tolerable-intolerable boundary according to this approach is therefore ‘a matter which the Sadducees admit’—that is, fundamentally, those undisputed matters

¹⁰ Lev. 4:13.

¹¹ The terminology of this distinction is also widespread in the Talmud’s laws relating to an idolatrous prophet. In this context it serves to emphasize the seriousness of deviation from the essential laws, which is understood as distorting the Torah itself. The metaphor of ‘uprooting a thing’ indicates the fixed and stable nature of the Torah, denial or nullification of which are seen as a distortion of the original Torah.

¹² The conception of ‘Law as Integrity’, as introduced in Ronald Dworkin’s legal theory, states that the law must speak with one voice, so that judges must assume that the law is structured on coherent principles and that in all fresh cases which come before them, judges must apply the same principles. Accordingly, integrity is both a legislative and an adjudicative principle. The legislative principle requires law makers to try to make the laws morally coherent. Law-makers are required assume that these principles were created by, or for, the community as an entity, and that they express the community’s conception, see Dworkin (1986, p. 225).

about which the rabbis had no record of a disagreement between Pharisees and the Sadducees:¹³

Rav Judah said in the name of Samuel: The court is not liable (for the erroneous ruling) only when they ruled concerning a prohibition which the Sadducees do not admit; but if concerning a prohibition which the Sadducees admit, they are exempt.

It follows from this that the tolerable-intolerable boundary does not pertain either to the laws themselves or to the extent to which the Torah, as divine law, is distorted, but rather to the degree of agreement with the Sadducees' legal norms or rulings.

The precise significance of the use of the tag 'a matter which the Sadducees admit' as a standard is obscure. There are at least two possible ways of reading the phrase. If the Sadducees were viewed as holders of erroneous knowledge but still holding to certain elementary norms which corresponded to the law acknowledged by other Jews, these norms would be considered by the rabbis as basic and therefore 'obligatory knowledge', so that whoever errs regarding them could not be tolerated. Alternatively, a 'matter which the Sadducees admit' might indicate norms in a territory of consent between the Sadducees and other groups, such as Pharisees, and these norms might be considered such common knowledge that no-one could ignore or miss them.

The standard of a matter 'which the Sadducees admit' also appears in Talmudic discussion concerned with judicial errors in trials involving death sentences. Among the differences between civic suits (in Talmudic terms, 'monetary laws') and suits involving capital punishments, is a rule which grants procedural privilege to the defendant in capital suits—'monetary suits may be reversed either for acquittal or conviction; capital cases may be reopened for acquittal, but not for conviction'.¹⁴ As opposed to civic cases, the defendant in capital suits enjoys the benefit of an erroneous acquittal. The Talmud, however, limits this *tannaitic* principle according to the same standard:¹⁵

'But not for conviction'. R. Hiyya b. Abba said in R. Johanan's name: proving that he erred in a matter which the Sadducees do not admit. But if he erred in a matter which (even) they admit, (we tell him¹⁶) go back to school and learn it.

How does the admission of the Sadducees about a specific matter mark the tolerable-intolerable boundary? According to the Talmud, this question was already asked by the *tannaim* of the school of R. Ishmael:¹⁷

R. Shesheth replied, and so it was taught by the School of R. Ishmael: Why has it been said of a court that ruled 'a matter which the Sadducees admit', that they are exempt? Because they should have learned and did not learn.

¹³ b *Hor.* 4a.

¹⁴ m *Sanh.* 4:1.

¹⁵ b *Sanh.* 33b.

¹⁶ This addition appears in: b *Hor.* 4a.

¹⁷ b *Hor.* 4b.

Accordingly, basic knowledge, which even the Sadducees admit, is obligatory for any jurist. Lack of such knowledge is intolerable; an unforgivable negligence that cannot be atoned by sin-offering. The tolerable-intolerable boundary here is determined by an *a priori* obligation. Thus the concept of tolerable error stands in relation to the concept of negligence. The rebuke ‘Go back to school and learn it’ is of course semantically close to the admonition ‘because they should have learned and did not learn’. Both identify the boundary of tolerable error with negligence—that is, ignorance of fundamental legal knowledge.

The scholastic approach to tolerable error, like the conventional approach, also appears in the *amoraic* layer of the Talmud and is not found in *tannaitic* statements. The Talmud suggests a distinction between tolerable error, or error regarding judicial discretion (*ta'ut beshiqqul hada'at*; טעות בשקול הדעת), which should not be reversed if it occurs, and error regarding an explicit teaching of the sages (*ta'ut bedavar mishnah*; טעות בדבר משנה), which can be reversed and considered a cause for compensation if damage occurs:¹⁸

R. Shesheth said in R. Assi's name: If he erred in regarding *devar mishnah*, the decision is reversed; if he erred in *shiqqul hada'at*, the decision may not be reversed.

The distinction drawn between these two categories—*devar mishnah*¹⁹ and *shiqqul hada'at*—is rooted in understanding of the authority of the sages and the canonical status granted to their teachings. In fact, this conception abolishes the gap between jurists and legal norms. Contrary to viewing the sages as merely the authorized commentators on the law, this perception presents an idea of self-canonization which provides the sages' teachings with an authoritative status in their own right.²⁰ Accordingly, the sages are not only the mouthpieces of the law or its discoverers, but rather they constitute the law by their teachings and rulings. The casuistic definitions of these categories underline the scholastic perception by which the law is

¹⁸ b *Sanh.* 33a.

¹⁹ The accepted view is that the term *mishnah* (teaching) was introduced following the Destruction of the Second Temple, even before it was applied to a specific corpus which came to be known as the Mishnah of R. Judah the Prince. The literal meaning of this term is evidently related to the activity of repetition; nevertheless, it also indicated the idea of independent authority ascribed to the sages. Compared with the early *midrashic* literary style which presents the laws as an outcome of a correct reading of the scriptures, the *mishnaic* style represents the laws as an inseparable part of the sages and their scholastic activities. The independent authority of the Mishnah was taken as equivalent to the scriptures and might be reflected in the Greek form of the term as used by the Church fathers (δεντεροσις) in the various translations of the verb ה.נ.שׁ, to repeat (δεντεροω), or ‘the Sages taught’ (οι σοφοι δεντεροσιν), and in anonymous Geonic commentary quoted by Nathan ben Jehiel of Rome, *Aruch Completum*: the reason ‘it is called Mishnah, is because it is secondary (שנייה; second) to the Torah ... And it is the Oral Torah; and it is clear that it is secondary to the first thing.’

²⁰ A commentator in fact speaks for the interpreted text and therefore his authoritativeness is derivative and secondary to the authority of the text. The idea of self-canonization implies the view according to which the sages take themselves as firsthand authorities. Therefore the difference between the two perceptions of the sages' authority illustrates the shifting from the text, as source of authority, to the sage, and from interpretation to teaching.

identified with the teachings of the sages. Hence, a deviation from the sages' teachings by a court is intolerable and thus can be reversed and subjected to compensational remedies.²¹ On the other hand, when a judge deviates from those teachings that are not explicitly fixed, but only determined by second order principles,²² this error can be tolerated and his decision must be allowed to stand.

Of these three Talmudic approaches, only the scholastic approach continued to develop in post-Talmudic law. It seems that, for whatever reason, the other two approaches were not deemed useful conceptions of the tolerable-intolerable boundary in later legal thought.

A tradition attributed in a later source to the last head of the Pumbeditan academy, Hai Gaon (939–1038), states that 'every report (שמיעה) of all the scholars is considered *devar mishnah*,'²³ so that knowledge was reckoned to expand beyond the Talmudic material, embracing the entire community of rabbinic scholars.²⁴ This view was not accepted by all. The Provençal Talmudic scholar Zerahiah b. Isaac ha-Levi (1125–1186) recorded his disagreement with an anonymous scholar²⁵ who had argued for the inclusion of the teachings of the Babylonian authorities—the Geonim—within the category of *devar mishnah* as part of the obligatory knowledge in respect of which erring is intolerable:²⁶

And I have heard, in the name of one of the scholars in the previous generation, that in our times no one errs in *shiqqul hada'at*, for all our halakhic rulings are fixed, either in the Talmud or by the post-Talmud scholars. Therefore, in our times, no one errs in *shiqqul hada'at*, but all those who err, err in *devar mishnah*. And I do not think so, but whoever makes an error not clearly conflicting the Mishnah or the Talmud is undoubtedly not erring in *devar*

²¹ 'Ravina asked R. Ashi: Is this also the case if he erred regarding a teaching of R. Hiyya or R. Oshaia? Yes, said he, And even in a dictum of Rab and Samuel? Yes, he answered. Even in a law stated by you and me? He retorted, Are we then reed cutters in the bog? How are we to understand the term: *shiqqul hada'at*?—R. Papa answered: If, for example, two Tannaim (i.e. sages of the Mishnah) or Amoraim (i.e. sages of the Talmud) are in opposition, and it has not been explicitly settled with whom the law rests, but he (the judge) happened to rule according to the opinion of one of them, whilst the general practice; follows the other,—this is a case of (an error) in *shiqqul hada'at*.' (b *Sanh.* 33a). On the status of such second order guiding principles in unresolved disputations see our discussion below.

²² The two examples brought in the Talmud are the spirit of the Talmudic discussion and the widespread habit.

²³ This statement is documented only in later sources and it is probably known only through the testimony of Estori Ha-Parhi (Isaac b. Moses; 1280–1355) who learned about it through his travels in the Orient, see *Kaftor va-Ferah*, Chap. 12, p. 51.

²⁴ The idea of which the general acceptance of a legal corpus makes it obligatory and of a canonical status renounce the notion of *ijma'* (إجماع) in Islamic jurisprudence. *Ijma'* refers to the consensus of the Muslim community. The various schools within Islamic jurisprudence define the consensus differently: Some argued that it refers to the consensus of the first generation or the first three generations of Muslims only; some held that it refers to the consensus of the jurists in the Muslim world in general and some even extend it to include consensus of all the Muslims, scholars and laymen alike.

²⁵ Ta-Shma identifies this scholar with Joseph b. Meir ibn Migash (1077–1141) the head of the yeshiva in Lucena, see Ta-Shma (1992, p. 113).

²⁶ *Sefer ha-Maor*, 80b.

mishnah, but rather erring in *shiqqul hada'at*. ... and what has been ruled by the discretion of the Geonim, subsequent to the sealing of the Talmud, and does not conflict with a clear Talmudic norm, is like a general practice, and whoever errs regarding that, his error is of *shiqqul hada'at* and not of *devar mishnah*.

While the older scholar opposed by Zerahiah apparently suggested viewing the category of *devar mishnah* as including all the rabbinic teachings up to his days, Zerahiah ha-Levi limited the category only to Talmudic teachings. In our terms, the two scholars argued about how to sketch the tolerable-intolerable boundary with regard to post-Talmudic rulings. The former tended to expand the range of intolerable errors, whilst the latter widened the realm of the tolerable.

One move away from the scholastic approach which took place in Geonic legal thought may be related to the development of Islamic jurisprudential ideas and methods, since the new meaning ascribed to tolerable error by these rabbis reflected a wholehearted change in their basic understanding of the concept of law and the act of adjudication. The change arose in the aftermath of the emergence of reasoning-based jurisprudence, that acknowledges and praises the involvement of legal reasoning in interpreting the law and applying it to new cases.

The ideas expressed by Sherira b. Hanina²⁷ about judicial errors were based on the Talmudic typology of tolerable and intolerable errors, but the meaning that he ascribed to these categories reflected a remarkable departure from Talmudic notions and a deep absorption of Islamic legal concepts into Jewish legal thought. In this respect, Sherira's embrace of Islamic jurisprudential concepts completely modified the traditional setting of the law and the meaning of legal reasoning. Consequently, he provides innovative accounts of what the law is, what adjudication is, and what judicial error concerns. Following the conceptual vocabulary of Islamic law, he departs from the scholastic perception of tolerable error and instead favours an objectivist approach which rests on a view of the law as made up of roots and branches. Judicial reasoning, accordingly, is about drawing analogical links between existing laws, 'roots', and new cases, 'branches':²⁸

In one of these two things judges err: either this legal case has a root, (which has) a tradition or ruling, and this judge did not know it has some resemblance (to that root), and (instead he) analogizes it to a different root—by that he errs in *devar mishnah*.

Or else, (when) this case is definitely a branch that has nothing in common with (another root), and that judge analogizes it to a root, which is not similar and has nothing in common—by that he errs in *shiqqul hada'at*.

This account of judicial error ignores the notion of error as a deviation from, or contradiction of, the teachings of the sages: for Sherira, judicial error is a failure to draw correct analogical links. The difference between tolerable and intolerable errors is therefore articulated according to a botanic metaphor and the relations of roots and branches. By viewing judicial error as a fallacy in applying analogical reasoning, Sherira expresses a position that seeks to impose constraints on its use and to limit

²⁷ Born around 900 and died around 1000. He served as the head of the Babylonian academy (*yeshiva*) in Pumbedita, which was relocated to Baghdad towards the end of the ninth century.

²⁸ *Otzar ha-Geonim*, Sanh., pp. 25–26.

the range of legal solutions that may be obtained thereby. Not only does he reject the view of analogical reasoning as a product of a jurist's personal preference, but he also proposes a new approach according to which executing judicial analogy requires substantive correlations between the root and its branches. Such an attitude limits the range of possible outcomes. In fact, Sherira wishes to create a conceptual criterion to distinguish between valid and erroneous analogies.²⁹ Such a perception is best understood as an objectivist approach.³⁰ We can summarize Sherira's position as an endeavour to provide relevant meaning to the Talmudic typology of judicial error in accordance with the Islamic theory of *qiyas*.³¹ Such relevance is possible with an objectivist attitude which allows the peculiar juxtaposition of 'erroneous analogy'.

Now we turn to the other boundary of the framework, that between what can be affirmed and what can only be tolerated. Compared with the tolerable-intolerable distinction, it is more difficult to account for the difference between the affirmable and the tolerable, since it does not reflect a division in principle between the legitimate and the illegitimate: in practice, both the affirmable and the tolerable are accepted, and thus the difference between them tends to be blurred. Indeed, we can sometimes trace the steps by which the distinction between the affirmable and the tolerable has been blurred both in practice and in theory.

Examples of this shift were expressed independently by two dominant Jewish jurists of the twelfth century: Isaac b. Abba Mari (1122–1193) and Moses Maimonides (1135–1204). Both scholars nullify, on different grounds, the Talmudic category of discretionary error (*ta'ut beshiqqul hada'at*), so that what had previously been considered only tolerable was deemed by them to be affirmable.

First, Isaac b. Abba Mari introduced a different perspective on the multiplicity of opinions in the Talmud. Against the perspective of the Talmud, Isaac b. Abba Mari explicitly ignored any second order procedure in deciding between opposing teachings of the sages. To him, multiplicity of teachings, and even opposing teachings, should be a source of legitimization for multiple practices.³²

²⁹ Sherira's insights can be compared to those of Sayf al-din al-Amidi (d. 1233). For Amidi, the resemblance between two analogized cases is anticipated due to its preexistence and not the aftermath the jurist's deliberation. By that, he situates the *qiyas* outside of the sphere of intellectual activity of the jurists; see Weiss (1992, pp. 552–553).

³⁰ It seems that for Sherira 'roots' and 'branches' have slightly different denotations. They do not indicate the principles and their particular derivations, but rather stand for two types of resemblance. A 'root' is a legal norm whose potential similarities, subject to further analogies, are fixed in advance. Therefore, failure to construe the *ab initio* similarities is an intolerable judicial error. A 'branch' is a legal norm whose potential resemblances are not prefixed. An analogy drawn to this norm does not undermine preexisting resemblances and is thus tolerable.

³¹ The Arabic term *qiyas* (قياس) in its legal sense refers to judicial analogy, general deduction or syllogism. At times legal *qiyas* is considered the archetype of all forms of legal argumentation. In particular, it indicates the various types of argumentations that legal scholars use in their independent reasoning. The term probably originated in the ancient Hebrew term *hekesh* (שקיה), based on the Aramaic root *n.k.sh* which means to 'hit together' See also p. 89 below.

³² *Itturei Soferim*, pp. 157–158.

What are (the circumstances of) *shiqqul hada'at* like? If two Amoraim are mutually opposed, and *sugia deshma'ta* (lit. a tradition on that matter), corresponds to the (other) one, it is not (considered) an error for whoever follows the practice of one to do so, and whoever follows the practice of the other to do so.

In fact, Isaac b. Abba Mari does not acknowledge any aspiration to legal unity in the first place, since for him, the open texture of the Talmud is sufficient for full acceptance, and there is therefore no need to have to tolerate what should be fully affirmable.³³

Isaac's contemporary, the great thinker and jurist Moses Maimonides, also tried to eliminate the affirmable-tolerable boundary, though on different grounds. As a typical rationalist in theology and in law, Maimonides, like the Babylonian Geonim, supported the use of legal reasoning. When dealing with the Talmudic typology of judicial error, he displayed much sensitivity with regard to the wide range of possibilities achieved by embracing legal reasoning. His approach on this issue expresses a sophisticated combination of fundamentalism³⁴ on the one hand, and reductionism on the other, hence his interpretation of the Talmudic categories of judicial error:³⁵

First, I will explain that judicial error may occur in one of two things, either with reference to (authoritative) transmitted text, as when he forgot the language or did not learn it, and this is called an error in *devar mishnah*. And the second is when he errs in a thing dependent on analogy: if the thing is possible as he stated, nevertheless the (common) practice contradicts it, and this is called an error in *shiqqul hadaat*.

Maimonides, like Sherira, adopts Islamic legal theory by equating the Talmudic categories to the distinction between revealed law (*al-nass*) and its extension by means of analogy (*qiyas*)³⁶ but, unlike Sherira, at least *prima facie*, he remains loyal to the essence of the Talmudic typology, preserving the notion of judicial error as a departure from an authorized norm. Maimonides' definitions of the circumstances applicable to different sorts of error do not correlate precisely to the scholastic approach to tolerable error, but he maintains the distinction between deviation from a fixed authorized norm and deviation from a norm that is fixed on the base of secondary principles. In this respect, Maimonides can fairly be characterized as a fundamentalist, and his approach as consistent with the Talmudic approach, but in the words immediately following the passage cited above he is revealed as reductionist when he inserts legal reasoning into the category of *ta'ut beshiqqul hada'at*, and, even more, when he historicizes the Talmudic typology:³⁷

(And) this was (relevant) before the editing of the Talmud, but in our times the possibility of this occurring has diminished, for if one issues a ruling, and we find the opposing view in the Talmud, then he errs in *devar mishnah*; and if we do not find the opposing view, and his

³³ Certainly, he held the 'documentation-as-legitimization' approach. See our discussion on p. 30 below.

³⁴ The fundamentalist character of Maimonides was recently emphasized by Stroumsa (2009, pp. 53–85).

³⁵ Maimonides, *Commentary on the Mishnah*. Bekh. 4:4.

³⁶ Maimonides' reference to the juxtaposition of revelational/derivative law with the terms of *nass* and *qiyas* illustrates a high incorporation of the *usul al-fiqh* technical terminology.

³⁷ Maimonides, *Commentary on the Mishnah*. Bekh. 4:4.

inferences seems probable according to the inferences of the divine law, although there are reasons against his ruling it is impossible to determine his error, for his analogy is possible.

In this passage, Maimonides first reduces the distinction between the two errors into modal terms: propositions from the transmitted text are necessary truths, their epistemological status is certain and absolute, thus rendering any deviation impermissible and intolerable, whereas propositions based upon legal reasoning are only possibly true, their epistemological status is probable, and therefore error regarding such statements is not to be reversed. Secondly, by contextualizing the Talmudic typology within a limited historical framework, Maimonides eliminates the possibility of discretionary error (*ta'ut beshiqqul hada'at*) and thus abolishes the possibility of tolerable error in the terms understood in the Talmud.

The canonization of the Talmud is for Maimonides a watershed moment in Jewish legal history,³⁸ a crucial event for the legitimacy of legal reasoning. Accordingly, rulings of post-Talmudic laws by analogical reasoning are not likely to be erroneous because 'it is impossible to determine his error, for his analogy is possible'. This, of course, destroys the Talmudic typology, as only one type of error is deemed possible—that is, a decision against an explicit ruling in the Talmud. This illustrates the Maimonidean fundamentalist-reductionist nexus: limiting the possibility of judicial errors to the Talmudic material in fact elevates the Talmud to the level of revealed law while at the same time also annulling the possibility of judicial errors regarding post-Talmudic cases. This being the case, whereas Sherira stressed restrictions in order to limit the range of possible analogies and ruled out laws based upon erroneous analogies, Maimonides denied the very possibility of post-Talmudic judicial errors by viewing the sealing of the Talmud as the opening moment for nearly unrestricted judicial reasoning.³⁹

In sum, post-Talmudic conceptualizations of tolerable error all continued to define the range of tolerance by external standards, using either a scholastic or a substantive approach. Through new definitions some scholars (such as Sherira) narrowed the realm of tolerable error, while others (such as Zerahia ha-Levi) extended it or even seemed to abolish the tolerable-affirmable boundary altogether, as did Isaac b. Abba Mari and Maimonides. But the most significant change in the history of the concept of tolerable error in the course of this period is the emergence of a reasoning-based jurisprudence that introduced a sharper methodological and conceptual apparatus to rabbinic legal thought.

How did these developments in Judaism relate to notions about tolerable error in Sunni Islam in the same period? A comparison with Islamic writers will reveal both similarities and differences: Some Islamic influence on Jewish thinkers is certain,

³⁸ The jurisprudential significance of historical events is also illustrated by a parallel conception in Sunni legal theory, according to which the 'gates of *ijtihad*' were 'closed' in the tenth century. On the meaning of this phrase, see Hallaq (1984).

³⁹ Maimonides' fundamentalist-reductionist approach is also apparent in his attitude towards the problem of transmission. On that topic he claims that rabbinic law indeed relies on a continuous transmission traced back to Moses at Sinai, however the continuous chain of transmission (*isnad*) had vanished when the Talmud was sealed and therefore post-Talmudic law is no longer based on transmission, see David (2008).

but some central themes in the Islamic texts are not to be found in contemporary rabbinic legal thought. In particular, despite their embrace of reasoning-based jurisprudence, and in contrast to the rabbis, some Islamic teachers aimed to restore intention in an act of error as a reason for toleration.

The idea of rewarded error appears in Islamic theology in association with the centrality of reasoning-based jurisprudence. Within mainly Sunni legal thought, special religious virtue is ascribed to the very process of legal reasoning by a jurist; the scholars' effort towards achieving the right answer—*ijtihad*—is thus appraised independently of the results of these endeavours.⁴⁰ Hence, *ijtihad* is not only viewed as a legitimate method, but also as a religious standard according to which the obedience of the believer is measured. Juristic efforts are therefore respected even when the outcomes are mistaken. The religious value of a mistaken judgment is well-articulated in the famous tradition that states 'He who is mistaken in his personal judgment deserves reward, while he who judges correctly deserves a double reward'.⁴¹ Accordingly, judicial error derived by means of *ijtihad* is not only tolerated in Islamic thought, but it also enjoys a positive reward, since the very quest for the Word of God is a merit by itself. A further expression of this conception can be seen in al-Ghazali's (d. 1111) account of the problem of judicial error in relation to reasoning-based jurisprudence. The idea is exemplified through the case of alms-giving:⁴²

... Everything that depends on an effort of personal interpretation is of this sort. For example, for legal almsgiving the recipient may be poor in the personal judgment of the donor, whereas secretly he is wealthy. This mistake is not sinful because it was based on conjecture. ... In this way the prophet and religious leaders were forced to refer the faithful to personal interpretation, despite the risk of error. The prophet—peace be upon him—said, 'I judge by appearances, it is God who looks after what is hidden.' This means, 'I judge according to general opinion taken from fallible witnesses, though they may be mistaken.' If the prophets themselves were not immune to error in matters of personal judgment, how much more so ourselves?!

Ghazali argues against viewing the instructions of the Imam as the ultimate response to uncertainty in the law. Instead he advocates the *ijtihad* as the preferable method. For him, *ijtihad* explicitly derives from the fundamental nature of legal knowledge as partly revealed. Hence, fallibility is a substantive and essential trait of the divine law itself.⁴³

In this respect, the appearance of the concept of rewarded error signifies a re-emergence of an intentional theory of actions that reestablishes the conceptual proximity between sin and error. Choosing alms-giving as a paradigm for right and wrong judgments is a fine demonstration of the shift from a consequential approach

⁴⁰ Shafi'i: '(It is) that in respect of which God has imposed on His creation the obligation to perform *ijtihad* in order to seek it out. He tests their obedience in regard to *ijtihad* just as He tests their obedience in regard to the other things He has imposed on them.' (*Risala*, § 59).

⁴¹ *Ibid.* §. 1409.

⁴² Al-Ghazali (2006, pp. 85–86).

⁴³ Referring to human fallibility as essential aspect of the divine law and its implications on the concepts of disagreements and diversity, see our discussion below about Elijah ben Abraham (pp. 39–42).

to an intentional one—‘since he is not punished, except in accordance with what he thought.’ Some scholars have claimed that the medieval rabbinic idiom ‘and his divine reward will be doubled’ (ושכרו כפול מאת ה') is an echoing of this concept,⁴⁴ though even if the echo is there, this notion never reached a parallel degree of articulation in rabbinic jurisprudence as it did in Sunni thought.

Distinct from the notion of rewarded error was the implementation of the concept of tolerable error in Sunni Islam to describe the differences between heresy and other wrong behavior or ideas, with the intolerable-tolerable boundary described by Ghazali in terms of primary and secondary issues:⁴⁵

‘My community will divide into over seventy sects; all of them will enter Paradise except the Crypto-infidels...’ As for the maxim, it is that you know that speculative matters (*al-nazariyat*) are of two types. One is connected with the fundamental principles of creed, the other with secondary issues. The fundamental principles are acknowledging the existence of God, the prophethood of his Prophet, and the reality of the Last Day. Everything else is secondary.

Know that there should be no branding any person an unbeliever over any secondary issue whatsoever, as a matter of principle ...

Obviously, the definition of heresy here is highly limited, and in fact leaves deviations from secondary issues subject to tolerance, but a connection between a fundamentalist approach and tolerance is observable. Tolerance is possible due to the reduction of the entire set of creeds and practices to a fixed list of principles. In contrast, and as many commentators have shown,⁴⁶ a fundamentalist construction of Jewish belief is lacking in Jewish intellectual history before Maimonides. In this respect, the development of these ideas within an Islamic intellectual milieu might help to explain the emergence of Maimonides’ views.

Finally, tolerable error was used by Islamic jurists for apologetic purposes as an argument for legitimizing speculative theology, philosophy and scriptural interpretation. By drawing an analogy from adjudication, Ibn Rushd argued that philosophers are judges of reality and as such they deserve at least the same standards that apply in legal judgments, including the concept of tolerable error:⁴⁷

... This is why the Prophet, peace on him, said, ‘If the judge after exerting his mind makes a right decision, he will have a double reward; and if he makes a wrong decision he will (still) have a single reward. ...’ These judges are the scholars, specially chosen by God for (the task of) allegorical interpretation, and this error which is forgivable according to the Law is only such error as proceeds from scholars when they study the difficult matters which the Law obliges them to study.

Interestingly, Ibn Rushd identifies the idea of a reward for an erroneous judgment with the concept of a tolerable error. He sees both concepts as dependent on the privileged status of the scholars, and therefore only errors made by mandated

⁴⁴ Lazarus-Yafeh, note 34 to Al-Ghazali (1965, p. 48).

⁴⁵ Al-Ghazali (2003, p. 112).

⁴⁶ Novak (1988).

⁴⁷ Ibn Rushd (1961, pp. 57–58).

scholars can be tolerated and even rewarded. The view of tolerance as a professional privilege rather than an impersonal matter is a striking one. One cannot escape the impression that this theory was intended to advocate the legitimization of speculative disciplines against an accusation of crossing over the line into heresy, but we can also understand Ibn Rushd's stress on the special status of the scholars on the basis of a connection between mission ('... the scholars, specially chosen by God ... they study the difficult matters which the Law obliges them to study') and tolerance. In this respect, the reason for tolerating an act or judgment derives from balancing the risk of erroneous judgment against a scholar's duty and enthusiasm to study difficult matters. The rationale for the concept of tolerable error and the reason for rewarding some judicial errors is the same: both were intended to acknowledge the missionary aspect of scholarship. Even so, the concept of tolerable error according to Ibn Rushd exposes an elitist perception, according to which non-professionals are excluded from toleration if they err. In a later text, Ibn Rushd combines the idea of tolerance as immunity with the fundamentalist approach seen above:⁴⁸

In general, error about Scripture is of two types: either error which is excused to one who is a qualified student of that matter in which the error occurs (as the skilful doctor is excused if he commits an error in the art of medicine and the skilful judge if he gives an erroneous judgment), but not excused to one who is not qualified in that subject; or error which is not excused to any person whatever, and which is unbelief if it concerns the principles of religion, or heresy if it concerns something subordinate to the principles.... Examples are acknowledgement of God, Blessed and Exalted, of the prophetic missions, and of happiness and misery in the next life.

Alongside the professional status of the jurist or the scholar, the subject matters of their judgments are also essential to determining the extent of the tolerance that will be extended to them. For such elevation of the status of scholars and their activities, the rabbinic texts of the medieval period provide no precise parallel.

To conclude, the history of the concept of judicial error in a legal context reflects the development of legal thought in general. Changing perceptions of legal authority, the organization of the law, the role of knowledge and professionalism and other aspects are all mirrored through changing approaches to the problem of error. As the preceding discussion has shown, the notion of tolerance in the form of tolerable error exists alongside the rabbinic tradition from post-biblical times to the Middle Ages. In that respect the history of tolerable error reveals an inner dynamic in rabbinic jurisprudential history that also sheds light on the history of tolerance in these contexts. This analysis has shown the very limited relevance of intention to the toleration of error after the biblical period, and the extent to which justification of tolerable error rested on ideas very different from justifications for toleration in the modern world.

⁴⁸ *Ibid.*, pp. 58–59.

Chapter 3

Unsettled Disputes

Abstract While the possibility of pluralism in modern legal theory is established on skepticism, toleration and decentralization, halakhic thinkers approach legal diversity from within their scholastic culture, discourse and dialogue. This chapter explores different attitudes towards the problem of unsettled disputes of authorized jurists. It examines three approaches: Talmudic indecisive disposition, Karaite a-traditional outlooks and the struggle of post-Talmudic Rabbinism with the ideal of halakhic uniformity. Each reflects a different evaluation of legal diversity.

The concepts of disagreement, diversity, toleration and pluralism all refer to the experience of multiplicity and heterogeneity in social lives, but while disagreement and diversity describe states,¹ toleration and pluralism denote attitudes and normative values. The analysis in this chapter will treat various accounts of disagreement and diversity and their implementation as they occurred in fact, without necessarily suggesting any normative implication (although accounts of diversity may reasonably be regarded at times as an embryonic phase between the acknowledgment of disagreement as a fact of life and the adoption of toleration or pluralism as a normative worldview.)

The analysis will examine the phenomenon of juristic disagreement from the perspective of the Babylonian Talmud, Karaism and post-Talmudic Rabbinism, attempting to show that in each of these perspectives legal diversity was valued differently, and explaining the differences in this respect between Karaites and Rabbanites and between the Talmud and post-Talmudic rabbis.

3.1 Two Concepts of Diversity

The Talmud, as an interpretative commentary on the Mishnah, differs from the Mishnah in the style in which legal norms are formulated and presented. While the literary genre of the Mishnah resembles a legal code in some respects, the literary style of the Talmud reflects scholarly activity as it actually took place within the

¹ By disagreement we mean the situation in which the disputing parties are aware of each other's different stances, whereas diversity can be observed independently of the consciousness of the disputing parties.

centers of rabbinic learning. These distinct styles are also demonstrated in the manner in which the disputes of the sages and their diversity of opinion on concrete legal norms are embedded in the texts. Whereas the references in the Mishnah to scholarly disagreements may be explicable within the framework of the codifying project of the text,² the Talmud documents disputations without reference to their practical implementation, merely as records of academic discussion. This documentary trait of the Talmud can be seen in the attention that is paid to the narratives of the conduct of disputes and (in general) the absence of such narratives in the style of the Mishnah. Furthermore, against the trend in some of the Mishnah for the law to be presented as definitive and applicable, most of the legal controversies in the Talmud are presented as open-ended discussions with no practical guidelines on their applicability.

Thus there are few expressions in the Talmud of any attempt to provide practical guidelines to deal with cases in which the Talmud acknowledges more than one authorized opinion. Such guidelines as are found appear to have been added in the latest editorial layer of the Babylonian Talmud, appearing only rarely in the text and never in the Palestinian Talmud,³ a fact which in itself illustrates the marginality of any aim to provide instruction on appropriate conduct in the face of disagreement. Nonetheless, such attempts as are found provide evidence for attitudes towards unresolved disputes found within the framework of the Talmud. These attitudes can be classified under three headings: reference to second-order considerations; recourse to extra-legal criteria; and treatment of diversity as a basis for personal liberty.

Sometimes the Talmud decides unresolved cases by reference to second-order considerations which are not directly related to the substantive component of the case in question but rather to general principles or supporting facts. In these narratives, the problem of a multiplicity of authoritative opinions is solved by reference to further standards external to the disputes themselves. One version of this method recommends adopting a restrictive policy whenever such uncertainty regarding the disputed case occurs.⁴ Another version requires preference for the opinions which are widely practiced or which are most often supported in the literary discussions

² Notwithstanding the majoritarian principle, the Mishnah also tends to record the rejected opinions of individuals. The reflection on these occurrences provides an elucidation within the codifying rationale, with reference to two opposing rationales—(1) ‘documentation-as-legitimization’ and (2) ‘documentation-as-elimination’: ‘And why do they record the opinion of the individual against (that of) the majority, whereas the legal ruling may be only according to the opinion of the majority? (This is so) that if a court approves the opinion of the individual, it may rely upon him. R. Judah said: if so, why do they record the opinion of the individual against (that of) the majority when it does not prevail? (It is recorded so) that if one shall say, ‘I have received such a tradition’, another may reply to him ‘Thou hast (but) heard (it) only as the opinion of so-and-so’. (m *Edu.* 1: 5-6).

³ Medieval traditions already identified these formulae as post-Talmudic Babylonian supplements attributed to the saboraim, see Lewin (1937, pp. 11–3).

⁴ Such a statement explicitly appears in a post-Talmudic tractate that reflects earlier traditions and dicta—‘and wherever two tannaim or two amoraim disputed, and we are not certain that the halakha is according to one of them, we follow the stricter view (אזלינן בתר המחמיר).’ (*Masekhet Sofrim* 13:9, p. 245). On the cultural context of its various parts see Blank (1999).

in the Talmud of the topic in question, a method well demonstrated in Talmudic discussion of tolerable error (see Chap. 2, above).⁵

Such second-order considerations can be understood as providing a practical method for dealing with uncertainty about legal norms, although these considerations are conventions within the legal realm, in which acting in accordance with a restrictive policy is a reasonable attitude in undecided situations. Likewise, whatever is general practice or most favored in literary discussions does often indicate roughly which opinion is informally accepted by the wider community.

In other passages the Talmud treats stories of unresolved disagreement as referring to disputes which cannot be decided by any means, and which are thus in fact intended to remain unresolved. Correct conduct in such cases is decided in the Talmud on extra-legal grounds, to emphasize that the equilibrium of the conflicting opinions is to be maintained. In such circumstances, the facts of the cases in question are excluded from the legal procedure, which is determined by extra-legal criteria. Among examples for the application of this method in the Talmud are passages which suggest the superiority of anyone who is more violent or anyone who has possession of a disputed object: ‘Now that it has not been stated what the law is,⁶ (the disputed cloth) is not to be taken away from her if she has already seized them, but if she has not yet seized them they are not to be given to her.’⁷ This method of dealing with disagreement involves evading a decision in favor of one side or the other in the dispute, either in recognition of pre-legal standards to solve conflicts, or in order to maintain the validity of both disputed opinions so as to keep them as live options in future discussions or to protect the court from taking steps that might seem arbitrary and undermine its integrity.⁸

In stark contrast to this are the Talmudic passages which treat unresolved disputes positively, as an opportunity to open the floor to multiple legitimate possibilities. This method is demonstrated in the dictum found as the conclusion of a number of Talmudic discussions, that ‘seeing then that it has not been stated definitely that the law follows either one or the other, if one follows the one he is right and if one follows the other he is right’.⁹ This method is found in two versions, reflecting

⁵ How are we to understand the category of *shiqqul hada'at*?—R. Papa answered: If, for example, two tannaim or amoraim are in opposition, and it has not been explicitly settled with whom the law rests, but he (the judge) happened to rule according to the opinion of one of them, whilst the commonplace practice (סוגיא דעלמא)/the (Talmudic) tradition on that matter (סוגיא דשמעתא) follows the other,—this is a case of (an error) in *shiqqul hada'at*. (b *Sanh.* 33a).

⁶ Lit. neither thus nor thus

⁷ b *Ket.* 63b.

⁸ For more on the various explanations for proposing the ruling ‘the one who is more violent prevails’ see the discussion below chapter 5.

⁹ b *Ber.* 27a; b *Shev.* 48a. A comparison between this ruling and the *ius respondendi* in the Roman Law and its later reduction which allowed the juristic liberty to choose their stance among the earlier answers: ‘The *responsa prudentium* are decisions and opinions of those who are allowed to establish the law. If the decisions of all of them converge on a point, what they thus hold obtains the force of law. If, however, they dissent, it is permitted for the judge to follow whichever decision he wishes. And this is made known by a rescript of *divus* Hadrian.’ (*Inst.* 1.7) A possible comparison of the inter-relations of the two houses and these of the Roman Law schools—the

different attitudes towards the connection between diversity and personal liberty. According to one version, unresolved disputes generate a privilege for a person to deliberately choose either of the conflicting opinions, with no further account or restrictions. The other version imposes restrictions on this privilege and narrows down freedom of choice in such circumstances.

The version according to which conflicting opinions legitimize the plurality of opinions is well reflected in the rabbinic imagination regarding the controversies of the two second Temple rabbinic schools—the houses of Hillel and Shammai. The Mishnah portrays the houses of Hillel and Shammai as agreeing in some respects to accept their differences: the editor of the Mishnah presents a reciprocal tolerance between the houses, best demonstrated in the discussion in *m. Yevamot* 1:4. This standpoint of the Mishnah represents an attitude different from the Talmudic dictum cited above, for the Mishnaic description is not a normative instruction for conducting a case on which the two houses disagree, but rather a description of how both houses in fact bridged their disputes and coexisted despite their different understandings and stances. Below, we will examine the underlying rationale that (according to the Mishnah) allowed the houses to transcend their distinct views. As we have seen, however, other rabbinic sources from late antiquity developed different accounts of the disputes of the houses, emphasizing the prevalence of the house of Hillel, or the expectation that one would follow exclusively the line of one house or the other, as illustrated in the following text from the Tosefta:¹⁰

The law invariably follows the opinion of the house of Hillel, but he who wishes to act according to the ruling of the house of Shammai may do so, and he who wishes to act according to (the ruling) of the house of Hillel may do so.

(He, however, who adopts) the more lenient rulings of the house of Shammai and the more lenient rulings of the house of Hillel is a wicked man, (while of the man who adopts) the restrictions of the house of Shammai and the restrictions of the house of Hillel, Scripture said: ‘But the fool walketh in darkness’.¹¹ A man should rather act either in agreement with the house of Shammai, both in their lenient and their restrictive rulings, or in agreement with the house of Hillel, in both their lenient and their restrictive rulings.

Clearly, the Tosefta presents a different attitude towards the disagreements of the houses: While the Mishnah pays tribute to the manner in which both parties transcended their adherence to allow their coexistence, the Tosefta is troubled by the possibility that such pastoral acceptance might encourage fickle conduct. Thus, the Tosefta condemns inconsistent choices and calls for a limit to the freedom of choice regarding matters on which the houses are in dispute. The importance of consistent choice is explained in the Tosefta in moral terms, as a demand of virtuous conduct. Unrestricted liberty of choice is not to be constrained because of its consequences but because of the bad faith that motivates it. Choices which are not committed to one doctrinal stance reveal the vices of dishonesty and folly; hence the uncom-

Proculian school and the Sabinian school—might shed light on the representations of the legal controversies of late-antiquity and their location in historical and jurisprudential terms. See Leesen (2010), pp. 1–40; Tuori (2004).

¹⁰ *t Edu.* 2:3; *t Suk.* 2:3.

¹¹ *Ecc.* 2:14

mited free chooser is either a fool or a wicked person. In this respect the Tosefta expresses both acknowledgment of legal diversity and a concern that legal diversity may be misused.

A later articulation of the requirement to stay in line with the view of one or other of the parties in dispute is focused not on the immorality of inconsistent choice, but a concern for the doctrinal integrity of each stance:¹²

Whenever you come across two Tannaim and two Amoraim who differ from one another in the manner of the disputes between the house of Shammai and the house of Hillel, a man should not act either in accordance with the lenient ruling of the one master and the lenient ruling of the other master, nor in accordance with the restriction of the one and the restriction of the other, but either in accordance with the lenient and restrictive ruling of the one or in accordance with the lenient and restrictive ruling of the other.

This version in the Babylonian Talmud differs from the earlier Tosefta passage in two aspects: First, freedom of choice is extended to include further juristic disputations as long as they resemble the disputes of the houses, and secondly inconsistency is not only denounced as immoral, but explicitly restricted for the sake of preserving the doctrinal integrity of either party.

To summarize, the text of the Talmud has an essentially documentary character and thus lacks any urge to resolve juristic disputation; as a result, its legal discussions are quite often presented as indecisive. The frequency of scholarly disagreement in the Talmud is disguised, and no attempt is made to stress the resolution of such disagreement. Even the methods discussed above should be understood not as resolutions of disputes, but only as practical advice when faced with differences.¹³ Thus the open-ended nature of Talmudic discussions expresses, if not *ab initio* recognition of legal pluralism, at least *post factum* acknowledgment of diversity.

The disputations of the houses of Shammai and Hillel are central to the Talmudic imagination of diversity, as they illustrate a format of coexistence between groups while in dispute. We shall see that the disputations of the two houses also captured the post-Talmudic imaginations of both Karaites and Rabbanites. So far we have encountered two conceptions of diversity: One, following the Mishnaic description of the houses, views diversity as neutral area, with full freedom to choose one norm or the other when matters are in dispute, while the other treats conflicting opinions as acceptable only as part of comprehensive doctrines, so that freedom of choice between them is regulated. In the post-Talmudic Jewish intellectual world, much legal thought was formulated in reference to these Talmudic ideas about disagreement and diversity, with the two conceptions further articulated in various ways and inspiring different reactions in the accounts of disagreement and diversity given by both Karaites and Rabbanites.

¹² b *Eruv*. 7a.

¹³ The instructional character of these methods is well demonstrated when compared to post-Talmudic diachronic methods regarding unresolved disputations, such as *hilkheta ke-batrai* (הלכתא כבבתראי; lit. the law is according to the later authorities) or *ein halakha ke-talmid befnei rabo* (אין הלכה כתלמיד בפני רבו; lit. the law is never according to the disciple when this conflicts with the rulings of the master).

3.2 Karaites

Post-Talmudic reflections on the notions found in the Talmud display in general an evolutionary process in which the conceptual vocabulary of tolerance is developed. Whether the Talmudic precedents of disagreement and diversity are criticized, embraced or ignored, the reactions towards them produce a clearer framework in which toleration is identifiable. The Jewish intellectual world met two significant challenges in this period: firstly, the internal tensions between Karaites and Rabbanites which affected the shaping of post-Talmudic rabbinic attitudes to tradition, and secondly the issues surrounding Islamic culture, which affected the development of rabbinic legal perceptions of diversity, in particular through the Islamic conception of *ikhtilaf al-fuqaha* (disagreement among the jurists)

According to one *Hadith*, diversity among the Muslim people is a kind of blessing: ‘Diversity (among) my nation is mercy’ (*ikhtilafu ummati rahma*).¹⁴ The concept of *ikhtilaf al-fuqaha* developed from the beginning of theoretical involvement with law in Islamic society during the second half of the eighth century. During the course of the ninth century, the four Sunni legal schools had developed and were shaped as legal communities even beyond the legal realm, as a framework for religious, social and political life. From the tenth century on, as each school began to develop its own legal methodology, the concept was gradually accepted that the four great imams, the founders of the schools,¹⁵ as well as their disciples, had promulgated juridical approaches which were comprehensive, so that all that was left for their successors was the interpretation and application of their teachings. From this arose recognition of the legitimacy of each of the four schools, and the notion that it was permissible for Muslims to be divided among the four. At this stage, ‘knowledge of the divisions’ (*ilm al-ikhtilaf*) served to examine the facts and the reasons for the differences among the various legal opinions and their documentation.

Against this Islamic backdrop, the listing of differences between rabbinic centres (Palestine versus Babylonia and Sura versus Pumbedita), or of the differences between Rabbanites and Karaites, authored during the Middle Ages, appears to mirror the phenomenon of the Islamic *ikhtilaf*. Of particular interest for us is the list of differences between the rabbis in Syria (Palestine) and those in Iraq (Babylonia),¹⁶ and the manner in which this list was used by Karaite scholars.

This unique account, which deals with rabbinic reflections on disagreements within Judaism in the Second Temple period and in later times, lists about fifty

¹⁴ This Hadith is cited in al-Nawawi’s commentary of *Sahih Muslim*, a book on the *waqf* (Al-Nawawi, *Al-Minhaj fi Sharh Sahih Muslim ibn al-Hajjaj*, 91). The authenticity of this Hadith was doubted by several scholars. Asad (1986) argues that the absence of such an idea in medieval Christian writings is not accidental, but connected to the different structures of discipline within the two religious contexts.

¹⁵ Abu Hanifa (699–767), Malk ibn Anas (715–795), al-Shāfi’i (769–820) and ibn Hanibal (d. 855). See Melchert (1997).

¹⁶ Margalioth (1938).

differences between Palestinian and Babylonian customs. We know much more of the uses of this list by Karaites than the background of its authorship. The Karaites, as we shall see, used it to discredit the Rabbanites by presenting their tradition as riddled with contradictions and lacking any inner coherence, but it is possible that it was composed by someone within the rabbinic movement. If so, the motivation of the author is obscure, since some have suggested reading the list as ‘documentation-as-legitimization’ rationale, so that the differences were recorded for information, to approve and respect local custom, while others have suggested a ‘documentation-as-elimination’ rationale¹⁷, in which differences are emphasized to clarify the remoteness of the practices which are not approved.

Whatever the motivation of the original author, most Karaite references to this list express an ambivalent criticism. On the one hand, they condemn the Rabbanites for claiming to depend on a continuous tradition and denying the occurrence of disagreement and diversity, while on the other hand, they also censure the full acceptance of diversity as reflected in the Tosefta and in this list of differences. It appears that there were at least three distinct Karaite reactions to the Tosefta’s description of the relations between the houses and to the notion of *ikhtilaf* as legitimation of diversity.

One of the most prominent Karaite authors, Abu Yusuf Yaqub al-Qirqisani (first half of the tenth century), refers to the list of the differences between the Rabbanites of Palestine and Babylonia within his account on the Jewish sects and Christianity of his time. A close reading of his critical account of rabbinic differences and their attitudes towards earlier disagreements might shed light on how the reality and ideology of diversity were perceived differently by Rabbanites and Karaites. Chapter 10 of Qirqisani’s account is devoted to a critical description of this list. It starts with the following comments:¹⁸

The things in which they differ are about fifty in number. We have no need to mention them all, and we wish only to deal with the more important points which cause the one party to accuse the other of heresy because they differ from each other. For the differences between the two parties is no narrower than that between both of them on the one hand and the Karaites and Annaites on the other. This fact discredits their claim to represent tradition and to derive their practices from the prophets.

Qirqisani assumes that, even if the list was not composed by the Rabbanites, they would not deny it. Thus, his introductory comment includes three attacks based on the meaning of the list of differences from a Rabbanite perspective. Firstly, the Rabbanites’ claim to rely on an unbroken and trustworthy tradition that is traced back to the times of prophets is explicitly refuted, according to Qirqisani, by their acknowledgment of distinct traditions. Secondly, this undeniable difference among the Rabbanites brings into question the sectarian borderlines between them and the Karaites: Since uniformity in legal practices is unobtainable even among the Rabbanites themselves, what then excludes the norms and scholastic opinions of Karaites from acceptance by Rabbanites? (I suspect that we should understand this

¹⁷ Müller (1969) in his introduction hesitates between the different rationales.

¹⁸ Al-Qirqisani (1984, p. 140).

statement not as a call for reconciliation between Rabbanites and Karaites,¹⁹ but rather as a cynical comment ridiculing the self-perception of Rabbanites as superior carriers of original Judaism.) Thirdly, Qirqisani's comment reveals that at least some differences even within rabbinic Judaism were evidently not acceptable to the Rabbanites, and that these differences were rejected by the Rabbanites to the point that they were considered as heresy.

This third mode of attack is interesting because it portrays the Rabbanites as monists to the extent that they might treat diversity as heresy, a reaction which obviously follows the rationale of 'documentation-as-elimination'. It is not clear how far we should trust Qirqisani's report on this matter: It may be that Qirqisani, for polemical purposes, radicalizes the Rabbanite attitude towards diversity and accordingly portrays Rabbanites as much more intolerant than they were in practice, but, as we shall see below, a denial of the legitimacy of disagreement and an association of diversity with heresy did indeed emerge in the thought of at least one rabbi, Judah ha-Levi.

In a later passage, Qirqisani attacks the Rabbanite attitude towards diversity by referring to the Talmudic ethos which upheld the simultaneous legitimacy of the houses:²⁰

Before describing their differences, we will mention what they say about this. (They say) that the house of Hillel and the house of Shammai differ on certain points, some of which the house of Shammai aggravates, while the house of Hillel alleviates, and on others, the house of Shammai alleviates, while the house of Hillel aggravates. The Rabbinates say that... one should follow consistently one of the two doctrines in its aggravations and alleviations. He who inclines in all things towards one of the two parties is praiseworthy. If their infamy were apparent nowhere else, this would be sufficient, since they claim that two different doctrines are both true and that whoever adheres to (either) one of them, pursues the right course.

Qirqisani explicitly associates the Rabbanite lists of differences with the Talmudic image of the practical relations between the houses as narrated in the Tosefta. For him, the main problem in this description is epistemological: It approves a double-truth epistemology, which he deems unacceptable. The endorsement of the two houses in the Tosefta, to the point at which two conflicting stances are both accepted as truths, seems to him totally impossible. Thus Qirqisani accuses the rabbis of over-accepting diversity to an extent which seems to him to oppose the *principium contradictionis*.

Towards the end of this chapter Qirqisani concludes his account by another reference to the different approaches towards differences, but on this occasion he contrasts the Rabbanite approach to that of the Karaites:²¹

This is what I have been encouraged to mention from what I can remember of our differences; the matter is daily growing worse. It may be that some of our co-religionists will

¹⁹ Indeed, the thirteenth-century Jewish scholar Sa'd ibn Mansur ibn Kammuna (d. 1248), in his *Treatise on the Differences Between the Rabbanites and the Karaites*, aims to narrow down the Rabbanite-Karaite gap by listing the differences and arguing that they are only minor.

²⁰ Al-Qirqisani (1984, pp. 140–141).

²¹ Ibid. 156.

blame me for having mentioned them, since some of the Rabbanites may use them to attack us, and use them as a counter-attack to our attack on the differences between the Syrians and the Iraqis.

Trouble yourselves not over this and pay it no attention. For this accusation and the contradiction attaches to them only since they claim that all their teachings come by tradition from the Prophets. If things are so, there should be no disagreement; the fact that disagreement has arisen, is a criticism of what they claim. We on the other hand arrive at knowledge by means of our intellects, and where this is the case, it is undeniable that disagreement will arise.

Here Qirqisani proposes an explanation of different approaches to disagreement and diversity by drawing a correlation between reasoning-based jurisprudence and a multiplicity of opinions. By emphasizing the dichotomy between traditionalism and rationalism he aims to explain the different approaches of Karaites and Rabbanites. From the point-of-view of reasoning-based jurisprudence, legal knowledge is dependent on intellectual capacity and effort—*ijtihad*,²² so that disagreements and different opinions can naturally be expected and hence are more likely to be tolerated. By contrast, tradition-based jurisprudence presumes the independence of legal knowledge, so that disagreements can only result from disruption within the transmission process, a fact officially denied by the Rabbanites' claim to rely on a trustful and continuous tradition.

In sum, Qirqisani's critique of Rabbanite approaches to disagreement and legal diversity is twofold: on the one hand, he condemns full acceptance of diverse opinions, as reflected in the Tosefta's descriptions of the houses and the concept of *ikhtilaf*, for it leads to logical fallacy. On the other hand, he also objects to tradition-based jurisprudence and its disinclination to tolerate disagreement or diversity in any way.²³ It seems that Qirqisani's stance is situated between two extremes—full affirmation of legal diversity, on the one hand, and extensive denial on the other hand—so that disagreement and diversity are anticipated and therefore are to be tolerated but not to be perpetuated. In terms of the conceptual evolution of tolerance, one can identify here an idea according to which toleration might be recognized where disagreements and diverse opinions are anticipated.

In the account of rabbinic approaches to disagreement and diversity by the Karaite author Levi b. Yefet (beginning of eleventh century), the polemical spotlight similarly seems to focus on the differences between Rabbanites and Karaites, but in this case with emphasis on different aspects of these phenomena. Levi, like Qirqisani, considered the Talmudic ethos of tolerance between the houses, identified with the notion of *ikhtilaf*, as typical of the rabbinic approach. Levi also reads the Talmudic descriptions carefully, however, and appreciates the different nuances of the Mishnah and the Tosefta, questioning the Mishnaic account and asking why the two houses kept on marrying each other despite their disagreements and what allowed both parties to rise above their principled disputes, or to suspend their opinions, so that they could coexist.

²² See below Chapter 2, pp. 23–24.

²³ One might understand the twofold criticism as hinting at the distinction between the Talmudic approach (demonstrated in the Tosefta's description) and the traditionalist worldview of post-Talmudic rabbinism.

As we shall see in the passage cited below, Levi, more than Qirqisani, objects to the *ikhtilaf* as a wholehearted acceptance of diversity. *Ikhtilaf* for him is not only epistemologically incorrect but also ethically wrong. Thus Levi views disagreements based on reason with approval, but disapproves of legal diversity. In other words, Levi agrees that where disagreement is anticipated it should be tolerated, but he insists that disagreement is not acceptable as the final stage of the law: a multiplicity of opinions, even if tolerable, reflects helplessness and thus should not be institutionalized or perpetuated.

Levi's analysis derives from his desire to distinguish between the legitimacy of two different contexts in which a multiplicity of opinions is at stake. Levi starts by claiming that the standpoint found in the Tosefta, which mandates the liberty to choose between the houses, should not be regarded as optimal:²⁴

And you should know that the diversity already existed between the two houses, and at that time there was no one to reveal the truth and to eliminate the differences. And these differences were between the house of Shammai and the house of Hillel and lasted long. And it is evident that there was no one (at that time) to eliminate the differences because they permitted every individual to follow whoever he wished, as the two houses made (this possibility) conditional as it is said in the Canaanite Talmud, Berakhot ...

Levi argues that *ikhtilaf* is not to be taken as a satisfying balance between disputing parties, but rather as regrettable, a sign of epistemological weakness. The *ikhtilaf* and the liberty to follow either of the houses are therefore reckoned legitimate only by default, through a failure to cope with uncertainties and decide in favour of the correct opinion. Thus *ikhtilaf* indicates an inability to pursue the truth, and in this respect toleration is not desirable as a value or doctrine in itself.

In a later passage, Levi sharpens the distinction in his treatment of disagreement and of diversity. Along the same lines as his correlation of disagreements with reasoning-based jurisprudence, he objects to *ikhtilaf* because it perpetuates temporary disagreements so that they become permanent:²⁵

However diversity among them was in practice, not as a (theoretical) disagreement of which they can remain fellows, as the matter object on which the two parties disagree does not cause them to divide, and their only interest in disagreement is to reveal the truth through disagreement. And (through) reasoning, and bringing evidence, their connections will eventually expose and remove perplexity as their minds will come closer rather than be divided. And this was not the pattern of the house of Shammai and the house of Hillel, but they strengthened the differences as they told the people—'choose whatever you wish to act in accordance with the law of either of the houses' ...

In this citation two aspects can be seen of the distinction between disagreement and diversity. First, Levi suggests viewing disagreement as part of an epistemological procedure towards the revelation of the truth, so that the legitimacy of different opinions is limited and dependent only on the inquisitorial process and not beyond. *Ikhtilaf* in this respect produces confusion between the legitimacy of disagreement as a means and diversity as a permanent circumstance. Second, disagreement as

²⁴ Levi ben Yefet, *Book of Commandments*, p. 14.

²⁵ *Ibid.* 14.

part of a reasoning-based jurisprudence aims to promote connections rather than to perpetuate distinct understandings and practices.

In sum, Levi shares with Qirqisani criticism of the *ikhtilaf*, both viewing it as a problematic form of resolution in epistemological terms. Levi goes a step further by sharpening the conceptual tension between disagreement and diversity, condemning the latter whilst indicating the advantages of disagreement as an epistemological vehicle. Moreover, in addition to epistemological criticism, Levi brings to the surface the ethical, or perhaps the political, dimensions of the distinction between disagreement and diversity, noting that, in contrast to the unifying character of procedural disagreements, permanent diversity, such as the *ikhtilaf*, acts as a catalyst for processes of social fragmentation.

The attack on the Rabbanites by a third Karaite, Elijah b. Abraham (twelfth century), stressed more than Qirqisani or Levi b. Yefet the difference between Talmudic and post-Talmudic approaches to disagreement and legal diversity. Like his predecessors, Elijah identifies the Talmudic account of the relations between the houses with the later notion of *ikhtilaf*, but he does not share their denunciation of legal diversity as a permanent arrangement. For Elijah, disagreements and diverse opinions are not only anticipated and thus tolerated, but they are reckoned fully legitimate on theological grounds. Hence Elijah's polemic against the Rabbanites focuses on the post-Talmudic approaches which disown legal diversity and which insist on the uniformity of the law. Elijah portrays these approaches as groundless authoritarianism, asserting that the methods used by the Rabbanites to avoid diversity are odd, arbitrary and in contradiction to the style of the Talmud itself.²⁶

... and the Rabbanites themselves narrated the deeds of the priests of the Second Temple and the Palestinian Sages, and (the disagreements) between the School of Shammai and the School of Hillel, between Zadok and Boethus,²⁷ and among the Sages themselves, this one saying thus-and-so, and that one saying otherwise. And since the time of Ashi and Rabina the teachings of the majority have been set up in one setting.

Elijah here outlines a rabbinic narrative according to which legal diversity existed from the Second Temple period until the sealing of the (Babylonian) Talmud, when diversity lapsed and a uniform law was imposed according to the rule of the majority. According to this narrative, the time of Ashi and Rabina, the two final compilers of the Babylonian Talmud, thus represented a shift from an environment of diversity to artificial uniformity which persisted to the present time.

Since the Karaite experience in relation to mainstream rabbinic Judaism shaped their consciousness as an enclave group rejected and repressed by what they perceived as an erring majority, it is unsurprising that they opposed majority rule, but from Elijah's sayings it appears that the rejection of rabbinic notions of the rule of the majority could also rest on the theoretical foundations of a general anti-authoritarian approach. Thus Elijah claimed that scepticism and fallibility are essential

²⁶ Elijah ben Abraham (1860, 101:26–28; 1981, pp. 69–70); Astren (2004, pp. 141–157).

²⁷ The reference here is to the presumed forefathers of the Second Temple sects the Sadducees and Boethusians. On views of the Boethusians through rabbinic eyes see Harari (1995).

traits of any areas of human experience, including religion and the understanding of divine norms, making the strongest case for his anti-authoritarian view in his confession about the fallibility of the Karaite tradition itself:²⁸

To him who says: ‘But look at Anan—how many times he erred concerning the Torah! And the later authorities from amongst you did not rely upon most of what he had said. If they had it by tradition that Anan’s words flowed from those ‘who sigh and groan,’²⁹ why did they not rely on all of his words?’

I would reply: ‘They did indeed rely on his words, and all that the Karaites have on hand they have received from him. But since they realized that they were not prophets and that the Holy Spirit was not with them—which would otherwise have saved them from error in all of their tradition—they did in some things display greater strictness.’

Indeed they said, ‘Presumably Anan and his generation were not sufficiently thorough in their interpretation (of Scripture), so that they fell into error in this or in that (matter).’ Moreover, they said (i.e. acknowledged) that they had forgotten some of their tradition. See, even in the virtuous times of the Israelites they erred as it is said, ‘And if you have erred’³⁰ and they were also uncertain about the commandments as it is said, ‘If there shall arise a matter too hard and doubtful for thee’.³¹

In response to a Rabbanite accusation that even Karaites distrust the tradition that goes back to Anan, Elijah acknowledges the risk of erring in regard to the chain of transmission and the possibility that teachings will fall into oblivion. Moreover, he also suspects that Anan and his generation erred, and he therefore encourages fellow-Karaites in his own time not to take their rulings for granted. This willingness to challenge the superiority of the ancestors, including the forefathers of Karaism, is a commonplace in Karaite writings which stress the fact that respect and commitment to previous scholarship should be limited and always subordinate to a dedication to the correct interpretation of the scriptures.

This advocacy of an appropriate scepticism corresponds to an acknowledgment of fallibility as an essential component in reasoning based on interpretation. In this respect, the Rabbanites are said to create a false impression when they claim to rely on a truthful and authoritative tradition. Likewise, so Elijah claims, rabbinic traditions themselves include counterexamples to an authoritarian approach.³²

In the same manner we see that the disagreements between the house of Shammai and the house of Hillel were caused because their interpretational (efforts) were not sufficient. And on this the Rabbanites said that on the ninth of Adar they decreed a fast day to commemorate the controversies between the house of Shammai and the house of Hillel and they regarded this event as just as grievous as the Affair of the Golden Calf. And if (the authority to decide uncertainties) was effective in the Second Temple, as these boastful (rabbis) claim, why did they not admit the same with reference to (the disagreements) between the views of the House of Shammai and those of the House of Hillel,

²⁸ Elijah ben Abraham (1860, 101:31–38; 1981, p. 70).

²⁹ This attribute is related to the description of the genuine chain of transmission based on the sufferings of the Israelites in Egypt according to Ex. 2: 23–24.

³⁰ Num. 15:22.

³¹ Deut. 17:8.

³² Elijah ben Abraham (1860, 101:38–41; 1981, p. 70).

and also between the sages of Jerusalem and the sages of Babylonia, and hold their peace (forever) after?

And (likewise) why did they not (i.e. the authorised Rabbis) execute Zadok and Boethus, if (they were indeed in power) to impose the ‘four capital punishments’? And why (did the Rabbis) refer to a heavenly voice (to reject the rulings of the house of Shammai in favour of those of the house of Hillel)?

According to Elijah, unresolved disagreements, a lack of executive power, and the reference to a heavenly voice, all serve to contradict the authoritarian view which the Rabbis claim to have held consistently. Thus Elijah not only joins his Karaite predecessors in calling for a toleration of diversity, but he also strikingly affirms legal diversity as a natural feature of scriptural interpretation in general. In other words, Elijah acknowledges the risk of error at any historical stage and with regard to every scholar, and consequently blurs the distinction between tolerating and affirming legal diversity: Diversity is to be welcomed and not to be extinguished by imposition of authority, and the Rabbanites are criticized for denying diversity and ignoring its appearances in the Talmud.

A counter example for the Karaite condemnation of the *ikhtilaf* might have been the *ikhtilaf* of the Masoretic schools, which were themselves indeed Karaite, but here we find diversity among the Karaites accounts. Thus Levi, further on in the discussion mentioned above, draws a distinction between the *ikhtilaf* in legal matters and the *ikhtilaf* in Masoretic issues, whereas Elijah finds no difference between the two areas and uses the Masoretic *ikhtilaf* to illustrate the existence of diversity even regarding the Scriptural text:³³

Further on you should see the differences between western and eastern (schools of Masoretes) on the (text of the) Torah,³⁴ this one says so and that one says so ... and so many traditions, one to the western (school) and one to the eastern (school), and similarly to (the school) of Ben Asher and to (the school) of Ben Naftali ... and many more like these. Now, if diversity appears in written (texts) that are transmitted by the prophets, it is clear *a fortiori* that other matters and doctrines not written by prophets will be corrupted and erroneous ... and it will be plausible for ‘him which is perfect in knowledge’³⁵ to deliver us a Torah that stands on ‘two opinions’³⁶ and two views And the prophet said, ‘Stand ye in the ways’³⁷ for the laws are compared to ways, therefore he said, ‘Behold, I will send my messenger, and he shall prepare the way before me’³⁸ and Jeremiah said, ‘And I will give

³³ Elijah ben Abraham (1860, 101:38–103; 1981, p. 73–74).

³⁴ The reference here is to the list of differences between these two schools edited in the eleventh century by Mishael ben Uzziel titled *Sefer ha-Hillufim* (1965). It includes 867 cases of disagreement and 406 cases of agreement among these schools against other schools of Masoretes.

³⁵ This adjective of God is based on the verse in Job. 37:16.

³⁶ Based on Elijah’s criticism of the syncretism of worshiping to God and the Baal together—‘And Elijah came unto all the people, and said, How long halt ye between two opinions? if the LORD be God, follow him: but if Baal, then follow him. And the people answered him not a word’ (1 kgs. 18:21). Our author therefore completely changes the original meaning of the phrase and advocates the coexistence of two contradicting practices.

³⁷ Jer. 6: 16.

³⁸ Mal. 3:1.

them one heart, and one way'³⁹ to teach us that only those who will raise at the end of our exiles will bring our salvation, but you should not trust us.

Elijah's enthusiasm for accepting diversity reaches the point where he provides theological grounds for it. In the homiletic fashion seen in the passage above, he suggests viewing diversity not only as an outcome of jurisprudence based on reason but also as entailed by the very notion of the divine law as a way or path.⁴⁰ By emphasizing the image of the law as a 'way', he encourages further acceptance of disagreement and a multiplicity of opinions.

Elijah thus advocated that striving for legal uniformity, which he describes as a utopian ideal to be achieved only by the *eschaton*, should be relinquished. In this respect, he represents a highly realistic approach which could be characterized as the nearest to a modern concept of toleration based in scepticism and an acknowledgement of fallibility as an essential aspect of human existence.

In sum, the distance between Talmudic and post-Talmudic attitudes towards disagreement and diversity was well observed in Karaite criticism of rabbinic approaches. Qirqisani and Levi found the notion of *ikhtilaf* to be not only in contradiction to the rabbinic façade of a uniform tradition, but also troubling both epistemologically and ethically, whereas Elijah embraced the *ikhtilaf* and called for a continuation of the Talmudic style of full acceptance of legal diversity. Added to this, and an important lesson for the history of toleration, is the manner in which tolerance was acknowledged as *ex post facto* meritorious. The recognition of a correlation between jurisprudence based on reason and disagreement and diversity strengthened toleration of different opinions and understanding as a natural outcome of rationalism.

3.3 Post-Talmudic Rabbis

Emphasis on a uniform picture of the halakhah was a common denominator of much post-Talmudic rabbinic Judaism, but the sources of this inclination towards uniformity varied between individuals. Authoritarianism was a central theme for post-Talmudic rabbis, but they did not share a single concept of halakhic authority, and opposition to legal diversity among these rabbis was based on two completely different theoretical perceptions. One stance rejected legal diversity both as a description of rabbinic Judaism and as a normative aim, while the other acknowledged the preconditions of diversity but justified the need to struggle with these reasons for diversity and to overcome them. To a large extent, the continuum of reasoning leading to disagreement, then diversity, then toleration, also stands in the background of these perceptions.

³⁹ Jer. 2: 39.

⁴⁰ See chapter one, n. 15.

The monumental work of Judah ha-Levi (1075–1141), *Sefer haKuzari*, was intended, in its earliest version, as an anti-Karaite work,⁴¹ and was eventually promulgated as a theological manifesto for rabbinic Judaism. Ha-Levi's confrontation with Karaite thought emphasized the tension between rationalism and traditionalism, as formulated by the dichotomy between *taqlid* and *ijtihad*.⁴² For ha-Levi this dichotomy reflected the theological division between rabbinic Judaism, which is highly committed to the *taqlid*, and all other religions and religious approaches. Thus he identified the Rabbanite-Karaite division with the *taqlid*—*ijtihad* dichotomy⁴³ and consequently rejected reasoning-based jurisprudence and any sceptical point of departure in religious life.

As we see in the passage below, against the well-known parable of jurists or believers as wanderers in the wilderness,⁴⁴ ha-Levi offered a counter-image of the blind disciples who have the benefit of peaceful minds, as they sleep blissfully on their couches in a walled city. Hence, in his view, even resourcefulness is not of any special value, nor is laziness seen as something to be condemned. The existential conditions of a believer are calmness and felicity of the soul, rather than scepticism and fear:⁴⁵

The Rabbi: 'This (i.e., the zealous efforts of the Karaites), as I have already told thee, belongs in the province of speculative theory. Those who speculate on the ways of glorifying God for the purpose of His worship, are much more zealous than those who practise the service of God exactly as it is commanded. The latter are at ease with their tradition, and their soul is calm like one who lives in a town, and they fear not any hostile opposition. The former, however, is like a straggler in the desert, who does not know what may happen. He must provide himself with arms and prepare for battle like one expert in warfare. Be not, therefore, astonished to see them so energetic, and do not lose courage if thou seest the followers of tradition, I mean the Rabbanites, falter. The former look for a fortress where

⁴¹ Lobel (2000), pp. 59–68.

⁴² The term *taqlid* (تقليد) is used in legal and theological contexts to denote imitation, blind obedience to the decisions of religious authorities, and adherence to one of the traditional schools. It is commonly contrasted with *ijtihad* (اجتهاد), a personal effort, which in legal contexts signifies independent reasoning as a source of validation. The tension between *taqlid* and *ijtihad* reflects the meta-legal perplexity in the Islamic legal world before Shafi'i and was one of the disputed issues between Shiite and Sunni jurisprudence.

⁴³ This identification was also claimed by Karaites who denounced rabbinic attachment to tradition. In this respect, it is plausible to view ha-Levi's theological project as an initial apologetic that was eventually internalized and then idealized.

⁴⁴ The example commonly brought to justify legal *ijtihad* as well as the multiplicity of opinions among jurists is the dilemma of finding the direction of prayer—the *qiblah*—for believers who cannot visually locate Mecca. While the obligation of facing Mecca applies to every Muslim believer with no temporal or spatial limitations, performing this duty might involve certain practical difficulties when Mecca is beyond the believer's sight. In that case, the worshipper must make a special effort (*ijtihad*) and use his own judgmental faculties in order to determine the correct direction. This metaphor concretizes the idea that, since the objective law is not always known to the believers, the place at which certainty ends is the point of departure for the personal independent reasoning. The image of the believers walking in the desert is associated with the image of the theologian as warrior defending religion and truth.

⁴⁵ Judah Ha-Levi, *Al-Kitab al-Khazari*, 3:37.

they can entrench themselves, whilst the latter lie down on their couches in a place well fortified of old.’

Heavily inspired by Neo-Platonic ideals of harmony and unity, ha-Levi adopted a radical anthropology of the nature of a believer. Clearly his anthropological description was a fantasy incompatible with the empirical perceptions of real rabbis, but the interesting development in ha-Levi’s reflections was the manner in which he transformed Neo-Platonic ideals into a jurisprudence of uniformity. As a result, he denied the validity of some features which belong in any legal system.⁴⁶

Al Khazari: ‘All thou sayest is convincing, because the Law enjoins that there shall be *One Law and One Ordinance*.⁴⁷ Should Karaite methods prevail there would be as many different codes as opinions. Not one individual would remain constant to one code. For every day he forms new opinions, increases his knowledge, or meets with someone who refutes him with some argument and converts him to his views.’

In these words, ha-Levi implicitly portrays rabbinic law (in contrast to Karaite law) as a sort of divine law lacking some essential aspects of any human law; he implies that rabbinic law cannot be fully comprehended or extended or changed. Moreover, since multiplicity and mutability are taken as deficiencies of the Karaites, inconsistency and diversity are also denied in relation to rabbinic law. Ha-Levi’s objection to the notion that rabbinic law is fully intelligible coheres well with ideals of harmony and stability. Calmness and confidence are the privileges of the true religion. Intellectual efforts therefore are not only an indication of religious falsity but also a source of heresy and of damage to affiliation to true religion, since they obliterate the distinction between true religion and idolatry, and are likely to legitimize paganism.⁴⁸

Otherwise they might draw conclusions from their own folly, try to improve upon the law and cause heterodoxy, I mean the splitting of opinions, which is the beginning of the corruption of a religion. They would soon be outside the pale of *one law and one regulation*. Whatever we might allow ourselves in matters of touching even repulsive things, is out of proportion to their (the Karaites’) schismatic views, which might cause us to find in one house ten persons with as many different opinions. Were our laws not fixed and confined by unbreakable rules, they would not be secure from the intrusion of strange elements and the loss of some component parts, because argument and taste would become guiding principles.

At this point, ha-Levi explicitly reveals his Neo-Platonic jurisprudence, which stands in complete opposition to reasoning-based jurisprudence. For ha-Levi, the latter is wrong not only metaphysically but also theologically, as deviation from uniformity entails heresy and threatens the integrity of religion.

Ha-Levi’s theological jurisprudence as found in these passages fits into the continuum of reasoning leading to disagreement, then diversity, then toleration, since

⁴⁶ Ibid. 3:39.

⁴⁷ Num. 15: 16. It should be noted that the original verse emphasizes the unity of the law in the sense that the law and justice should be equally applied to the Israelites and the aliens (גר תושב). Therefore, the requirement of ‘one law’ is not epistemological but rather the moral demand to treat insiders and outsiders equally.

⁴⁸ Judah Ha-Levi, *Al-Kitab al-Khazari*, 3:49.

it treats these concepts as parts of the same totality. He also, however, introduces a counter-continuum, in which blind traditionalism leads to legal uniformity and thence to intolerance.

In strong contrast to Judah ha-Levi, Maimonides (1135–1204) was very much identified with a jurisprudence based on reasoning, a trait that aligned him with the Islamic jurists and with the Karaites, but with characteristic ambivalence he was also committed to the rabbinic aspiration for legal uniformity. The argument for resolving this tension was worked out by Maimonides in a very original way.

In the introduction to his *Commentary on the Mishnah*, Maimonides discusses the nature of the Oral Law and prophecy and provides a general account of the history of rabbinic law, its divine source and other aspects. Elucidation of features of the Oral Law was critical for him in his argument against the Karaite denial of its validity and thus the authority of the Talmud, but it is interesting to note that in making this argument he emphasized as essential the entire list of features that ha-Levi had denied:⁴⁹

When Moses, peace on him, died and after having bequeathed to Joshua the explanations that were given to him, and Joshua and the people of his generation studies them. And of all that he or one of the elders received from him (Moses) there was no need for further (discussions), since no disagreement occurred thereon. And that which he (Joshua) did not hear directly from the prophet, peace on him, required discussion and deliberation, he derived (the law) by means of analogical reasoning, by means of the thirteen principles given to him at Sinai, which are the thirteen interpretative methods.

And of these derived laws—some were free of disagreement, but rather enjoyed a general consent. On some laws, however, difference of opinion occurred between two argumentative views... it is typical to occur on dialectical reasoning. Thus when such difference of opinion occurs, they followed the ruling of the majority as the Lord said ‘after multitude to predispose.’⁵⁰

And you should know that prophecy is not effective in investigating and commenting on the Torah nor in the study of the derived laws (i.e. the branches) through the thirteen principles (of inference). Rather, that which Joshua and Pinchas (i.e. the disciples of Moses) wrought through deliberation and analogical reasoning, much the same as did Rabina and Ashi.

As a distinctive rationalist like the Karaites, and against the usual Rabbanite view, Maimonides argued against the superiority of earlier figures and master-disciple hierarchical relations, asserting that so long as legal reasoning plays a central role in extending the scope of law, previous generations of sages enjoy no superior authority in comparison to later scholars. Maimonides’ integration of revelation as a source of the law together with consensus (*ijma’*) and reasoning (*qiyas* and *ijtihad*) situated him very close to Sunni jurisprudence, but Maimonides did not proceed further along Sunni lines to approve also the *ikhtilaf*, instead raising the need to achieve uniformity in light of the anticipated problem of diversity.

The appearance of the principle that the view of the majority should be followed as the final stage in the passage cited above is unexpected, since it seems to suspend the process of jurisprudence based on reason and to disengage from the legal content of the case in dispute in favor of an institutional criterion. The explanation

⁴⁹ Maimonides, *Commentary on the Mishnah*, introduction, 4.

⁵⁰ Ex. 23:2.

for this leap may lie in Maimonides' universal theory about the necessity of law in every human society:⁵¹

... Because of the manifold composition of this species (i.e. human being)... there are many differences between the individuals belonging to it, so that you can hardly find two individuals who are in any accord with respect to one of the species of moral habits... Nothing like this great difference between the various individuals is found among the other species of animals, in which the difference between individuals belonging to the same species is small, man being in this respect an exception. For you may find among us two individuals who seem, with regard to every moral habit, to belong to two different species. Thus you may find in an individual cruelty that reaches a point at which he kills the youngest of his sons in his great anger, whereas another individual is full of pity at the killing of a bug or any other insect, his soul being too tender for this...

Now as the nature of the human species requires that there be those differences among the individuals belonging to it and as in addition society is a necessity for its nature, it is by no means possible that his society should be perfected except—and this is necessarily so—through a ruler who gauges the actions of the individuals, perfecting that which is deficient and reducing that which is excessive, and who prescribes actions and moral habits that all of them must always practise in the same way, so that the natural diversity is hidden through the multiple points of conventional accord and so that the community becomes well ordered. Therefore, I say that the law, although it is not natural, enters into what is natural. It is a part of the wisdom of the deity with regard to the permanence of this species of which He has willed the existence, that He put it into its nature that individuals belonging to it should have the faculty of ruling.

In this passage Maimonides refers to the nature-law question as it stands at the heart of the formation of political life. The nature-law question in this context is perceived as an outcome of two naturalist assumptions: the Aristotelian assumption that the human is political by nature; and the assumption that human diversity, in terms of character and behavior, is a natural necessity.

In discussing politics, Maimonides is not concerned with detailed methods in the organization of societies but rather with the political necessity to eliminate aspects of the natural diversity of human beings. The success of a society, according to him, depends on leadership which rules the people in a way that blurs their given uniqueness and aspires to make them uniform. Thus all law, and not only divine law, is a response to the natural diversity of the human species; a reaction to natural heterogeneity.

Legal uniformity, according to this passage in Maimonides, is thus not peculiar to rabbinic law, but a general feature which lies at the basis of the whole concept of law. The aim of every law, including religious law, is to struggle with the natural disposition towards diversity, which is a unique trait of human beings and which law tries to expunge in order to render human conduct more uniform. Maimonides clearly departs in this instance from a jurisprudence based on reason and elevates political concerns above epistemological commitment. The search for legal uniformity by Maimonides is driven not only by theology but by political pragmatism.

⁵¹ Maimonides, *The Guide for the Perplexed*, II: 40, 381–382.

3.3.1 Conclusion

This analysis of Jewish reflections on disagreement and legal diversity exposes traces of pre-modern conceptions of tolerance, but in comparison with modern Western notions of tolerance, which are basically derived from European political and religious experience, the attitudes we have found in late-antique and early medieval Jewish texts are mainly products of discursive and interpretative activity by religious thinkers, both Rabbanite and Karaite. While tolerance in modern societies is treated as a moral or political value, in the context of late-antique and medieval Judaism tolerance appears as a deliberative value, emerging as an offshoot of a scholastic culture. The Talmud and earlier rabbinic sources already provided patterns for understanding tolerance when they described disagreements between the sages and appropriate conduct in the face of unresolved disputes, but while post-Talmudic Jewish approaches presupposed the notion of deliberative tolerance, they differed on the appropriate policy that should be taken towards diversity. This examination has revealed that while the Rabbanites inclined towards legal uniformity, their Karaite counterparts denied any need for uniformity and were mainly concerned to establish a balance between acknowledged variety on the one hand, and a fear of enabling and encouraging the permanent establishment of diversity on the other.

Chapter 4

Judicial Discretion (*Shiqqul hada'at*)

Abstract In tracing the semantics of the Talmudic term for judicial discretion (*shiqqul hada'at*) we uncover a conceptual transformation in its usage by post-Talmudic commentators. The transformation from the equilibristic to a cognitive definition of discretion reflects a significant process in which legal reasoning was internalized. In the former meaning the judge weighs the external facts (conflicting opinions, proofs, claims, etc.), whilst in the latter the judge weighs internal considerations. The internalization of judicial discretion is best understood by acknowledging the semantic proximity of the Talmudic term to concurrent dialectics within Islamic theology and neo-Platonism.

The previous section discussed the equilibristic meaning of discretion as referring to the existence of opposed solutions that are equivalent in terms of their normative status, and its relation to the phenomenon of unresolved disputes. In the following section, we shall attempt to describe the semantic and conceptual change that came about in the use of the term *shiqqul hada'at* and the emergence of its cognitive meaning. Accordingly, judicial discretion is accounted as purely inner, mental activity. Gulack's discussion of the meaning of the Talmudic term 'discretionary error' (*ta'ut beshiqqul hada'at*) concludes that the equilibristic meaning was the common meaning throughout the medieval halakhic writings, for which reason other kinds of discretion are lacking.¹ However, as we shall further see, in addition to the equilibristic meaning, there also developed additional meanings of judicial discretion.

As we noted above, the Talmudic conceptions of judicial error reflect a perception of self-canonization, in which the law is identified with the Sages' sayings. Accordingly, the term *shiqqul hada'at* in the Talmudic context contains unresolved disputes in which opposing sayings of the sages are taken to be equivalent to one another. The following discussion will examine the significance of the profound transformation of the meaning of 'judicial discretion' in rabbinic thought, through tracing the semantic shift of the term *shiqqul hada'at*. This transformation, reflected in post-Talmudic usages of the term, uproots the equilibristic meaning and gives rise to the cognitive meaning. Normative equivalence no longer indicates the borderline of legal lucidity, but rather the preconditions for mandating the jurist's cognitive activity. In other words, *shiqqul hada'at* no longer describes normative

¹ Gulak (1966, pp. 180–1, n. 10).

equivalence, but an opportunity to apply judicial reasoning. The departure from the equilibristic meaning of *shiqqul hada'at* and the emergence of its cognitive meaning may therefore be explained against the background of a certain withdrawal from the perception of self-canonization and the influence of theological thoughts (*Kalam* and *Mu'tazilah*), and philosophical approaches (neo-Platonism) in relation to fundamental elements of rabbinic jurisprudence.

In fact, the cognitive meaning of *shiqqul hada'at* may be divided into two sub-meanings, between which it is important to distinguish: the dialectical meaning and the analogical meaning. The emergence of the dialectical meaning of *shiqqul hada'at* will be discussed here, while the analogical meaning will be discussed in the next chapter. Unlike the analogical meaning, which involves a different structural understanding of the halakhah, the dialectical meaning primarily reflects changes in the halakhic discourse without challenging fundamental perceptions.

The overturning of the equilibristic meaning of *shiqqul hada'at* has far-reaching conceptual implications, especially in relation to the problem of judicial error. As we have seen above, the Talmudic conception of judicial error reflects a deviation from an existing normative state of affairs, but with the decline of the equilibristic meaning, the problem of the meaning of judicial error in relation to cognitive activity emerged.

The Emergence of the Cognitive Meaning The first scholar to call attention to the decline of the equilibristic meaning was Solomon Judah Loeb Rapoport (1790–1869), in his essay on R. Nissim b. Yaakov.² According to Rapoport, post-Talmudic usages of the term *shiqqul hada'at* depart from the equilibristic meaning and instead denote a general usage of a kind of rational or commonsense meaning—‘every matter that an ordinary person’s common reason will declare to be correct.’³ Rapoport bases his observation on various quotations from early medieval Jewish thinkers (from Hai Gaon (939–1038) to Abraham Maimonides (1186–1237)), in which the use of this term indicates the role of the rational faculty in various religious matters. Obviously, the manner in which Rapoport relates to the later meaning of *shiqqul hada'at* was influenced by the contemporary Jewish Enlightenment movement and the idealization of universal human rationality as opposed to traditional particularist orthodoxy.³ The following analysis follows in Rapoport’s footsteps. In so doing, it will indicate two secondary versions of the dialectical meaning of the term *shiqqul hada'at*. The first is clearly related to the dialectical method of the *Kalam*, while the second relates to neo-Platonic epistemology. But before turning to the relevant texts, a comment is required on the nature of the dialectical method of the *Kalam*

² Rapoport (1831, pp. 62–63, n. 11). On Rapoport’s contribution to the research of medieval rabbinic writings see Barzilay (1967).

³ The ideological connotation of Rapoport’s comment is evident in his concluding remark ‘... and if Naphtali Hirz Wessely (1725–1805) had known this, he would have been very happy as he worked hard to clarify this point while his contemporary scholars condemned him as innovator which is hard to accept.’ Indeed, Rapoport’s method follows Wessely’s philological investigation of Hebrew roots and synonyms in his book *Gan Na’ul* (Amsterdam 1766).

and the *Mu'tazilah*, and on the connection between legal thought and the dialectical method in general.⁴

Judicial Discretion as Dialectic The next source to be discussed preserves the equilibristic meaning of the term *shiqqul hada'at* while indicating its dialectical aspect. Indeed, this does not challenge the equilibristic meaning with the cognitive one, though it represents the involvement of personal reasoning within the adjudicative process.

R. Yitzhak al-Fasi (1013–1103), the great halakhic authority of north-Africa and Spanish Jewry, rejects the opinion, attributed to some anonymous sage, which claims to harmonize two conflicting passages in the Talmud by interpreting each with reference to a different meaning of the term *shiqqul hada'at*. Hence, according to this anonymous sage, while in one Talmudic context the equilibristic meaning of *shiqqul hada'at* is applied, the second context refers to the cognitive meaning.

Al-Fasi objects to resolving the conflicting passages by introducing the cognitive meaning of *shiqqul hada'at*. Instead he advocates the distinction between two types of balance in regarding to which judicial error might occur, thus differentiating between fallible and infallible judicial discretions, based on the fact that some of the conflicting opinions in the Talmud are determinable by reference to second-order standards while others are not. He concludes that whenever there is a second-order standard that supports either opinion the discretion is fallible, but in the absence of second-order standards, the conflicting opinions remain balanced and therefore subject to discretion.⁵

In fact, al-Fasi characterizes the second-order criterion of *sugyan de'alma* (סוגיין דעלמא) not only as an instrumental guideline in uncertain circumstances, but also as an epistemological measure: As evidence proving the correctness of either opinion. Also, al-Fasi's account of Talmudic deliberation appears in terms of classical dialectics and the view according to which disputes are none other than epistemological processes of gaining a truth conclusion. The terms in which al-Fasi characterizes the second-order standard *sugyan de'alma*, as a 'proof' or 'evidence' echoes the Muslim doctrine of dialectic in which the proof, *al-dalil* (دليل)⁶ serves as an argument for proving the truth statement. The following discussion will attempt to shed light upon the cognitive meaning of *shiqqul hada'at*. In doing so, it will briefly indicate the development of the dialectic method in Muslim thought in parallel to the emergence of the cognitive meaning of *shiqqul hada'at* in rabbinic thought.

⁴ These comments are based on the monumental works of Makdisi (1974, 1981).

⁵ By this, Al-Fasi clearly strengthens the weight of the second-order criterion and reduces the gap between discretionary error (*ta'ut beshiqqul hada'at*) and error regarding an explicit teaching of the sages (*ta'ut bedever mishnah*). Accordingly, both errors are about ignoring epistemological standards. While the former error is about ignoring an implicit standard, the latter is about ignoring an explicit one.

⁶ Pines (1971, p. 35), Makdisi (1974, p. 652).

Dialectics in Islamic Thought The dialectical method essentially embodies both a method of presenting arguments and a mode of thought. The dialectical method, as exemplified in the scholastic works of Peter Abelard (d. 1142) and Thomas Aquinas (d. 1274), was one of the most remarkable accomplishments of medieval academic institutions and stood as the focus of the scholastic movement and the cultural revival of the twelfth century in European Christendom.⁷

Makdisi's studies concerning the development of educational institutions in the Muslim world and the relation between Muslim law and social structure shed new light upon the emergence of the dialectical method in the Latin West during the course of the twelfth century, and its sources. He argued that the origins of the dialectical method can be traced back to Muslim thought and the central role that reasoning played in the formative process of Muslim orthodoxy, which over the course of time became known to the Latin jurists and canonists.

Makdisi's argument about the origins of the dialectical method thus involves two aspects: an external one, relating to the formation of dialectical presentation, and an internal one, relating to dialectic as a system of thought. Regarding the external aspect, he claims that there is a profound connection between the mechanism of *ijma'* as a source of the law, and the literary genre of *ikhtilaf* that aims to document the differences, in theory as well as in practice, between the various legal schools:⁸

Having no councils or synods, Islam had to depend on the principle of *ijma'* or consensus, to define orthodoxy. And since consensus could be tacit, the doctors of the law, as a matter of conscience, felt obliged to make known their differences of opinion, lest a doctrine, which they opposed, be considered as having received their tacit acceptance. Since there was no formal organization of *ijma'*, the process worked retroactively.⁹ Each generation cast its glance backward to the generations that preceded it to see whether or not a certain doctrine had gained acceptance through consensus; and it was decided by the absence of a dissenting voice among the doctors of the law regarding that doctrine. In time, these differences of opinion were compiled in large tomes, and *khilaf* became an important field of knowledge taught in the schools of law.

⁷ Common scholarship indicates three roots to the Christian scholastic dialectics of the twelfth century: the dialectic method of *sic et non* that was first developed among canon lawyers at the end of the eleventh century; Aristotelian dialectics and logic, which were known in the Western world in two different historical phases; and the institution of the *disputatio* which was based upon fixed formulae of dialectical dynamics.

⁸ Makdisi (1974).

⁹ According to Makdisi, the retrospective aspect is essential to the *ijma'*, and by it the necessity of the *ikhtilaf* literature is explained. When Maimonides identifies the halakhic institution of the *takkanah* (תקנה, lit. regulation) he also defines its retrospective aspect. In his words: 'And the fifth category consists of laws gained by investigating human affairs and their utilities in those matters that do not constitute an addition to or detracton (from a biblical commandments), or regarding things that are efficacious for people with respect to the observance of the (divine) laws. These are called *takkanoth* and customs. It is prohibited to transgress these in any way since they are accepted by all 'people' (Maimonides, *Commentary on the Mishnah*, intro., 42). Accordingly, *takkanah* is not to be identified with enactments, as many commentators tend to translate but rather as a norm which is validated retrospectively. Likewise, the mechanism of retrospective validation appears as a significant one in other areas in Maimonides' theories such as: the authoritative reception of the Babylonian Talmud, his own halakhic code and more.

Documentation of the differing opinions, according to Makdisi, assured a pluralistic orthodoxy, whose boundaries were determined retrospectively each time. Thus, it was neither philosophy nor theology that supplied the initial impulse for the development of the *ikhtilaf* literature, but rather the law. Therefore, the dialectical method was created in tandem with the development of Muslim law, as a law without church authority and as a condition for the process of its acceptance.

Nevertheless, the claim about the Muslim origins of the dialectical method also pertains to its inner aspect, namely, to its being a uniquely Muslim legal concept. In that regard, Makdisi notes that Muslim dialectics, the *jadāl* (جدل),¹⁰ was already established during the course of the ninth century and in dialectical works that appeared during the tenth and eleventh centuries, whose roots lay in works that preceded them by a century.¹¹ The aim of these dialectical works was to develop expertise in the art of polemics (*jadāl*), and thereby to prepare students and readers for public debates, *munāzara* (مناظرة)¹² in which they participated.

Makdisi's comments are relevant to the characterization of the Islamic Law as scholastic law, lacking a decisive institutional authority.¹³ However, Makdisi did elaborate on a possible backdrop to such legal scholasticism; that is, the Talmudic literature. Nevertheless, posing Makdisi's argument in juxtaposition to post-Talmudic halakhah further sharpens the role of dialectical thought in rabbinic thought that is based upon Talmudic literature.

4.1 Shiqqul haDa'at as the Dialectic of the Kalam

Some of the strongest expressions of the semantic relation between the term *shiqqul hada'at* and the dialectics of the *Kalam* appear when the term *shiqqul hada'at* refers clearly to a cognitive meaning, in explicit relation to the *Kalam* style of dialectic. Two such examples will be discussed below. In the first, *shiqqul hada'at* in its cognitive meaning is taken as an exegetical criterion that is integrated within the rationalist exegetical method of *Kalam* thought. In the second one, the term *shiqqul hada'at* stands as the equivalent Hebrew term for *Kalam* or *Mu'tazilah*.

Shiqqul haDa'at as Exegetical Standard In general, the Geonim held a critical attitude towards the legendary parts of the Talmudic literature, the aggadah. In this context, the Geonim formulated a distinction between the authoritative status of the halakhah as against that of the aggadah, creating various rules to express this

¹⁰ The *mutakallimun* were also titled as *ashāb al-jadal*, i.e. companions of controversy. See Pines (1971).

¹¹ Makdisi (1974, p. 651) and onward (especially his discussion about the dialectics of Qirqisani and Ibn A'qil (1119–1040).

¹² The *munāzara* as a form of controversy played a different role than the Latin *disputatio*. The former was a means of expressing excellence and knowledge within a public controversy. Thus, the one who prevailed in such a controversy gained a status of a leader. See *ibid.* 650, n. 45.

¹³ *Ibid.*

hesitation, such as ‘one does not base oneself upon aggadah’¹⁴ or the statement that matters of aggadah are no more than ‘onjecture’ and that their normative status is of ‘things that are not halakhah.’¹⁵ Within this framework, there are two extant statements of R. Hai b. Sherira Gaon as to the proper attitude towards rabbinic aggadah, in which he makes use of *shiqqul hada'at* as a standard for examining the contents of the Talmudic legends and the midrashim.

One of his responses refers to the Talmudic discussion in the ninth chapter of *b Berakhot* (59a) in which it is explained that earthquakes are the result of events within the deity himself: Weeping, clapping his hands together, groaning, kicking the firmament, or pushing his legs beneath the divine throne. These explanations, according to which natural phenomena are mirroring heavenly occurrences, derive from a mythical perception of reality in which God has exaggeratedly human characteristics. The tension between these mythological and anthropomorphic images of God and the transcendent conception of the deity unsurprisingly invites an exegetical account. An inquiry addressed to Hai concerning this matter, these Talmudic quotations are presented as paradigmatic for the appropriate rabbinic method of exegesis to Aggadic material in general. Accordingly, Hai’s answer is formulated in general terms that clarify the systematic principles of the suitable exegesis.¹⁶

... this matter is fable (Arm. *aggadeta*), and in all similar matters, the sages stated that (we) should not rely on fables (*aggadah*).

And the exegetical way is to begin with spelling out that, either from discretion (*shiqqul hada'at*) or from the sayings of the sages, there is no doubt that God does not figure to any creature, and he has no worn, no cry, not a sigh, and tears and friction.

And once this matter is elucidated, it is acknowledged that everything that the sages had said and which is similar to these (figurative images) was not intended to its literal meaning, but rather to allegorize the matter, by analogy, to matters that are visible in our understanding. Just as the Torah spoke in a popular language (דברת תורה לשון בני אדם), for the prophets similarly allegorize (in referring to) the ‘behold, the eye of God’ or ‘behold, the hand of God’... And just as these were not intended literally but rather in the form of an allegory and an intelligible language, likewise the fables.

Hai argues that all anthropomorphic images of the deity coined in the scriptures and in rabbinic literature must be rejected, and that therefore those rabbinic sayings that attribute human features to God must be reinterpreted allegorically. By this, Hai wishes to expand allegory as the exegetical method proposed to explain the expressions of corporeality found in the Bible, and to apply it to the Talmudic literature as well.

The allegorical method in the biblical exegesis joins a long-standing tradition of advocacy of abstraction, dating back to the Second Temple exegesis. Following the

¹⁴ The Provençal scholar R. Abraham ben Isaac of Narbonne (1110–1179) ascribes this rule to R. Hai (*Sefer ha-Eshkol*, 158). However, Lewin shows that the rule already appears in R. Sa’adyah’s writings (*Otzar ha-Geonim*, Ber. comm., 91, n. 10).

¹⁵ These statements appear in *Sefer ha-Eshkol* (ibid.). A pioneering study on the Geonic sayings about matters of aggadah, see Hildesheimer, *Mystik und Agada im Urteile der Gaonen R. Scherira und R. Hai*.

¹⁶ *Geonic Responsa (Lik)*, 30a–31a. *Otzar ha-Geonim*, Ber. Comm., pp. 91–4; *Newly Discovered Geonic Responsa*, 224–8.

increasing involvement of Muslim theology with the issue of corporeal descriptions of the deity it came into the theological focus of rabbinic and Karaite thinkers. The intellectual background against which this exegetical method is formulated lies in the statement that the descriptions of God found in the Bible were initially written as allegory in order 'to allegorize the matter, by analogy, to matters that are visible in our understanding'. This principle regarding the nature of Biblical expression relies upon the rabbinic statement that 'the Torah spoke in a popular language'.¹⁷ Interestingly, Hai extends this allegorical method to post-biblical descriptions.

Hai's approach here towards rabbinic aggadah is thus an ambivalent one: on the one hand, he dismisses the value of the aggadah by saying that '(we) should not rely on fables'; on the other hand, he compares the rabbinical utterances to those of the prophets and argues that they, too, need to be interpreted allegorically. Regarding the matter under discussion here, it should be noted that, for Hai, abstract interpretation is validated both by intuitive reasoning¹⁸ (i.e. *shiqqul hada'at*) and tradition. According to Hai, *shiqqul hada'at* is the parallel Hebrew term to the general term *Kalam*¹⁹ or to the term more common in the *Mu'tazilah* jargon: 'aql (عقل). Elsewhere Hai makes use of the term *shiqqul hada'at*, to indicate reasoning as an independent source of knowledge, which he also sees as an exegetical standard for understanding the words of the Talmudic Sages.²⁰

And we hold from tradition (Arm. *hilkhetah*), and from intuitive reasoning (*shiqqul hada'at*) and from explicit scriptural (evidences) that 'everything is in the hand of heaven except the fear of heaven.'²¹ (Thus) the sayings of R. Hama in three places are annulled, and their meanings are (based) on different overt explanations.

And that pleading guilty as it is said '(the Holy One, blessed be He), in the end gave Moses right—that is a later projection of an idea by usage of a biblical 'proof-text' (Arm. *asmakhta*).

And what has been said, allegedly, that '(Moses) seized god's garment'—(it means) pleading and begging for mercy.

In this way the rabbis had interpreted these things, and you should interpret similar things in this order and this way so they will not contradict scriptures and intuitive reasoning (*shiqqul hada'at*).

Hai relates here to three Amoraic homilies in b. *Berakhot* 32a that refer to the sin of the Golden Calf, from which there emerge ideas opposed to the philosophy of the *Mu'tazilah*.

¹⁷ *SifLev*, Kedoshim, 10(1), 91a; *SifNum*, 112, 121. On its pivotal role in the Maimonidean hermeneutical theology see Nuriel (2000).

¹⁸ The intuitive reasoning in the *Mu'tazilah* is designated by the term *fitrah* (فطرة) which is based on the Stoic identification of reason and nature. In this respect the intuitive reasoning differs from deliberative reasoning, of which the intellect weighs, decides and imposes inner harmony. Deliberative reasoning is based on the Platonic theory of knowledge. On the identification of deliberative reasoning and *shiqqul hada'at* see below and Faur (1976).

¹⁹ On the semantic linkage between 'logos' and 'kalam' see Wolfson (1976).

²⁰ *Otzar ha-Geonim*, Ber. Comm., p. 45; *Newly Discovered Geonic Responsa*, 230.

²¹ b *Ber.* 33b.

The idea of predestination—*qadar* (قدر)—is affirmed by the prophets and as such negates the idea of free will and personal responsibility of human beings for their acts:

R. Hama said in the name of R. Hanina: But for these three texts, the feet of Israel's enemies would have slipped.

One as written 'Whom I have wronged';²² and one as written, 'Behold as the clay in the potter's hand, so are ye in My hand, O house of Israel';²³ and one as written 'And I will take away the stony heart out of your flesh, and I will give you a heart of flesh.'²⁴

As is known, the problem of free will was one of the very first issues to be discussed in Muslim theology, as early as the end of the seventh century. Discussion was originated by the *Qadariyya* movement which championed the principle of the creation of acts—*khalq a-laf'āl* (خلق الافعال). It was continued in the most extreme formulations of the *Mu'tazilah* circles, according to which this principle is derived from the concept of divine justice. The negation of predestination and the affirmation of free will are of course based on both biblical and rabbinic ideas; nevertheless, their formulation as religious principles within tenth century rabbinic thought was doubtless influenced by the intellectual discussions of the *Kalam* and the *Mu'tazilah*. Hai does not make use of the *Mutakallimun* argument to reject faith in predestination, but rather cites the very same perception in rabbinic terms through the dictum of R. Hanina, 'Everything is in the hand of heaven except the fear of heaven.'²⁵

Ascribing immutability to God's will, knowledge or intentions In another homily brought in the same context, Moses holds God responsible for the sin of the Golden Calf,²⁶ and God consequent accepted this accusation and took back His indictment against Israel:

R. Samuel b. Nahmani said in the name of R. Yonatan: Whence do we know that the Holy One, blessed be He, in the end gave Moses right? Because it says: 'And I multiplied unto her silver and gold, which they used for Baal.'²⁷

The homily of R. Yonatan portrays God as immutable and echoes the theological discussions about the changeability of God's will. However, in Hai's view the reference to the biblical verse does not acknowledge this theological principle, which is projected by the later scholar who uses the verse as merely a 'proof-text' (*asmakhta*) for this idea.

The immutability of God's will, the *badā'* (بداء),²⁸ was a theme in early Muslim theology and in fact correlates to the idea of predestination as illustrating God's omniscience over human deeds and history.

²² Mic. 4: 6.

²³ Jer. 18: 6.

²⁴ Ezek. 36: 26.

²⁵ b *Ber.* 33b; b *Meg.* 25a; b *Nid.* 16b.

²⁶ 'Thus spoke Moses before the Holy One, blessed be He: Sovereign of the Universe, the silver and gold which Thou didst shower on Israel until they said, 'enough,' that it was which led to their making the calf.' (b *Ber.* 32a).

²⁷ Hos. 2: 10.

²⁸ Lit. appearance or emergence. In the theological context it refers to the emergence of new circumstances which cause a change in an earlier divine ruling.

The doctrine of *badā'* was widespread in Shiite circles, who sought to explain the gap between the Shiite claim for leadership and legal authority over the entire Muslim community and the fact that, during many periods in history, power and authority were in the hands of the Sunni dynasty. Thus, wherever the prophecies regarding the good future of the Shiites and the defeat of the Sunnis failed, it was argued that a change had occurred in the divine plan in wake of a change in the divine will.²⁹ Sunni theology, on the other hand, rejected this doctrine by general consensus (*ijma'*), while criticizing Jews and Christians for adhering to this belief.³⁰

The corporealization of God and his portrayal in the image of human beings The descriptions of God in corporeal terms—*tajsīm* (تجسيم)—and his comparison to human beings—*tashbīh* (تشبيه)—was a point of contention between the *Mu'tazilah* circles and the *Ash'ariyya* circles in Muslim *Kalam*. Hai's attitude towards rabbinic homilies concerning this matter reflects these principles. He refers to a homily of the late third century Talmudist R. Abbahu of Caesarea that describes Moses' pleas to assuage God's anger in wake of the sin of the Golden Calf in gross anthropomorphic terms:

R. Abbahu said: Were it not a Scriptural verse written, it would be impossible to say such a thing; this teaches that Moses took hold of the Holy One, blessed be He, like a man who seizes his fellow by his garment and said before Him: Sovereign of the Universe, I will not let Thee go until Thou forgivest and pardonest them.

In fact, Abbahu's homily departs from the literal meaning of the verse, substituting for it an extreme anthropomorphic description by means of the rhetorical formula, 'Were there not a Scriptural verse written, it would be impossible to say such a thing.'³¹ Concerning this matter, Hai fails to take note of the gap between the biblical description and that in the homily, but takes exception to Abbahu's willingness to adopt anthropomorphism, explaining his words metaphorically 'as a manner of speaking that (Moses) seized his garment' and restores the biblical description of prayer and petition.

Hai concludes his reservations about these rabbinic homilies with a general guideline in which he elaborates the three kinds of attitudes which he has used (denial, reliance upon a biblical proof-text, and metaphorical reinterpretation) as suitable means of interpretation of rabbinic aggadah that contradict either biblical verses or intuitive reasoning. Certainly, the term *shiqqul hada'at* in this context designates intuitive reason as posed against the explicit verses. Of course, in light of the propinquity of these positions to those of the Islamic *Kalam* and *Mu'tazilah* circles, Hai's saying reconfirms the identification of *shiqqul hada'at* with *kalam* or '*aql*. This identification is further strengthened by the following words of Hai in which he leaves no doubt as to this identification.

²⁹ Bar-Asher (1999, pp. 210–12).

³⁰ Lazarus-Yafeh (1992).

³¹ On the usage of this formula in anthropomorphic homilies see Halbertal (2009).

The People of Shiqqul hada'at In the following passage, Hai explicitly uses the term *shiqqul hada'at* as an equivalent term to the Arabic *Kalam*. From the content of his remarks, one may also discern his attitude towards the theological dispute between the *Mu'tazilah* circles and those of the *Ash'ariyya*, and they may also hint at a certain identification with the position of the *Mu'tazilah*. The context in which these things appear is a responsum to Mar Rav Yosef b. Mar Berachiah of Kairouan regarding the magical uses of sacred names. In the course of his discussion, Hai elaborates upon matters of magic, enchantment and miracles, including questions of the possibility of miracles:³²

And this matter, mentioned in your query, is on disagreement among the sages of *shiqqul hada'at*. Some say that it is probable that God makes miracles to the righteous which are like the signs being made to the prophets. And some say that the signs (being made to the prophets) are done only as a proof to distinguish between false and truth and to signal the speaker on behalf of God that he truly sent him.

Thus, most of the miracles and wonders that only the creator can do will not be signs to the true prophet, as God has made them in the way of the world. While the signs (being made) to the prophets are alternation in the way of the world, as a matter that the non-created can do and only the creator can do.

And if you will say that (God performs) signs also to the complete righteous to pronounce their righteousness, it might be that the righteous will multiply (and consequently) these deeds will multiply and will become as the ways of the world and not as signs that been made only occasionally and rarely, so when they are done, people will be marveled, but if they will be as the common wonders of God in the world. And so the sun's track from west to east, will be taken by people, as its move from east to west, as this and that cannot be done by a creature, but it is a sign that it is not the way of the world and the creator does not do so often and it is not seen only as a proof, and this is not a sign, because it is a constant deed, And if it will be done as much as the other, it would no longer be an extraordinary proof and the matter would cease to be a sign.

Hai discusses here the question of whether miraculous acts were intended only to indicate true prophets and to distinguish them from false prophets, or whether they are no more than a divine gesture, and thus might be performed for the righteous. This question is discussed in Muslim theology, in both *Kalam* and philosophical thought, where it is known as the problem of 'the miraculous deeds of the righteous'—*karāmāt awliya* (كرامات الاولياء). The rejection of miracles performed by the righteous already appears in early *Kalam* theology and it became the widespread stance of the *Mu'tazilah* sages. In a statement made elsewhere by Hai, it is implied that he himself supported this doctrine and took it as unchallenged.³³ Moreover, in the same responsum he mentions the rabbinic rejection of this doctrine, ascribed to R. Samuel b. Hofni Gaon (d. 1034), which he sees as reflecting improper non-Jewish influence.³⁴ As against that, in the present responsum Hai does not take an explicit position in support of either side, but indicates that the sages of *shiqqul hada'at* were divided on this point. It would therefore appear that the 'sages of *shiqqul hada'at*' here are the *Mutakallimun*, the sages of *Kalam* theology, the

³² *Otzar ha-Geonim*, Hag. Resp., p. 18.

³³ *Otzar ha-Geonim*, Hag. Resp., p. 20.

³⁴ *Ibid.*

dispute referred to evidently being that between the *Mu'tazilah* and the *Ash'ariyya* over this question.

Nevertheless attention should be paid to the fact that, although Hai himself does not express an explicit position on the question of the miracles of the righteous, he does explicate an extensive argument in which he supports the position of the *Mu'tazilah*. Accordingly, rejection of the 'miracles of the righteous' is necessary in order to distinguish between the miracles of the righteous and the miracles of the prophets, in which the latter serve as a sign of the authenticity of their mission, arousing astonishment, surprise and wonder. By contrast, were miracles of the righteous to be possible, the distinction between nature ('the way of the world') and miracle ('an alteration in the way of the world') would become blurred, and in its wake the possibility of identifying true prophets by means of their miracles would be nullified—'And if this one does so as much as the other, it would no longer be an extraordinary thing and the matter would cease to be a sign.' It is interesting to note that an argument of this type was already articulated by the *Mu'tazilah* thinker Abū 'Alī al-Jubbā'ī (849–915), one of the leading figures in the *Mu'tazilah* circles in Basra. He rejected the miracles of the righteous by claiming that, if the righteous really did enjoy this grace, it would be impossible to distinguish them from the prophets.

It may be that this identification, and in particular Hai's choice of the Hebrew term *shiqqul hada'at*, was intended to shed light upon Hai's attitude towards the various systems of thought widespread in contemporary Muslim theology. However, whether we adopt his portrait as a 'Jewish *Mutakallimun*'³⁵ or whether we see him simply as one who was well familiar with the *Mu'tazilah* but held certain reservations regarding them, his expressions as discussed above indicate a terminological identification between the term *shiqqul hada'at* and *Kalam* dialectics. This identity is, as we said, one of the expressions of the flourishing of the term's cognitive meaning, according to which it indicates intuitive reasoning as a reliable and authoritative source of knowledge.

4.2 Shiqqul haDa'at and the Neo-Platonic Dialectic

As part of the emergence of the cognitive meaning of *shiqqul hada'at* in its dialectical sense, one should also note the neo-Platonic version of this meaning. The first characteristic of the neo-Platonic dialectic as opposed to the *Kalam* dialectic relates to the nature of reason, which is the source of authoritative knowledge. *Kalam* thought sees the rational element as a kind of intuition, whose theoretical justification is grounded in the Stoic assumption regarding the identity of intellect and nature. As against that, the rational element in neo-Platonic thought is described, in the spirit of Plato's epistemology, as an element that weighs, decides, balances and

³⁵ Kaufmann (1895, p. 84).

imposes inner harmony. Thus, reasoning by its essence is a deliberative component, such that only at the end of the process are the rational truths attained.

In this sense, *shiqqul hada'at* does not express the final triumph of the conflicting statements but rather an inner process that occurs within man's mind. Needless to say, according to this approach the balance referred to is not a legal state of affairs, but rather a mental one. However, even the nature of the dialectic here differs from that described in the *Kalam* thought. Dialectics, according to the neo-Platonic approach, does not reflect a head-on confrontation between opposed propositions whose resolution is attained by means of additional statements, but rather a qualitative weighting of the various possible resolutions. This activity is thus similar to the use of scales or, to be more exact, the image of the 'scales of the soul' that examines the various possibilities and weighs them against one another. One example of the adoption of this image may be seen in the following remarks of R. Sa'adyah Gaon (882–942), in which the fool is described as one who does not know the art of weighing and the use of scales:³⁶

He resembles a man who is unacquainted with the art of weighing, with the shape of the scales and weights, and with the amount of money owed him by his debtor. Even if his debt is paid it will not be clear to him that he had received the full payment; and if he took less than was owed him, he might think that he had cheated his debtor.

These comments indeed demonstrate the dialectic of deliberative reasoning.³⁷ In this sense, dialectic is an inner and personal activity granted to each individual in a personal way and performed within the mind. It follows from this that the personal dimension of *shiqqul hada'at* is an exclusive talent that only sages, or those who know the art of balancing (*zena'ah aluzan*), can carry out. Unlike the dialectic of the *Kalam*, the image of 'scales of the soul' is also liable to provide a good explanation of the phenomenon of discretionary error. Accordingly, an error is a dysfunctional use of the 'scales of the soul' or lack of knowledge of the art of weighing.

Another example in which *shiqqul hada'at* is described as an inner dialectic by means of the 'scales of the heart' may be seen in the words of Ibn Ezra. As has been observed by Rappaport in the note mentioned above, the term *shiqqul hada'at* is used extensively by the great Andalusian thinker, R. Abraham b. Meir ibn Ezra (1089–1164). In various places, the term *shiqqul hada'at* is explicitly related to deliberative reasoning and the image of scales. An example of this is found in his *Introduction to the Torah*, in which ibn Ezra rejects Christian allegorical interpretation, and instead advocates an exegesis based upon a literal and rationalistic reading of the scriptures. Such interpretation is based upon rationalistic assumptions regarding the existence of a fixed, predetermined correspondence between human reasoning and the revealed contents immanent in the bible. In describing this rationalistic assumption, ibn Ezra relies upon the image of the 'scales of the heart,' which is in practice a combination of the concept of intuitive reasoning (commonly held in *Mu'tazilah* and Stoic thought) that presumes that the rational element is part

³⁶ *The Book of the Beliefs and Convictions*, 3–4.

³⁷ On the Sa'adynic theory of knowledge see Efros (1942), Wolfson (1942), Heschel (1943). On the theory of knowledge and the theory of commandments see Altman (1943) and Ben-Shammai (1972).

of man's concrete nature and impressed within his soul, and the concept of deliberation, which sees the rational element as a deliberative faculty (i.e., the neo-Platonic approach).³⁸

... every matter, however small or great, concerning a mitzvah, must be weighed in the scale of the balance of the heart. For planted in the heart is knowledge (deriving) from the wisdom of the Eternal Unchanging One. (However, only) in cases where this knowledge cannot support (the interpretation) of the word, or corrupts that which can be clearly perceived by the senses, should a person seek out a hidden interpretation. Weighing of knowledge (*shiqqul hada'at*) is the foundation, for the Torah was not given to anyone lacking in knowledge.

Moreover, the angel between a man and his God is his intelligence. Anything which knowledge does not contradict we should interpret according to its plain meaning and the normal function (of the wording), leaving it in its (natural) proportions, believing that this is its true (meaning). We should not grope a wall like the blind, stretching words according to our (own selfish) requirements. Why should we turn exoteric (meanings) into esoteric (ones)?

In the first part of these words, the image of the scales stands out strikingly as the basis of the significance of the term *shiqqul hada'at*. The 'scales of the heart' are the rational basis imprinted within each person; *shiqqul hada'at* is therefore a universal characteristic shared in common by all those addressed by the Torah, 'for the Torah was not given to anyone lacking in knowledge.' In the second part of his words, reasoning is described as an angel, mediating between the human and the divine. In this description, ibn Ezra makes use of an explicitly neo-Platonic image. The conclusion that follows from these images is that reasoning is a precondition for any possible interpretation of scripture. In this respect, ibn Ezra of course follows in the footsteps of the rationalistic commentators, as expressed in the teachings of Philo, Sa'adyah and others, according to which reasoning is a relevant exigency of every interpretation, alongside those things that are explicit in the text or that have been accepted by tradition.³⁹

³⁸ Ibn Ezra, *Introduction to the Torah*, 158–9.

³⁹ On Ibn Ezra's use of the Sa'adyan principle of interpretation see *Commentaries on the Torah*, 139.

Chapter 5

Law and Violence

Abstract This chapter deals with the tension between law and violence in Talmudic jurisprudential thought. As a test case for the law-violence ambivalence we examine a Talmudic norm according to which violence might be legitimized where civil cases are indeterminable due to lack of evidence. Our analysis shows that while ancient sources legitimized extra-legal violence, medieval thinkers neutralized the norm and reduced it to economic procedures. Our exploration also reveals cases involving the justiciability, honor and stability of legal institutions.

The relationship between law and violence is a fundamental problem that touches the most essential features of the concept of law and the understanding of its political and social functions. For this reason, any jurisprudential doctrine or political theory will not be complete without addressing this conceptual problem. While its explicit formulation emerged only in modern jurisprudential writings, a careful and accurate survey of pre-modern sources discloses its reverberations throughout legal and political thought. Schematically, we could speak of two basic legal approaches to the problem: The antithetical approach, in which law and violence are perceived as separate and contrasting notions, and hence as mutually exclusive; and the symbiotic approach, which views law and violence as essentially interwoven notions. This latter approach requires entirely different conceptual tools from the antithetical one.

The antithetical approach reflects one of the basic insights of modern jurisprudential and political thought, according to which law is essentially assigned the function of displacing violence in the public sphere; its job is to uproot and minimize resorting to violence as a means of solving conflicts or determining legal rights and statuses. The political and social role of the law is to regulate violence, to constitute an alternative to violence, thus controlling its eruption into public life and minimizing its appearance. This antithetical approach is deeply rooted in the political thought of Spinoza and Hobbes, and has subsequently penetrated deep into the core of modern legal and political thought.¹

In contrast with this approach, various trends in the twentieth century called for an end to traditional *naïveté* or intellectual dissimulation; they sought to uncover the mutual dependency between law and violence, and to illuminate the profound

¹ A brief analysis of this view in the writings of Austin, Bentham and Holmes can be found in Riga (1983).

connections between them. According to this approach, violence as a phenomenon is an indispensable feature of law and exists beyond law as well as within it. In the same manner that it serves to achieve extra-legal ends, violence also serves to achieve legal goals. In this light, the traditional distinction between law and violence required a new formulation, one that distinguished legitimate violence from non-legitimate violence.² One of the pioneering thinkers in developing this view was Walter Benjamin, who argued that violence was indispensable to law and acknowledged that violence functions as source of authority for the law and hence also for its services.³ According to Benjamin, we should not view the law as a counter-phenomenon to violence, but rather talk about the law's violence, viz., 'law-preserving violence', as opposed to the violence that undermines the legal conditions by displacing or crumbling the state's power, viz., 'law-making violence'. The diagnosis that violence accrues under the authority of official legal institutions, in various forms, is not a dramatic innovation. Indeed, we can hardly conceive of law without violence. On the other hand, it would be wrong to conflate them, since if law were completely equivalent to violence, it would not be an evident and noticeable phenomenon. Therefore, the key question in this respect is: what is legitimate violence in the service of law? And how are we to distinguish it from violence that works against the law?

Following these questions, twentieth century post-modern thinkers and legal scholars attempted in different ways to characterize the distinction between legitimate and illegitimate violence and to define the justifications and constraints of law's violence. Derrida emphasized the different modes the law uses to silence violent acts, and the role violence plays as a constitutive element for the establishment of law and its authority.⁴ Robert Cover underscored the connection between law's violence and the centrality of hermeneutical processes in applying the law.⁵ These intellectual trends emphasized the monopoly of law over extra-legal violence, and considered it to be unlawful and delinquent. The law was thus conceived as essentially dependent on violence, and as an effort to use violence to counteract the more

² In fact, the symbiotic approach is based on a neutralized notion of violence and so differs from the antithetical approach. In other words, while the antithetical approach is compatible and coherent with the definition of violence as inappropriate aggression, and therefore views violence as a condemned act, the symbiotic approach neutralizes its normative sense and treats it in descriptive terms. Basically, neutralizing violence enables its legitimization. Hence the two approaches essentially differ in their fundamental views on the question of whether violence as a phenomenon carries normative sense at all.

³ Benjamin (1996).

⁴ Derrida (1989). Derrida's remarkable essay highlights three fundamental features of the law—its universality (the law always tends towards universality), the essentiality of rights (the law operates to maintain, and thus is inseparable from, rights) and its concern with self-preservation (the law is bound up with the silence of its own force, and is self-preserving). For one of many good reflections on Derrida's claims see Buonamano (1998).

⁵ Cover (1985–1986). To this form of thought we should also add Austin Sarat's approach, see Sarat and Kearns (1991). An interesting point of view on this relationship is expressed through the claim that 'law is simply one of many mechanisms human beings have developed to give moral meaning to violence'; see Brooks (2002–2003).

destructive and lethal violence, i.e. the extra-legal violence that threatens the basic values of the law itself.

In what follows, I would like to shed light on various aspects of the law/violence problem. To begin, this proposed discussion is not only a theoretical analysis, but also carries a historical dimension that draws its perspective from the relationship between modern and pre-modern conceptions of the law/violence problem. This is in contrast to the approach to the phenomenology of law taken in the above-mentioned works. Given its appearance in pre-modern legal systems, the advantage of adding a historical dimension to this problem lies in its potential contribution towards developing a different perspective on the relationship between law and violence. Adding the perspective of pre-modern and non-western legal systems exposes how, when characterized as either antithesis or symbiosis, the relationship of law to violence is misleading, or at least inaccurate. Moreover, the perspective moves the discussion of the relationship between law and violence away from an abstract and conceptual level to the extra-legal realm where violence occurs. Stated otherwise, rather than dealing with the tension between law and violence, I shall try to analyse the specific circumstances that legitimize extra-legal violence. The significance of this legal transference, as this discussion will demonstrate, is some kind of recognition of extra-legal violence as an acceptable solution for various legal problems, in which violence is tolerated, or even accepted by compromise. In other words, this approach to the law/violence problem will first examine the question: Is there any interest in preserving the law/violence distinction? And what is earned by this distinction?

Specifically, the focus of this discussion is the legitimization mechanisms of extra-legal violence and the modes of justification that arose for them. To this end, an understanding of the jurisprudence that recognizes extra-legal violence as a legitimate procedure will be sought, tracing its underlying assumptions and conceptual applications. The basis of the investigation will be an analysis of the Talmudic legal norm *kol dea 'lim gavar* (in Aramaic; lit. the one who is more violent prevails; henceforth: KDG).⁶ This norm, as will be demonstrated, appears in Talmudic literature as an appropriate solution for cases that could not be decided by the ordinary legal procedures. In other words, this discussion is interested in the circumstances in which adjudicative uncertainty becomes a cause for excluding the case and giving the advantage to the violence of the conflicting opponents. In this light, we must ask: what is the justification for violence as a legally recognized procedure? And what underlies the conception of the relationship between law and violence in this norm?

⁶ The original meaning of the Aramaic root a.l.m is: strong, aggressive and big. According to R. Nathan ben Jehiel of Rome there is a semantic connection between the Aramaic verb (א.ל.מ) and the Arabic root (أ.ل.م) which in its second and fourth derived stems means to cause pain, suffer, agony etc. (*Aruch Completum*, s.v. 'alim,' 1:97). The use of this term in Talmudic literature is widespread, and alongside the physical meaning it also denotes a normative status, of the Mishnah (b *Shab.* 12a), court (b *Git.* 36b) and more. However the formula *kol dea 'lim gavar* is manifesting the possessive right achieved by the aggression of the stronger.

Obviously, such an inquiry gives rise to additional questions regarding wider aspects of violence as a normative phenomenon and the processes of adjudication. For this reason, the following discussion will attempt to focus on KDG as a private case of *prima facie* legitimization of extra-legal violence. The analysis will seek to characterize three types of justifications: One that reduces extra-legal violence to quasi-legal, or pre-legal, procedures, a second that is based on the link between violence and the concept of natural law, and a third that considers further modes of dependence between law and violence.

Even so, due to the immense scope of the topic, the purpose here is neither to survey the entire history of the legal norm KDG, nor to supply exhaustive explanations as to its appearances in different historical and textual contexts, but to draw schematic outlines of the history of KDG as a conceptual and theoretical problem. The pivotal point of discussion, therefore, will be limited to the various mechanisms of legitimizing extra-legal violence.

5.1 Violence as *Judicium Dei*

Understanding the basic features of KDG will be made easier by comparing it to similar legal norms that existed and were practiced in medieval customary law, in which extra-legal violence was also recognized as a legitimate procedure. This recognition was well known in two legal procedures, or more precisely two legal institutions: The duel (*duellum*) or trial by combat, and the ordeal (*ordalium*).⁷ These institutions were conceived as acts which completed ordinary legal procedures, and were usually activated in cases that could not be solved in the courtroom. The duel as a legalized procedure was originally practiced by the Germanic tribes, the Celts and the Franks in the early medieval period, from which point it was extended to the entire continent during the middle- and late-medieval period.⁸

⁷ The ordeal seems to have been confined to Germanic legal practice. The ordeal is a test employed under fixed conditions to discover the will of God in matters involving the innocence or guilt of human beings. Ordeals can be divided into three types according to their aims: (1) natural, as when arrows are shot to determine which road to take (Ezek. 21:21), as when priests are chosen by lot in Rome or in Tibet, as when the choice of animals to be sacrificed in the Temple is determined (m *Tam.* 4:3-5:1), or as when settlers want to know who is to rule; (2) truth of property or ownership claim; (3) guilt or innocence when a charge is preferred against someone. This last type could be perceived as unilateral procedure when fire, water swallowing, lots, etc. are used on a suspected violator and multilateral procedure when battle decides the issue. For more on this, see Bloomfield (1969).

⁸ The Romans saw the duel as a barbaric habit lacking any legal value. In contrast, there are many indications that the duel was practiced as legal procedure in antiquity. The appearance of the duel as an accepted legal procedure in Europe was due to the influence of Germanic tribes. Following them, the duel became a common legal practice all over Europe. An extensive legislation of the duel's rules is found in the orders of Lewis the Pious, the Frankish King from 819 A.D. Using this fact and other sources, we can estimate that during the ninth century this practice was widespread throughout Europe. From the Germans this practice was transmitted to France, where

Various contemporary explanations and justifications were suggested for these praxes, in which the common idea of all was to view them as evidential procedures leading to a correct and justified consequence since they reflected the deity's adjudication (*judicium Dei*).⁹ Theoretically speaking, the duel was conceived as a correct and justified procedure, for the deity's power was understood not only as a metaphysical feature, but rather as expressed through interventions applying law and justice in earthly life. Therefore, the long hand of the deity was conceived of as reaching out on behalf of the righteous and the innocents, and strengthening their physical force. The similarity of the duel and the ordeal is not coincidental, and their justification mechanism makes them similar legal procedures. The duel as well as the ordeal placed the accused before a real danger whose outcome signified innocence or guilt, and in both procedures, the results were considered the deity's verdict. Therefore victory in duel, and survival of an ordeal, were interpreted as indication of heavenly adjudication and not as an arbitrary result.

We should note that neither duels nor ordeals were regarded as common religious acts addressing the deity's will; rather, they were considered legal procedures with a clearly institutionalized dimension. Dueling was an act of calling upon the deity to intervene by expressing His position on the case at hand. Revelation of the deity's will through a duel or an ordeal was not conceived as miraculous, but as a natural recruitment of heavenly powers to assist earthly efforts to discover truth and apply justice. The legitimization of these extra-legal procedures derived from a worldview that acknowledged the intensity of divine intervention and obscured the gap between human and heavenly acts. Therefore, making known the 'Word of God' during battle was complementary to ordinary procedures. In other words, 'violence in the battlefield was not conceived as a totally arbitrary and human act, but as an expression of divine justice revealed through physical combat.'¹⁰ This might be described as an institutionalization of miracles, or as an attempt to control the uncontrollable; to systemize arbitrariness through physical and violent acts. The conceptual platform of these practices was problematic in many senses. And indeed, engaging the deity's power, institutionalizing miracles and ascribing legal meanings to arbitrary aggressions were still considered extreme ideas and were rejected from

it flourished mainly during the period of the customary law-the twelfth century-and the knightly culture developed there. The Frankish kings saw there a means for limiting the judicial power of the independent vassals. Therefore, it was a form of legal procedure open to every free man, and in some cases, such as under the kingship of Louis the Sixth, the right to participate in duels was bestowed also for slaves.

⁹ Morris (1975), Brown (1984a), Baumgarten (2011).

¹⁰ The idea that God is revealed through violence deeply rooted in the theology of the Bible where God is described as a warrior who reveals His power in the battlefield. This idea of course stands on the basis of Jewish and Christian apocalypses that visualize the day of the Lord as a harsh battle and therefore describe the expected revelation as ultimate violence. On the Biblical image of God as a warrior, see Miller (1965), Brettler (1993). On the biblical idea of the 'Day of the Lord,' see von Rad (1959). A different opinion is suggested by Weiss (1992).

different angles during the medieval period,¹¹ until finally these practices became merely aristocratic modes of fighting for proving personal honor.¹²

In jurisprudential terms, the legitimization mechanism of the duel as a legal procedure reflects a way of treating uncertain cases within a religious form of life that takes seriously the divine role in making justice and exposing truth. From a judicial standpoint, the mechanism legitimizing the duel as a legal procedure in effect expresses a way of dealing with the phenomenon of legal uncertainty, and a perspective that views its existence as a moment in which the case exceeds the bounds of the law and is transferred for adjudication via an alternative procedure.

This view is a kind of legal dualism that recognizes two legal systems—ordinary and common law on the one hand, and heavenly law on the other, activated when ordinary law is circumscribed and paralyzed.

It should be noted that such a dualistic worldview is not alien to the Talmudic spirit and it appears in several manifestations in Talmudic thought. For example, the determination ‘exempt from human judgment but liable to the heavenly judgment’¹³ expresses recognition of the existence and validity of heavenly justice in parallel to human legal standards. This parallel justice system in fact adds a moral dimension to halakhic norms.¹⁴

Nevertheless, the similarity between European and Talmudic legal dualisms is only superficial. The viewpoint associated with the European duel considers the earthly consequences of violence as the epiphenomenon of heavenly justice. Such relations blur the border between human deeds and the deity’s actions, and through this lack of distinction violence is justified and the participants of the duel are absolved of moral responsibility. On the other hand, the Talmudic norm of ‘exempt from human judgment but liable to the heavenly judgment’ draws a clear line between heavenly law and human law, and in so doing neutralizes the intervention of

¹¹ Since the ninth century the church decisively objected to the duel as a legal procedure and rejected all reference to it. Nevertheless, the duel continued to be practiced in Europe until the sixteenth century. Since then the duel shifted from being a legal procedure to being a social institution that confers honor, namely an institution used to recover honor or to refute accusations of cowardice. See Baldick (1965), Kiernan (1988).

¹² Allen and Reed (2006).

¹³ This idea is quite early and it appears already in Tannaic sayings, ‘R. Joshua said: There are four acts for which the offender is exempt from human judgment but liable to the heavenly judgment. They are these—(1) To break down a fence in front of a neighbor’s animal (so that it gets out and does damage); (2) To bend over a neighbor’s standing corn in front of a fire; (3) To hire false witnesses to give evidence; and (4) To know of evidence in favor of another and not to testify on his behalf’ (b *BK* 55b). Later in the Talmud, we find additional examples such as ‘... a case of a man who does work with Water of Purification or with the (Red) Heifer of Purification... the case of one who placed deadly poison before the animal of a neighbor... the case of one who entrusts fire to a deaf-mute, an idiot or minor (and damage results)... the case of the man who gives his fellow a fright... the case of the man who, when his pitcher has broken on public ground, does not remove the potsherds, who, when his camel falls does not raise it... the Sages hold that he is exempt from human judgment but liable to the heavenly judgment’ (b *BK* 56a).

¹⁴ Halbertal (1999, pp. 30–33).

the former in the latter.¹⁵ The Talmudic phrase ‘exempt from human judgment but liable to the heavenly judgment’ thus keeps the heavenly law transcendent to the human law, relegating it to the status of moral aspiration.¹⁶ As we will demonstrate in what follows, the legitimizing mechanism of the Talmudic norm KDG is essentially distinct from the legitimizing mechanism of violence under the European practice of the duel, and their difference is derived from the absence of deity’s intervention in justice making and exposing the truth.

What is then the legitimizing mechanism of KDG? And why is it sometimes preferred over ordinary procedures?

In order to explore this question, we will briefly survey the main appearances of this norm in Talmudic literature and in major post-Talmudic trends. Subsequently we will analyze the legitimizing mechanism of violence underlying this norm and attempt to understand the relationship between law/violence relations represented therein.

5.1.1 *Kol deAlim Gavar: An Ambivalent Norm*

Literally, the Talmudic expression *Kol deAlim Gavar* means ‘the one who is more violent prevails’.¹⁷ Its appearances in post-Talmudic literature carry ambivalent meanings and therefore its normative status is also expressed and evaluated differently. This ambivalence is mainly articulated in the fact that the term KDG signifies an appropriate norm, on the one hand, while on the other hand it denotes a highly condemned and undesirable normative state of affairs that leads to political anarchism. There is a significant gap between the two meanings of this term, which vary in different contexts. This gap between the normative meanings of the term KDG raises several interesting questions: Does it reflect contradicting approaches to the idea of violence, or does it perhaps represent a common conceptual idea? And what is the nature of this justification or condemnation of violence?

We will now seek to outline the norm KDG and to expose the semantic fields of the principle expressed by it in Talmudic and post-Talmudic literature, in an attempt to make sense of its ambivalence and to demonstrate its peculiarity in the two aspects discussed, namely the legitimizing mechanism of violence and the law/violence relationship. We shall begin by understanding the different meanings of

¹⁵ It should be noted the medieval halakhic sources oriented in Germany mention duel and ordeal as widespread practices in the local legal systems differing from Jewish legal practices. For example, Gershom ben Yehuda (Me’or HaGolah, 960?–1028) in one of his halakhic writings presents his solution to suspicious stolen property as against the solutions suggested in the local legal systems: ‘... and every non-Jewish is suspicious in that lost property which didn’t returned (that object, should) put his hand in the fire according to the local rules of the gentiles. And on Reuben’s property they made time for dueling ...’ (*Réponses Rabins Français et Lorrains*, 97, 54–55).

¹⁶ On the use of ordeal in the medieval rabbinic tradition see Eidelberg (1980).

¹⁷ Some readings of this expression tend to blur the meaning of violence conveyed in the term *a’lim*. Therefore they prefer the following translations: ‘the stronger one prevails’ or ‘the stronger shall prevail.’ However, the reasonable semantic connection to the Arabic meaning (see *supra* note 6) supports our translation that also conveys the meaning of violence.

this norm and then proceed to explain the conceptual ideas that determine their meanings.

5.1.2 *The Legal Norm*

The term KDG¹⁸ appears in several Talmudic discussions as a proposed solution in cases where uncertainties about the factual or legal conditions prevail. It should be mentioned that KDG in Talmudic literature does not appear as common practice for resolving hard cases, and in fact its appearance is quite limited. Notwithstanding the marginality of KDG as a legal norm, its appearance, followed by discussion, leaves no doubt as to its existence and to its being recognized as a valid norm in the Sages' view. However, while the rabbis of the Talmud do not provide an account of the nature of KDG and on the legitimizing mechanism of violence contained in it, post-Talmudic discussions are much more strongly centred on the question of how this norm validates violence, and on identifying the circumstances that justify referring legal cases to violent confrontation between opposing sides.

The clear appearance of KDG is attributed to R. Nachman (early fourth century Babylonian scholar), who viewed KDG as an appropriate solution for proprietary cases where two contradicting and equivalent claims were raised regarding the right of possession. The Talmudic discussion on R. Nachman's saying locates KDG alongside other known solutions for doubtful cases, such as dividing the subject matter between the claimants or giving to judicial discretion:¹⁹

(If there are two claimants to a property and) one says: 'It belonged to my fathers', while the other says: 'To my fathers' (without either of them bringing any evidence), R. Nachman says: *'kol dea 'lim gavar'*.

Why, (it may be asked), should the ruling here be different from the case in which two deeds (of sale or gift relating to the same property and) bearing the same date are presented in court, in which case Rab rules that the property should be divided between the claimants, and Samuel rules that the judges should assign it according to their own discretion?

R. Nachman's view here is indeed expressed very briefly, and it lacks any explanation about the nature of KDG and why it is an appropriate and justified solution. Locating KDG together with the solutions of Rab and Samuel sharpens the occasional aspect of KDG. While deciding the doubtful case, according to Rab and Samuel, is done on the authority of the judges and within the limits of law, according to R. Nachman the solution lies outside the court and is disconnected from its authority. R. Nachman therefore extends the legal procedure beyond the court verdict and the judge's discretion, and according to him, the results of the claimant's physical confrontation are also legally meaningful.

The Talmudic discussion preceding R. Nachman's saying presents KDG as an alternative to court possession of a property until sufficient evidence is collected for

¹⁸ Maimonides describes this norm in terms of being privileged; see *Mishneh Torah*, 'Laws of Neighbors', 3:10.

¹⁹ b *BB* 34b.

one of the claimants. According to this text, the question that stands at the base of KDG is: how should the court function in doubtful cases that cannot be solved using ordinary legal procedures? More precisely, the question is one of the court's authority and duty to protect properties subject to unresolved conflicts. The positions taken by Talmud scholars thus are centred on two basic questions: (1) Is it appropriate to charge the court with the distribution of property whose status is unclear, or should we transfer it outside court and leaving it for the claimants to fight over? (2) Should the court return property whose status is unclear and which was already in the court's possession?:²⁰

There was a certain riverboat about which two men were disputing. One said: 'It is mine,' and the other said: 'It is mine.'

One of them went to the court and appealed to them (the judges): 'Impound the boat until I bring witnesses to prove that it belongs to me.' (In such case) would we impound the boat or not?

R. Huna says: 'We should attach it, and R. Judah says: 'We should not.'

(The court having attached the boat], the man went to look for his witnesses but did not find them, whereupon he requested the court to release the boat, leaving it to the stronger to obtain possession (KDG). In such a case should we release (it) or not?

R. Judah says: 'We should not release it.' R. Papa says: 'We should release it.'

The accepted ruling is that we should not attach in the first instance, but if we have attached we should not release.

Here the Talmudic discussion is constructed towards the conclusion that adopts R. Judah's position that in doubtful cases, a court should not intervene in ordinary procedures and should not make any change upon the claimant's requests, nor leave it to violent resolution in the absence of sufficient evidence for either party. In other words, the court should not take possession of the property until relevant witnesses are brought to court. In this context, KDG is presented as a supplication to the court on behalf of one of the claimants, requesting the court to remove its authority from this case and leave it to the balance of power between the disputants. This request by one of the claimants is in fact a request that the court maintains an indifferent attitude towards this case and avoid any further intervention. Thus, KDG is not presented as a natural solution for doubtful cases, consistent with R. Nacham's saying, but rather as an optional solution that the law recognizes, but is considered only because of the claimant's appeal.

The common feature of these two expressions of KDG as a principle is the fact that both supporters—R. Nachman and R. Papa—view it as expressing the recognition of the limits of the court's authority in cases that are unresolved through ordinary legal procedures. KDG, according to these two sages, is derived from the silencing of the court and from its self-restraint not to intervene in doubtful cases that cannot be decided according to ordinary procedures. On this count, of course, the resemblance between the European duel and the Talmudic norm is easily identifiable; both the doubtful cases paralyze legal authority and become a sufficient cause for removing the case from the court and transferring it to the dynamic of violence. Legal doubt, or legal uncertainty in general, is in fact a transitional point

²⁰ *ibid.*

for cases unsolved in court to migrate to the arena of backyard wrestling. However, it seems that this similarity exhausts the phenomenological resemblance as the basis for legitimization for each is totally different.

Attention should be paid to the fact that the above cases demonstrate how KDG is proposed in cases of factual doubt. In the forthcoming Talmudic passage, we can see that this idea is also extended to significant legal doubts. The next Talmudic context is the fifth chapter of tractate *Gittin*, which is constructed over a list of the Sages' rulings all based on the same *ratio legis*, that is, the interests of peace (מפני רדכי שלום; lit. on account of the interests of peace).²¹ One of these rulings is the following: 'The pit that is nearest the (head of the) watercourse is filled from it first (and meanwhile the owner of the pit has the right to dam the watercourse), in the interests of peace.' This ruling actually determines the privilege of the nearest pit owner to take advantage of the water based on the rationale that this will prevent conflicts between the beneficiaries of the water. Later on in the Talmudic discussion a similar rationale is raised, and due to this similarity between the cases and for the sake of harmonizing the Tannaic ruling with the Talmudic, they discussed the matter to clarify their sayings:²²

It has been said (Where fields) adjoin a river, Rab says: 'that the owners lower down have the right to draw off water first,' while Samuel says that the owners higher up have the right to draw off water first.

So long as the water is allowed to flow, both agree that no problem arises. Where they differ is on the question of damming for the purpose of watering. Samuel says that those above can draw off water first, for they can say 'We are nearer to the source,'

...

while Rab holds that those below can draw off first, for they can say 'The river should be allowed to take its natural course.' R. Huna b. Tahalifa said: Seeing that the law has not been determined one way or the other, each must fend for himself (KDG).

As opposed to the Tannaic rationale in the Mishnah, the Talmudic discussion views the problem of privilege here not as derived from the ideal of preventing conflicts between the owners, but rather from considerations of principle regarding who has the right to use the water first. At this point, a significant gap between the two perspectives is introduced. While according to the Mishnah, the solution should be drawn from the moral principle of preventing conflicts and supporting peaceful regulations, the Talmudic answer—KDG—leaves the owners' conflict unresolved and free to be solved by the balance of their power, without taking any position. This resolution, of course, encourages violent struggle between the conflicting neighbors.

The discussion opens with the Sages' disputation about who has the right in principle to use the river water—those located downriver (Rab) or upriver (Samuel)? The conclusion of this discussion by R. Huna b. Tahalifa shifts the focus from the question of privilege to the factual determination of the appropriate norm, and ends with the conclusion: 'Seeing that the law has not been determined one way or the

²¹ Textually this ruling follows a series of rulings dealing with various regulations regarding the prosperity of society or fixing public norms such as 'for the order of the world' (תיקון העולם; lit. repairing or healing the world).

²² b *Git.* 60b.

other, KDG'. Here we see that KDG does not derive from a paralysis of the ordinary legal procedures, but from the difficulty in identifying the appropriate norm in face of the disputing positions of Talmudic scholars.

This extension is indeed non-trivial and demands an explanation as to why disagreement among the scholars, or the lack of determination between their positions, is a cause for expropriating the case from the legal sphere and relegating it to the violent struggle outside court. Moreover, the Talmudic literature is full of unsolved disagreements between the Sages. Does one then conclude that, according to R. Huna b. Tahalifa, we should turn to violent practice whenever a scholarly disputation is unsolved? Answering these questions is much beyond our discussion, which seeks to deal with the nature of the legitimization mechanisms of violence in doubtful cases.²³ For our purposes, we need only refer to the basic structure of this norm, in which judicial doubt becomes a cause for relegating the case to the violent struggle of the conflicting sides.

The fact that referring to violence in the above cases is not described or explained as referring to divine adjudication (*judicium Dei*) demands that we seek for different directions of understanding and justifying their rulings. As mentioned, KDG is not elaborated or discussed in the Talmud itself, but only in post-Talmudic literature that reflected the existing norms. In the following, we will investigate several modes of dealing with the problem of the law/violence relationship used by post-Talmudic scholars who reinterpreted KDG and gave it a different rationale that neutralizes violence.

5.1.3 *Neutralizing Violence: Competence and Pre-Legal Procedure*

The first mode of neutralizing the violent aspect of KDG, which reduces KDG to a legal procedure based on fair competition and not the balance of violent power, is attributed to R. Hananel b. Hushi'el (Kairouan, d. 1055/56). The key for this hermeneutical move rests in the conceptual distinction between 'aggression' and 'competition'—a distinction that for our purposes is quite subtle but nevertheless crucial. Competition as aggression also demonstrates physical power and not a pure balance of rights, but on the other hand, competition as opposed to aggression is a fair confrontation, because the opening positions are equal. Therefore, according to

²³ Apparently the position attributed to R. Huna b. Tahalifa reflects late editorial rationale which prefers to bestow the Sages' disputations a canonical status, and therefore has the interest of preserving the disputation and not deciding on one side or the other (see p. 30 above). Yet we should also note that R. Huna b. Tahalifa's pattern generally is not followed apart from very few exceptions. One unique example can be seen in the writings of Rabbi Meir b. Barukh of Rottenberg (1215–1293), in which he avoids determining the dispute between his rabbinical authorities and therefore he ruled KDG—'... since it is unclear for us whether the right ruling is according to Rashi' (Solomon b. Isaac; 1040–1105) or Rabbenu Tam (Jacob b. Meir; 1100–1171) ... we say KDG and if partners are stronger in holding the eastern (side) they obtain possession' (*Mordekhai* on b *BB*, 507, 86a).

R. Hananel b. Hushi'el KDG is not recognition of the arbitrariness of the most powerful side's superiority, or a view that violent aggression is a way for resolving legal cases; rather, it is a recognition of the appropriateness of the result of a competition held under fair conditions. R. Hananel's distinction is sharpened by the comparison between the above case regarding the ownership of the riverboat and the early Tannaic verdict 'Two hold a garment—one of them says: I found it, and the other says: I found it; One of them says: it is all mine, and the other says: it is all mine... (the garment) shall then be divided between them':²⁴

And R. Hannael wrote there... that case of the riverboat is where it was possessed by none of them, but placed down in the street or in a place where their access is equal²⁵ and therefore KDG. However, our case (i.e. in the Mishnah) is when they are both occupying it (i.e. the garment)—we do not expropriate it from their hands to say KDG.

The hermeneutical efforts of Talmudic and post-Talmudic scholars to harmonize the various rulings widespread in the Talmud are also demonstrated in this quotation. The question then arises of why, in the doubtful case where 'Two hold a garment', is equal division and not KDG offered as an appropriate solution? R. Hananel's answer distinguishes between two distinct situations of conflicting claims for full ownership in which court is helpless: A situation where the conflicting sides both occupy the subject and thus leaving it in their hands means encouraging the violent and aggressive struggle between the two, and a situation where they do not have any possession and so their conflict bears a more competitive character.

The basis for this distinction between aggression and competition is rooted in R. Hananel's saying that re-describes the Talmudic cases: the doubt regarding the ownership of the riverboat is portrayed as 'a place where their access is equal' and therefore the result of the struggle could be taken into account as a solution. In the case of 'Two hold a garment', however, the situation is not competitive but simply aggressive, and is therefore disqualified from the application of KDG. Therefore, KDG according to R. Hananel is limited only to struggles classified as fair competition and not to states-of-affairs where the point of departure ('they are both occupying it') invites aggression. This principle was later formulated by one of the halakhic authorities, R. Isaiah b. Mali di-Trani (Italy, 1220-before 1260): 'it is not lawful that we say to the violent: attack the weaker, take what he possesses and earn it'.²⁶ R. Hananel's interpretation therefore expresses the lack of satisfaction with *the prima facie* legitimization given to aggressive violence in the Talmudic norm.²⁷

Another example of grappling with the *prima facie* legitimization given to violence can be found in the sayings of R. Asher b. Yehiel (Toledo, 1250–1327). As

²⁴ m *BM* 1:1. Medieval halakhic authorities frequently quote R. Hananel's saying. The above quotations are taken from commentary on the Talmud attributed to R. Moshe b. Nachman (1194–1270), see *Nahmanides Novellae*, on *BM*, 1.

²⁵ במקום שיד שניהם שווה; lit. wherein their physical possession is initially equal.

²⁶ See *Piskei Ha-Ryid to Bava Metsia*, p. 3.

²⁷ His response of reinterpreting this Talmudic norm in a manner that weakens the moral problem is indeed typical of post-Talmudic scholars who are trying to resolve problematic aspects of the Talmudic regulations.

opposed to R. Hananel, whose position reflects an eastern tradition, R. Asher b. Yehiel represents a hermeneutical tradition which is probably rooted in the *Tosafot* academies of the twelfth or early thirteenth century in northern France. He deals with the *prima facie* legitimization of violence on two hermeneutical levels. Firstly, he significantly narrows the circumstances under which we legally recognize the superiority of the more violent claimant. Secondly, he gives KDG a new meaning based on an economical rationale. R. Asher b. Yehiel thus reduces KDG from an extra-legal procedure to a pre-legal procedure to be completed in court:²⁸

This KDG is a law that the one who is stronger at the first time possesses the object until his friend brings a proof against him. As long as he doesn't bring a proof, even if he becomes stronger, we do not take it out of from him. For it seems unlikely that the Sages would regulate a norm that leaves the claimants fighting and in disputation for their entire lives—today he is the stronger and tomorrow his friend will be the stronger one.

Rather, the Sages ruled that the one who is more violent this time prevails, and they trusted in that that the one who is right is more likely to produce evidence on his behalf. Moreover, the one who is right will take a greater risk to earn what is his, more than the other will risk himself by stealing it. Additionally, (the one who steals will) say: why should I take a risk today if tomorrow he (i.e. the real owner) will bring proof and take it from me?!

First, R. Asher describes KDG as a ruling made by the Sages, namely as a secondary regulation (תקנה) that attempts to achieve a more appropriate or more just solution.²⁹ He thereby seeks to degrade the normative value of KDG. Yet at the same time, his main innovation is in the essential insight, similar to that of R. Hananel above, that it is impossible to understand KDG as normative justification for violence 'For it seems unlikely that the Sages would regulate a norm that leaves the claimants fighting and in disputation for their entire lives—today he is the stronger and tomorrow his friend will be the stronger one'. Therefore, violence is not ratified as a final procedure for determining ownership, but rather as a quasi-temporal means of determining possession until relevant proofs are brought to court and the case is solved according to ordinary evidential procedures.³⁰ This innovative interpretation runs counter to the view of violence as a legitimate procedure for determining doubtful cases, and limits its legal meaning in two senses. First, violence is efficacious only as a primary act for determining possession, and therefore, the problem of ownership is not subject to the claimants' struggle over the long term. Second, the period of possession of the property through violence is not absolute, but limited until the submission of the relevant proofs to the court. KDG is thus reduced to a technical-

²⁸ *Piskei ha-Rosh*, Bava Batra, 3:22, 368. His position appears elsewhere in his writing and is widely quoted in medieval rabbinic literature.

²⁹ On the normative status of *takkanah* see Elon (1994, II. p. 477).

³⁰ A parallel stance is founded in a contemporary halakhic authority, Menachem b. Shlomo Ha-Meiri (1249–1315): 'And you have learned in your own way that whenever two are arguing about one matter—one says: 'It is mine' and the other says: 'It is mine'; one says: 'It belonged to my fathers' and the other says: 'It belonged to my fathers'—and it cannot be resolved, it is not in the possession of either party, and the thing is not handled by court, or by any person; It is not under the jurisdiction (of the court), and the one who is more violent prevails. After one of them has overcome the other, (the court) will consider the claims for expropriating it from him.' (*Beit Ha-Bechirah*, on b. *BB* 34b).

temporal solution that is not a substitute for the essential evidence necessary for determining ownership, but a temporal aid: ‘The one who is stronger at the first time possesses the object until his friend brings a proof against him.’

The attitude reflected in the above passage again exposes the fundamental distinction between viewing the duel as a legal procedure and as KDG. The above saying of R. Asher clearly refutes an understanding of the stronger party’s power as evidence of his legal rights. The status of this does not constitute the discovery of legal facts nor an irreversible legal right; rather, it standardizes the possession of the property as part of due process. A denial of the view according to which violence is an acceptable method for determining legal facts is more explicit in the second part of R. Asher’s saying, in which he enumerates three reasons for KDG that naturalize its aggressive aspect and reject the legal advantage of violence. The three reasons that R. Asher counts are in fact three psycho-economic presumptions that explain KDG as pre-legal procedure. These three presumptions, in his view, supply the basic rationale for KDG as a norm.

The first reason explains why KDG does not waive the legal rights of the weaker party, since we should presume that the real owner, even if he is the weak party in the struggle over the property, will succeed in obtaining sufficient proof for his case: ‘they trusted in that that the one who is right is more likely to produce evidence on his behalf’. This presumption, according to R. Asher, assures the real owner’s confidence against the temporary possession of the stronger, for the Sages who regulated KDG presumed that he would bear the required burden of evidence. Nevertheless, this presumption is also based on the assumption that a proprietary right achieved through KDG is a limited and temporary right that should not impinge on the real owner’s rights.

The conception of KDG as a pre-procedure is illustrated by the following reasons: The constitutive rationale of KDG according to them is economic logic that encourages the procedures of legal inquiry to be temporarily postponed in the absence of sufficient evidence for either of claimants. The core of this economic logic is predicated on the assumption that excluding the case and leaving it to the claimants to struggle is a means of promoting the evidential procedure. In this manner, the temporary exclusion of the case from the court in fact encourages the real owner to produce the required evidence to prove his ownership, and discourages the liar from perpetuating his lie: ‘Moreover, the one who is right will take a greater risk to earn what is his, more than the other will risk himself by stealing it’. It is clear then that KDG is not an alternative to ordinary legal procedure under the court’s authority, but rather a calculated tactic meant to positively encourage the real owner, and on the contrary to discourage the liar and weaken his claim.

We have thus seen two post-Talmudic interpretative moves that seek to naturalize the aggressive aspect of the *prima facie* legitimized violence based on KDG: An interpretative move that reduces KDG to a fair competition, and a more radical move that diminishes the legal value of extra-legal violence and which views it as a halfway phase designated to promote ordinary evidential procedures. In what follows, we shall turn our attention to a number of additional aspects of KDG that indicate different directions of justifying extra-legal violence.

5.1.4 *Anarchy, Moral Transgression and Cause of Heresy*

Alongside the attempts to preserve the Talmudic norm of KDG while deconstructing the violent and aggressive aspects of it, were widespread views that considered KDG as a condemned and undesirable normative state of affairs, or an expression of illegitimated violence. These views are well articulated in hermeneutical and contemplative compositions, which could be called non-legal intellectual literature; that is, a kind of literature that is freer to deviate from the original meaning of KDG as rooted in the Talmud. These views differ from the above interpretive moves in that they recognize an essential deficiency in the very idea expressed by KDG, and therefore view KDG as condemned and disqualified norm, despite the fact that it reflects an appropriate norm in Talmudic terms.

Such a critical approach towards the expression can be seen in Rashi's commentaries on the Bible in which he is not deterred from explaining verses that describe various forms of anarchy using the term KDG. For example, in this manner he explicates the corruption described by the prophet Ezekiel (22:6) ('each one has used his power to shed blood in you') through the term KDG. In a similar manner he illustrates the meaning of Zechariah's prophecy regarding the great panic that will infect the Gentiles in the days to come: 'Everyone will seize the hand of his neighbor and raise his hand against his neighbor's hand' (14:13), as total anarchy and the domination of the principle of KDG.

Another example can be seen in the view which characterizes KDG as a condemned norm with ethical and theological attributes. According to this manifestation, KDG expresses an immoral and corrupt normative state of affairs that leads to actual heresy and a denial of the existence of God. This conception sees an essential causal relation between morality and the belief in the existence of God, and, correspondingly, between immorality and heresy. KDG is the link that creates the logical and causal continuum between ethical and religious deviation, because legitimized violence means admitting to the absence of authority or sovereignty.³¹

For this (robbery) causes heresy for they would say: 'there is no law and no Judge therefore the one who is more violent prevails (KDG)'; for the severity of the sin of (robbery) is not due to the essence of this sin but due to the evil brought about by it-because the sinner in robbery might clean his conscience and say: 'there was no crime for there is no 'God who judges earth'³² and consequently he becomes 'companion to a destroyer'³³

Drawing the conceptual line between lack of law and sovereignty and the term KDG reflects the antithetical approach to law and violence mentioned above, by which law is indeed perceived as contradicting and excluding violence and vice versa.³⁴

³¹ Luntschitz, *Kli Yakar*, on Gen. 1:1

³² Paraphrase based on Ps. 58:11.

³³ Paraphrase based on Prov. 28:24.

³⁴ Indeed, this is a fascinating example of theological and literary critique of the law that uses the narrative to undermine the legal approach altogether. The violent possibilities offered by the law and which are expressed by KDG are seen as enormously dangerous. The implicit recognition that

Together with these critical readings of KDG is another reading that views KDG as a condemned and inferior normative state of affairs on the one hand, but ascribes it a moral value on the other hand. This dialectical attitude could serve a key for the gap between the two meanings of KDG, and might even supply an explanation for the nature of the mechanism of justifying violence and the compatibility between law and violence in general. This attitude, as will be shown, posits that violence is a norm applying to the concept of natural law.

5.2 Violence and *Lex Naturalis*

One approach that resolves the ambivalence of KDG as a norm appears in the theological doctrine of R. Yosef Albo (Spain, 1380–1444). Albo's approach is eclectic, merging different systems of thought, philosophical and theological alike. It draws on Islamic literature on the one hand, and Christian scholastics on the other hand. Influenced by the thinking of St. Thomas Aquinas (1224–1274), the structure of Albo's jurisprudential view is based on the same typology of the law: the theory of 'triple legal systems (religions)'.³⁵ According to his typology, there are three systems of law:³⁶ natural law (*lex naturalis*), human law (*lex humanitus posita*) and divine law (*lex divina*)³⁷ These three systems stand in a clear hierarchical relation based on their source of validity, extension and functionality. Natural law is essentially universalistic, independent of any temporal or geographical context, and has a relatively modest aim: to supply basic norms for the minimal survival of society.³⁸ Human law is a product of human intelligence and therefore corresponds to spatial and temporal conditions. A supplementary value of human law, according

there are cases that may not be susceptible to judicial resolution is tantamount to admitting that there are times when the divine judge is absent. (There is no law and no Judge and therefore the one who is more violent prevails.)

³⁵ *Summa Theologica*, II. 91. 1–5. On the Scholastic and Christian background of Albo, see Guttman (1955), Husik (1925).

³⁶ On Albo's use of the term 'religion' to mean a legal system see Lerner (1964), Melamed (1989), Ehrlich (2006).

³⁷ 'There are three kinds of law, natural, positive and divine. Natural law is the same among all peoples, at all times, and in all places. Positive is a law ordered by a wise man or men to suit the place and the time and the nature of the persons who are to be controlled by it, like the laws and statutes enacted in certain countries among the ancient idolaters, or those who worship God as human reason dictates without any divine revelation. Divine law is one that is ordered by God through a prophet, like Adam or Noah, or like the custom or law which Abraham taught men, instructing them to worship God and circumcising them by the command of God, or one that is ordered by God through a messenger whom He sends and through whom He gives a law, like the Law of Moses.' (Albo, *Book of Principles*, I:7, pp. 38–39).

³⁸ 'The purpose of natural law is to repress wrong, to promote right, in order that men may keep away from theft, robbery and murder, that society may be able to exist among men and everyone be safe from wrongdoers and oppressor.' (ibid.).

to Albo, is its pedagogical aspect.³⁹ In contrast to these two systems, divine law is the outcome of revelation, and its aim is to impel human beings towards religious and spiritual achievement.⁴⁰ In contrast to Christian legal views that were certainly in the background of this conception, these three legal systems are not seen to abrogate each other, and are not structured on an eschatological scheme. In other words, one system of law does not annul the validity of another, and in fact, Albo claims, they reflect the structure of the history of religion.

This legal theory is very interesting for our purposes, mainly because Albo also seeks to offer it as the theoretical base for a general theory of halakhah. In this context, the most important fact is the extension of this theory into a political doctrine that also provides a brief phenomenology of violence.

Albo's legal typology, as I read it, is transferred to the socio-political sphere where a distinction is made between three political and moral views (in his words: 'three opinions', 'three sects') that base their social order on three distinct principles: violence, domination and worship. Unlike the synchronized typology of law mentioned above, the socio-political typology reflects three phases in the evolution of religion and politics: the era of natural violence (recognized according to the biblical narrative with the generation of the flood), the era of political domination (from the flood until the revelation of the Torah) and the religious era (subsequent to the giving of the Torah). By anchoring his theory of 'triple legal systems' in Biblical narrative, Albo provides a realistic meaning to his legal theory. For our purposes it is very important to address the way in which he characterizes natural society and the place of violence in it.⁴¹

According to these three opinions of Cain, Abel and Seth, respectively, all mankind are divided into three classes. One class follows the opinion of Cain, and thinks that the most important human occupation is agriculture. They feel hostility towards political rulers and desire to kill them, as Cain killed Abel. A second class follow the opinion of Abel, thinking that politics is the most important pursuit, and risk their life for political activity like Abel, because they think that it leads to human perfection, as we are told concerning their Roman rulers. So kings risk their lives for the sake of power, which is natural to them as it was to Abel, who was the first shepherd and ruler and lost his life on that account. The third class follows the opinion of Seth, thinking that the important thing is to worship God, and despite power and the other pleasures...

³⁹ 'The purpose of the positive law is to suppress what is unbecoming and to promote what is becoming, that men may keep away from indecent deeds according to human opinion. Herein lies its advantage over natural law, for positive law also controls human conduct and arranges their affairs with a view to the improvement of human society, even as natural law.' (ibid.).

⁴⁰ 'The purpose of divine law is to guide men to obtain true happiness, which is spiritual happiness and immortality. It shows them the way they must follow to obtain it, teaches them the true good that they may take pains to secure it, shows them also real evil that may guard against it, and trains them to abandon imaginary happiness so that they may not desire it and not feel its loss. And in addition it also lays down the rules of right that the political community may be ordered in a proper manner, so that the bad order of their social life may not prevent them from attaining true happiness, which is the ultimate end of the human race to which they are destined by God. Divine law is therefore superior to positive law.' (ibid.).

⁴¹ Albo, *Book of Principles*, III: 15, pp. 232–234.

But the opinion of Cain was widely prevalent among his descendants, and hence the earth was filled with violence on their account, their belief being that man has no superiority over animal, and the one who is more violent prevails (KDG). Therefore they were corrupt and lived like animals. For this reason it was decreed that their name should be wiped out from the earth in the flood.

The three political worldviews are symbolically represented through the three sons of Adam, and in accordance with them the universal population is divided into three types of society. Since our interest is in examining the normative aspects of KDG and the relationship between law and violence, we will limit our focus to the first two societies.

The first society is agrarian⁴² and is deeply hostile to government and dominance by an elite; a society whose political order is characterized by natural violence. The naturalistic view widespread in this society does not conceive of normative behavior as separate from nature and natural constraints, but as rooted in nature and deriving from it. Viewed through the lens of this society, normativity is not autonomous, but dictated by natural forces and at the same time reflective of them. Therefore, violent behavior in their view is normative, and the violence of KDG is a code of behavioral normativity. It is in this sense that Albo understands KDG as reflecting the basic principle of social order in the pre-cultured society in which the essential gap between nature and culture is their belief ‘that man has no superiority over animal, and the one who is more violent prevails’.

The second society is an authoritarian society whose political structure is based on the principles of dominance (*potestas*) and authority (*auctoritas*). The high regard for political authority and government in this society is not only an expression of power, but rather a moral aspiration for human perfection marked by self-dominance and self-control. Moral ideals engaged with self-government are well known to us from the Sophistic moral worldview and from the political logic of ancient Rome, and indeed Albo denotes Roman culture as ratifying this identification. Placing government as a moral ideal, according to him, inculcates a passion for domination and the willingness to fight and endanger oneself for the sake of a moral value. The way in which Albo seeks to distinguish between these moral doctrines with a high degree of sensitivity describes the moral theory of law, domination and authority as a human effort to establish a ‘second nature’, a moral nature superior to the naturalistic nature.

It is worthwhile to pause here to consider two interesting points in Albo’s writing. Firstly, the distinction he makes between the two political-legal views coincides with the distinction between the Stoic and Sophistic legal theories which at its latest stage is known as the distinction between *jus naturale* and *jus civile*. The interesting feature in Albo’s theory is how he identifies in this classical distinction the footprints of the distinction between law and violence. A social order based on

⁴² It is not really clear whether he sees an essential linkage between violence as a norm and the agrarian society. Nevertheless, it is plausible that such a linkage is reflected in his view of the feudal structure which he is willing to locate in the tri-functional typology he develops. On the other hand, perhaps this linkage is a consequence of his hermeneutical move that connects this structure to Adams’ three sons and mainly to the tension between Cain and Abel.

natural law actually adopts violence as a basic norm, while a social order based on human law is woven around concepts such as domination, authority and positive law.⁴³ Secondly, Albo addresses natural law as a complicated and dialectical issue. Natural law, according to him, is a double-faced legal-political agenda. On the one hand, he is acquainted with the idea that natural law reflects moral intuitions about universal and eternal norms. On the other hand, he insists that a worldview that supports natural law in fact legitimizes violence as a habitual and accepted behaviour. Hence, the relationship between law and violence is also an evolution in the development of society from naturalistic-violent to a society based on positive law.

Nevertheless, Albo points out the existence of a conceptual connection between the notion of natural law and the violence deeply embedded in the norm KDG. This observation actually reduces the distinction between law and violence to the distinction between positive law and natural law, while the naturalistic violence characterizing natural law is the violence addressed by the norm KDG. In other words, according to Albo, the justification of violence concealed in KDG is equal in extent to the legitimization and normative value of violence in natural law. Removing a case from court to the struggle in the courtyard is therefore a regression from positive law to natural law.⁴⁴

5.3 Stabilizing Law by Violence

As we have seen, for Albo, reduction of the law/violence problem into a question of positive vs. natural law actually describes the legitimization mechanism of KDG as equivalent to the validity and legitimacy of natural law. The step towards extralegal violence is thus a normative withdrawal into an inferior stage in the evolution of the legal-political culture.

We shall now consider a different type of justification for extra-legal violence, one which exposes the latent advantage hidden in KDG. As shown above, R. Asher b. Yehiel's position saw KDG as a pre-legal procedure whose target is to promote the relevant discussion in court. This position views extra-legal violence as an event that is ultimately concluded in court with ordinary legal procedures. This position is explicit in the commentaries of the Talmud that seek to rationalize KDG as a norm

⁴³ Albo's distinction between violence and political power definitely recalls the distinction made by H. Arendt in her concluding analysis of both notions: 'Power and violence are opposites; where the one rules absolutely, the other is absent. Violence appears where power is in jeopardy, but left to its own course, it ends in power's disappearance' (Arendt 1970, 65).

⁴⁴ The identification of the fundamental justification of KDG in reference to Natural Law was made by Atlas (1978). Atlas's analysis of Talmudic discussions and post-Talmudic commentaries lead him to associate the halakhic category *hefker* (ownerless property and renunciation of ownership) with the idea of Natural Law. Regarding that, it should be noted that in classic Roman Law there exists a conceptual connection between legal categories of ownerlessness (*derelictio, res nullius*) and Natural Law. An example of such connections can be seen in the following: *quod enim nullius est, id ratione naturali occupandi conceditur* (Dig. 41.1.1).

that is not an alternative to the law, threatening its power and authority, but rather one that contributes to the preservation of its status and to the strengthening of its authority. An explicit expression of this view appears in the sayings of R. Samuel b. Meir (Ramerupt, France, 1080/85–1174), explaining the preference for extra-legal violent procedure over the conventional procedures for doubtful cases, such as division or judicial discretion:⁴⁵

... Maybe the witnesses will show up and testify who is the owner and as result of that court's verdict will be broken and refuted for they already ruled division or judicial discretion. For this reason the court is not getting involved in that case and therefore the one who is more violent prevails.⁴⁶

Similarly to R. Asher b. Yehiel's approach, R. Samuel b. Meir also does not regard the Talmudic cases as essential doubts, but as doubts to be solved when suitable evidence is ultimately brought before the court. Consequently, extra-legal violence is perceived as an appropriate solution in contrast to erroneous verdicts that might be reversed once sufficient evidence is brought before the court. For this reason, extra-legal violence is practiced as means of preventing possible embarrassment on a future occasion when evidence is submitted to the court. In other words: extralegal violence is the court's flotation device that spares it from possible contradiction and shame. This explanation seems to emphasize a different aspect of the law/violence problem, namely, the supplementary value of KDG by which extra-legal violence contributes to the strength of the law itself. Extra-legal violence therefore serves the law and saves it from inconsistencies and self-contradictions that might enfeeble verdicts, or without which would leave them seeming 'broken and refuted'.

An outstanding expression of such logic that describes KDG as an extra-legal procedure designated to protect the court from making mistaken judgments can be seen in the following anonymous source:⁴⁷

The reason for the ruling KDG is that court is not required to address their case for there is no loss of money for both of them and no urge to reach a decision. Accordingly it is comfortable to leave them to do what they wish and we should not give an erroneous verdict. Therefore the one who is more violent each time owns it, until the other one will overpower him, either by arm or by evidence.

Here we see again a clear explication of the motives that lie beyond the legitimization of extra-legal violence, and which link KDG to the fear of erroneous judgments. According to this description, the interest of preserving the court's dependability overrides the concern about arbitrary consequences reached through violence. In a different way, one might also say that extra-legal violence is a kind of solution

⁴⁵ Quoted in *Sefer Terumat Ha-Deshen*, p. 352, 313.

⁴⁶ There are two medieval versions of Samuel ben Meir's position. Alongside the one quoted above there exists a similar one which makes the same claim in different terms: 'Maybe the witnesses will show up and refute the verdict ruled by the court, therefore the court is not troubled for them to judge a case likely to be a distortion, rather leave the parties and KDG until witnesses come and clarify the case'. (Samuel b. Meir, *Commentary on b. BB 35a*).

⁴⁷ This source is found in a sixteenth century collection of mid-medieval commentaries on the Talmud and rabbinic *responsa* collected by Bezalel b. Abraham Ashkenazi (1520-91/4), see *Shitah Mekubetset*, on b *BB 34b*, p. 148.

that is evidently unjust, but thanks to its legitimization it ratifies the justifiability of ordinary legal procedures.

5.3.1 *What does the Law Earn from Violence?*

Above we have sought to elaborate on a different aspect of the law/violence relationship by focusing on the legitimate transference of a case from the realm of law to the realm of extra-legal violence. In this sense, we wanted to shed light on the problem of justifying extra-legal violence and the logic that this legitimization is based on. As we saw, transference from the legal to extra-legal violence is usually done in the context of uncertain adjudication undetermined by ordinary legal procedures, which for that reason become a cause for moving beyond the law. Metaphorically speaking, uncertainty and doubt are the passing points or departure gates for extralegal violence. In the cases analysed above, legal doubt signifies the limits of law and the end of the law's power to dominate just regulations among the conflicting parties.

As we saw, the legitimization mechanism of violence in the European duel could not serve as an explanatory model for the Talmudic norm KDG, for there is no base for identifying violence as a revelation of *Judicium Dei*. Nonetheless, we did point out three legitimization mechanisms in the post-Talmudic rabbinic literature. One neutralizes violence and reduces it to competitive venture which can also be viewed and evaluated in economical terms as pre-judicial procedure. The second is based on the recognition of violence as a justified norm according to natural law, and the third is based on acknowledging the utility of violence for the law itself. All three represent different ways of dealing with the legitimization of extralegal violence at different levels. The third explanation is the most striking and deserves special attention, since it represents the violence-law relationship from an innovative perspective. In contrast with former explanations, the antithetical as well as the symbiotic (*judicium dei*, competition, natural law, etc.), this explanation emphasizes the direct interest the law has in extra-legal violence. In other words, this explanation not only views extralegal violence as compatible with the law, but also as serving the law and supplying a meaningful contribution to its status.

In fact, our analysis pointed out the opinion that legitimizing extralegal violence might benefit the law itself in a very complex manner. This formula can be demonstrated in two aspects, both emphasizing various advantages: a tactical and a strategic one.

At the tactical level, we can view the moment the court decides when and where to intervene or to adopt a passive position not as a moment of powerlessness, but rather as an expression of control and power. Put differently, the manifestation of the court's power is not only recognizable by judicial activity but also by judicial passivity, and mainly by the liberty the court enjoys in deciding when and where to hold an active stance or a passive one. In that respect the authority to decide whether to intervene in conflicts is stronger than the official authority of actual interventions in different realms.

To the same extent that judicial activism elevates the court above its declarative function, the court is also elevated by judicial passivity that gives it a voluntary stance, enjoying the choice of whether to react to the call for justice or to avoid it. In other words, nonjusticiability and paralyzed courts do not necessarily express the weakness of adjudicative ability, but rather a powerful stance no less, or perhaps even more, than judicial activism.⁴⁸ The question of authority and power in that respect contains a paradoxical structure in which the silencing of the court's action and judicial procedures in fact reconfirms its dominant power and superiority. However, R. Samuel b. Meir's interpretation exposes an additional advantage achieved by the legitimization of extra-legal violence. According to this view, by legitimizing extra-legal violence, the court's image accumulatively earns a benefit in the long run perspective. That is, the extra-legal violence saves courts from contradictions and embarrassments and preserves the coherent and consistent image of the law. According to that, when the court's decisions might present it in an unfavorable light is the time for the law to recognize the legitimacy of extra-legal determinations.⁴⁹

5.3.2 Conclusion

In this chapter we have attempted to discuss a number of elements pertaining to the understanding of judicial error and the concept of 'error in *shiqqul hada'at*.' Our conclusions indicate several basic characteristics of the concept of judicial error in Talmudic literature. We began by establishing the claim that the concept of error reflected in the Talmudic case in *Sanhedrin* assumes a conceptual structure in which the concept of error in relation to God's word is connected with the idea of the tolerability of deviation from the proper law. According to this relationship, error as a deviation is measured according to the degree of its distance from the proper law. In order to trace the conceptual structure of tolerable error and its presence in the *sugyot* in question, we suggested examining the issue of judicial error through the use of two organizing concepts: the 'limit of plausibility of error,' which encompasses tolerated deviations from the suitable norm, and the 'limit of error,' as a concept indicating the limit or boundary of the realm of tolerability. We claimed that this conceptual structure of tolerable error exists in three consecutive contexts: the Biblical concept of *shegagah*, of unintentional error; the laws in *Horayot*, and

⁴⁸ In that sense the tactical advantage here is certainly related to the question of justiciability, where the court is provided with techniques for refraining from deciding cases on the merits when doing so would be imprudent. Though the doctrine of justiciability generally addresses the interface of political and legal issues, our exposition here offers an understanding that stretches the court's non-justiciabilities to the border of law and violence.

⁴⁹ Justiciability is usually explained through three approaches: (1) The classical approach, which inquires whether there exist affirmative grants to the limits of jurisdictions; (2) The functional approach, which takes pragmatic, efficiency-oriented inquiries to the ability of the judiciary to resolve the controversy; (3) The prudential approach, which includes sensitivity to the necessity of judicial respect for other branches of government, and the potential for embarrassment of incoherency or inconsistency; see Smith (1992).

in the Talmudic case in *Sanhedrin*, as well as in the distinction between error in Mishna (*ta'ut bedevnar mishnah*) and 'error in *shiqqul hada'at*'—albeit, in each context the realm of possibility of error and the boundary of error are derived from different principles. Hence, the continuity among these three contexts ought to be perceived as a kind of two-stage conceptual devolution of the idea of tolerated error. The first stage is the transition from the Biblical doctrine of sin-offering, to the laws of *Horayot*, which deal with erroneous rulings on the part of the court.

This transition draws an analogy between a deliberate act of sin and a ruling of the Court that may involve 'uprooting words of Torah,' while the act of unintentional sin is compared to an erroneous ruling relating to one of the details of the mitzvah. Moreover, analysis of this transition reveals the ethical dimension of the obligation to know the law as a significant component in terms of the definitions of tolerated error. The second stage is the transition from the laws of *Horayot* to the distinction between *devar mishnah* and *shiqqul hada'at* in which, in practice, the 'limits of error' are transformed from a concept indicating the boundaries of halakhic ruling itself to one indicating an inner distinction between two kinds of error. The boundary of error, which according to the laws of *Horayot* indicates a sharp deviation from the basic rules of the Torah, indicates, according to the *sugya* in *Sanhedrin*, deviation from the words of the Sages. By this, the degree of tolerated deviation from the Word of God becomes an internal standard within the post-Mishnaic halakhic material.

The second conclusion, one derived from the previous discussion, is that one may discern three different meanings to the 'realm of plausibility of error' within Talmudic literature—the substantive meaning, the conventional meaning, and the canonic meaning. As our discussions have attempted to show, these three meanings reflect the multiple dimensions of the phenomenon of judicial error and the manner in which the boundary of error is derived from different criteria.

Another axis of the discussion of this chapter was that of the different meanings given to the term *shiqqul hada'at* and their jurisprudential implications. The poles of the discussion were the equivalent meaning of the term implied by R. Pappa's definition, on the one hand, and the cognitive significance that is refined in the words of the Geonim, on the other hand. As we have attempted to show, the equivalent meaning of *shiqqul hada'at* is connected with the self-canonization of the Talmudic Sages, according to which the words of the Sages are given an obligatory, normative stature, except for certain cases in which their words are the subject of an unresolved dispute. We therefore argued that the manner in which R. Pappa defined the category of 'error in *shiqqul hada'at*' expresses a jurisprudential approach towards the phenomenon of the unresolved dispute. We classified the different approaches to the phenomenon of unresolved disputes in the Talmud into two basic approaches. The one approach sees this phenomenon as a legal state of affairs that paralyzes the law and allows for the introduction of extra-legal norms. Another approach sees this phenomenon as an opportunity to implement second-order considerations. Thus, R. Pappa's definition is explained as belonging to the second approach, that gives the status of a second-order deciding factor to *sugya de'alma* and *sugya d'shema'ia*.

Our discussion in this chapter closes with the emergence of the cognitive meaning of *shiqqul hada'at*, which prepares the ground for the continuation of the discussion in the next chapter. The cognitive meaning of *shiqqul hada'at* evidently already existed in the words of the Talmud in the *sugyot* which chronologically preceded those of *Sanhedrin*; however, its transformation into the dominant meaning takes place during the period of the Babylonian Geonim. In our discussions surrounding this concept, we have attempted to present those sources in which one sees the semantic transition between the equivalent meaning and the cognitive meaning, and to indicate the extra-halakhic contexts that underlie the background of these processes.

Chapter 6

Legal Reasoning: Structure and Theology

It follows that Islamic Law everywhere strives to go back to direct the pronouncements of the founder; thus veritably developing a strictly historical method, while both Talmudic and Canon Law seek to make their points by means, not of historical fact-finding, but of logical deduction (logischer Ableitung). For deduction is subconsciously determined by the goal of the deduction, that is to say the present, and therefore it gives contemporary power over the past. Investigation, on the other hand, makes the present dependent on the past. Even in this seemingly pure world of law, then, one can still recognize the difference between the commandment to love and the obedience to law.

Franz Rosenzweig (1985, pp. 216–217)

Abstract This chapter examines the role of judicial analogy (*qiyas*; قياس) in particular, and legal reasoning in general, within rabbinical jurisprudential thought, in comparison to their prominent role in Islamic jurisprudence. More precisely, we tackle the claim that legal reasoning was a controversial topic between the Karaites and the Rabbinates, as the latter denied its legitimacy. Following structural analysis of the advocacy of *qiyas* we construe Sa'adyah's treatise, *Kitab Tahsil Ashar 'i' Asama 'iyah*, and the typology of *qiyas* therein.

Interestingly, Rosenzweig observes legal reasoning as a typological differentiator between the three monotheistic legal systems—Islamic, Talmudic (Franz Rosenzweig 1985) and Canon law. He portrays two types of confronting legal theories: on the one hand, Islamic law is based on 'nostalgic jurisprudence,' is highly committed to historical facts,¹ and accordingly celebrates obedience to law as the supreme value. On the other hand, Talmudic and Canon law, as future-oriented systems, are based on 'deductive reasoning,' much less constrained by the law and hence emphasize

¹ '... the soil of Islam nourished the first real historical interest since antiquity, a really and truly scientific interest in the modern sense, without any ulterior "philosophy of history".' (Graham 1993). See also Rosenzweig (1985, p. 225).

the virtue of love as the ultimate divine commandment. Rosenzweig's observations are, however, peculiar and incompatible with common scholarly accounts of both Jewish and Islamic legal systems. First, against the view of mainstream rabbinic theology as legalist by nature, he describes Jewish law in Christian and antinomian terms as an expression of the ultimate commandment to love. Second, and perhaps even more irreconcilable with our usual understanding, is his presentation of Islamic law in opposition to the use of deductive reasoning. While one can deny viewing Jewish law as based on a future-oriented jurisprudence, it is much more difficult to agree with Rosenzweig's observation that Islamic law is not deductive. In fact, his position is a total denial of the fourth root Sunni jurisprudence, which is the jurist's independent reasoning—*qiyas* or *ijtihad*. Being freed from Judeo-Christian idealism,² we will focus on the significance of legal reasoning in medieval rabbinic jurisprudence through a comparison with its role in Islamic jurisprudence.

Generally, rabbinic jurisprudence in the Middle Ages may be examined in reference to three axes. The first one pertains to the relationship between Talmudic and post-Talmudic reflections on legal concepts. One focus of post-Talmudic efforts was to reconcile and harmonize Talmudic and post-Talmudic rulings. The second axis illustrates the complex relationships between a rationalism that celebrates human reasoning as an essential component of any legal activity, and traditionalism, which insists on taking the law as an outcome of divine revelation and therefore opposes reliance on human reasoning in legal matters. The third axis is the Rabbinate-Karaite³ polemic, which reached its climax in the first half of the tenth century.

There is some evidence to support the view that legal reasoning was indeed a controversial topic in the Rabbinate-Karaite polemics,⁴ though our analysis suggests a revision of this view and hence its moderation. On the other hand, legal reasoning was at the heart of the rationalist-traditionalist tension, to which Jewish legal historians have paid very little attention.⁵

² For the reconstruction of Judeo-Christian theology Rosenzweig (1985, p. 66) dismantles the Quranic ethos about the heavenly book (*Umm al-Kitab*)—a prototype of the Quran—of which Jews and Christians are considered its early possessors. This ethos underlines the theological commonality of the three Abrahamic religions as repositories of the Holy Scriptures, and consequently endows Jews and Christians with a special status as the 'people of the book.' See Vajda, 'Ahl al-Kitab' *Encyclopedia of Islam*, (Second Edition).

³ Astren (2004).

⁴ Ravitsky (2009, p. 186).

⁵ The debate about the authority of human reasoning divided the Islamic world into two camps—traditionalists (*ahl al-hadith*) and rationalists (*ahl al-ra'y*). Islamic legal historiographies often describe this tension as the background for the growth of jurisprudence as an autonomous discipline and its literary form of the *usul al-fiqh*. Notwithstanding, such a debate did not divide the Jewish intellectual world in the period, although the conceptual apparatus that was shaped by Islamic jurists did underlie the rabbinic attitudes to the question of legal reasoning.

6.1 The Qiyas (Legal Analogy)

The Arabic term *qiyas* (قياس) in its legal sense can refer, in various contexts, to any of the three legal concepts—judicial analogy, general deduction or syllogism.⁶ Legal *qiyas* is at times considered the archetype of all forms of legal argumentation.⁷ In particular, it indicates the various types of argumentation that legal scholars use in their independent reasoning—*ijtihad* (اجتهاد),⁸ and for this reason it occupied a central place in the *usul al-fiqh* literature.⁹ Following Shafi'i's¹⁰ discussion, *qiyas* revolve around the fundamental typology of (1) cause-based *qiyas* and (2) resemblance-based *qiyas*. Cause-based *qiyas* is a means for extending an existing norm to cases where there is no explicit instruction or precedent in the known law. Accordingly, the expansion of the law is based on an existing causal component (cause, reason or meaning) shared by both the existing law and the new case.¹¹ Resemblance-based *qiyas*, on the other hand, is based on the isomorphic resemblance of the two

⁶ It probably originated in ancient Hebrew, but its assimilation within the Arabic language began at an early period and its general meaning preceded the legal one. Schacht (1950, pp. 99–100) identifies the origins of the Islamic *qiyas* in the Hebrew term *hekesh* (שקיה), based on the Aramaic root *n.k.sh* which means to ‘hit together’. Further parallels between the Islamic doctrine and the Greco-Roman legal-logical terminology have also been drawn (Carter 1997). For a refutation of the Hebrew and Greek influence on the *qiyas* see Hasan (1980).

⁷ Hallaq (1997, p. 83).

⁸ The conceptual connection between *qiyas* and *ijtihad* is evident in the *usul al-fiqh* writings that blur the difference between the two terms, see (Lowry 2007, pp. 142–163; Zucker 1972, p. 380, n. 27). On Ghazali's discussion on this topic see Hasan (1980, p. 5).

⁹ In earlier contexts the *qiyas* signified legal analogy alone, though later it also served as a synonym for philosophical syllogism in general. One should not confuse the two terms; Legal *qiyas* is a technique for expanding the revealed law—a finite body of knowledge—to respond to new circumstances, whereas the syllogistic *qiyas* validates the logic of this technique without deriving any new conclusion. The two types of *qiyas* therefore exclude one another; Syllogistic *qiyas* does not create new propositions, whereas legal *qiyas*, on the contrary, does not prove its own logic. Legal *qiyas* is operative and as such produces legal norms, while syllogistic *qiyas* is methodological, justifying arguments that have been put forward.

¹⁰ Imam Muhammad ibn Idris al-Shafi'i (767–820) was a highly profound jurist whose writings and teachings eventually created the Shafi'i school, one of the four canonical schools in the Sunni legal tradition. Traditionally considered the founder of Islamic jurisprudence, his pioneering *Risala* is still acknowledged as one of the earliest accounts of legal reasoning, which influenced later discussions on these matters.

¹¹ To Shafi'i, the cause-based *qiyas* is defined as follows: ‘...when God or His Messenger forbids a thing by means of an explicit text, *manṣūṣan* (منصوصا), or makes it licit, for a particular policy reason, *ma'nā* (معنى). If we find something which is covered by that reason in a matter for which neither a passage from the Book nor a Sunna has provided an explicit rule for precisely that thing, then we could make it licit or forbid it, because it is covered by the reason for making (the earlier thing) licit or forbidden.’ (*Risala*, § 124). Lowry discusses these paragraphs in (2007, pp. 149–155). According to the Hanafi School, only this type of *qiyas* is justified, see (Zysow 1984, p. 329).

cases.¹² These two types of *qiyas* thus illustrate distinct associations between an existing law and a new case: while in cause-based *qiyas* a shared element associates the two cases, in resemblance-based *qiyas* the isomorphic likeness allows their association. That is, cause-based *qiyas* connects the two cases by means of a third factor—the underlying cause, while resemblance-based *qiyas* connects the two to one another intrinsically.

6.2 Epistemology and Legal Theology

There are two people in the same state and under the same king, living two lives and under two jurisdictions, clergy and laity, spiritual and carnal, 'sacerdotium' and 'regnum'.

Stephen of Tournai¹³

The identification of the law with the 'Word of God' is indeed a central principle for both Judaism and Islam. Consequently, a great degree of correlation between legal propositions and theological principles is anticipated. From the very outset, Medieval Jewish and Islamic laws emphasized the transparent relationship between the positive contents of the law and the perception of God as the ultimate legislator. Thus, in many respects, knowing the law and applying it correctly are equivalent to the reception of divine revelation. As such, legal epistemology is reliant upon its theological assumptions, so that the epistemological propositions are mixed together with the theological claims about the nature of God and His relation to the believers. This aspect singles out the uniqueness of these legal systems in that the source of legitimacy in Jewish and Islamic laws is epistemological rather than institutional. Due to the association of legal theology and epistemology, many of the debates about legal reasoning are associated with theological discussions about the nature of human reasoning from a theological point of view: Is legal reasoning essentially no more than an interpreting faculty, or is it, alternatively, an autonomous source of knowledge? To illustrate the dependency of epistemology on theology and its implications on the theoretical structure of the law, we shall refer to a metaphor that is commonly mentioned in Islamic jurisprudential discussion to support legal reasoning.

6.2.1 Orientating the Sacred Place

The example commonly brought to justify legal reasoning and the multiplicity of opinions among jurists is the dilemma of finding the direction of prayer—the

¹² According to Shāfi'i, this type of *qiyas* is when '... we find something to resemble one thing (that has been forbidden or made licit) or another thing, and we can find nothing that resembles it more than one of those two things. Then, we would bring it into a certain relation with one of the (two) things that best resemble it.' (*Risala*, § 124).

¹³ Kalb (1983, p. 114).

qiblah (قِبْلَة)—for believers who cannot visually locate Mecca.¹⁴ While the obligation of facing Mecca applies to every Muslim believer with no temporal or spatial limitations, performing this duty might involve certain practical difficulties when Mecca is beyond the believer's sight. In that case, the worshipper must make a special effort and use his own judgmental faculties in order to determine the correct direction.¹⁵ The traveler who seeks the direction of Mecca needs available signs by which he can find the proper direction.¹⁶ In that respect, these circumstances exemplify both the epistemological problem and its solution. Determining the correct direction illustrates the ascertainment of the right answer, and the traveler's predicament is analogous to the confusions that may beset the jurist who seeks the right answer for the case that confronts her. This metaphor concretizes the idea that, since the objective law is not always known to the believers, the place at which certainty ends is the point of departure for the jurist's independent reasoning. Legal reasoning in this sense is not the jurist's privilege, but rather a mandatory religious duty under conditions of insufficient knowledge. From this metaphor we can derive the following presumptive approaches, which are not entirely epistemological principles or theological postulations; they present a combined matrix in which the epistemological dimension is an inherent component of legal theology.

1. **Metaphysical realism:** The first approach relates to the metaphysical dimension of legal norms. It assumes that legal answers are characterized by 'strong objectivity.'¹⁷ In other words, it asserts that the metaphysical existence of a legal norm is independent of human ability to conceive it. According to this principle, every legal question has a definite answer; there is a relevant answer for every possible normative state of affairs. A specific case for which there is seemingly no existing law is nothing but a cognitive blindness and not a limitation of the law itself.¹⁸ The incorporation of realist metaphysics within the context of revealed law implies that the divine law reflects God's concern with every

¹⁴ Following the Jewish custom of facing the site of the temple in Jerusalem during worship, Muhammad instructed his followers to turn their faces at prayer-time towards Mecca. The *Quranic* verse pertaining to this obligation refers primarily to those outside of the city and who find themselves in remote places—'And wherever you may go out, you shall turn your face towards the holy mosque, and wherever you may be, turn your faces towards it' (*Quran* 2, p. 150). *Risala*, § 1377–1391.

¹⁵ According to Jewish law, in similar circumstances the believer is not obliged to face the temple but to direct his heart towards God. See *t Ber*: 3: 14.

¹⁶ Moreover, just as the heavenly signs—given by God—are the means for the worshipper to orient himself, so too does the jurist rely on God-given proofs—His signs and hints—to determine the correct answer: 'And (Allah) marks and sign-posts; and by the stars (men) guide themselves' (*Quran* 16, p. 16).

¹⁷ The terms 'metaphysical realism' and 'strong objectivism' are taken from the description of legal epistemology by Coleman and Leiter (1995, p. 248).

¹⁸ 'There is, for everything which befalls a Muslim, a binding rule, or, by means of pursuing the correct answer in regard thereto, some extant indication. He (i.e. the Muslim) must, if there is a rule concerning that specific thing, follow it. If there is no such rule, then one seeks the indication, by pursuing the correct answer in regard thereto by means of *ijtihad*. *ijtihad* is, in turn, *qiyas*' (*Risala*, §1326); (Lowry 2007, p. 145).

possible set of earthly circumstances. For that reason, the religious value of the law is not exhausted by the subordination to the Word of God, but primarily in the fact that through the law God reveals his concrete intentions about the world. As such, legal knowledge that uncovers God's will is of no lesser value than theological knowledge that reveals God's nature and His guiding principles.¹⁹

2. **Incomplete revelation and limited legal knowledge:** Despite the above, the law known through revelation does not include the rulings for all possible circumstances. Hence, this entails the distinction between the law known by revelation, i.e. the law inscribed in the Qur'ān or revealed in the Sunna (henceforth: the revealed law), and the law derived from it (henceforth: the derivative law). This distinction acknowledges the structured limitation of legal knowledge. Therefore, the part of the law that is not known by revelation is concealed and hidden from human eyes, just as the holy mosque and the city of Mecca are indiscernible to the remote traveler. Legal knowledge therefore is first obtained through revelation and thence derived by legal reasoning (*ijtihad*), interpretation (*tawil*), and analogy (*qiyas*). Similarly, this premise makes it clear that legal reasoning expresses the religious virtue of human efforts in discovering the implicit Word of God.
3. **Gnostic gist:**²⁰ The third approach is related to the previous two. It asserts that notwithstanding the incompleteness of revelation and the restrictions of legal knowledge, God in His goodness would not leave his believers in doubt and confusion. To this end, He conceals within the revealed law hints and traces without which the believers cannot discover the correct legal answers. This theological stance reemphasizes the juxtaposition of epistemology and theology.²¹ It concretizes the idea that God's grace is translated to epistemological and methodological aid.²² Thus, the theoretical justification of legal reasoning is in fact a combination of skeptical epistemology and gnostic theology. Legal reasoning is therefore no more than a structured component of the Divine law that is designed to include human reasoning as an interpretative tool.

These three approaches illustrate that religious legalism is inherently linked to a dual-stratum structure or the division of the entire body of law into two categories: (1) The law known through explicit revelation; and (2) The implicit, derivative law

¹⁹ Calder (1983, p. 70): '(For Shafi'i) all events have the resolution in God's law; all knowledge is therefore knowledge of God's law'.

²⁰ We use the term 'gnostic' here in its literal sense derived from the Greek word γνῶσις, which means 'knowledge'. This usage is of course distinct from the historical meaning of Gnosis denoting the first century's religious movements, which held dualistic worldviews.

²¹ Shafi'i (*Risala*, § 69) highlights this principle basing it on a verse from the *Quran*—'Does man think that he will be left uncontrolled (without purpose)?' (*Quran* 75:36).

²² Shafi'i explains that God's guidance comes about through two distinct channels, paralleling the revealed/derivative distinction—'(God) guided them (i.e. the believers) to the truth by means of plain texts and by means of inferential indications.' *Risala*, §1445; Lowry (2007, p. 245). Elsewhere he states that God's guidance pertains to every possible state-of-affairs. *Risala*, §20. See also Calder (1983, p. 55) and Makdisi (1984, p. 41).

known through the jurists' intellectual efforts that captures the dialectic notion of divine law in human hands. Legal norms of the first category are transparent and knowable to the entire community of believers, certain, and therefore indisputable. Conversely, propositions of the second category are subject to a wide range of interpretations. Therefore they are not only disputable but epistemologically at best only plausible. The dual-stratum structure also projects far-reaching sociological implications. It decisively supports the privileged status of the legal experts. In terms of sociological theory, such a structure provides the preconditions for the necessity of clerical expertise. Put differently, this structure represents the endeavor to reserve legal exegesis for an exclusive group of experts.

6.3 Did the Rabbis Oppose Legal Reasoning?

Generally, Jewish medieval jurists did embrace legal reasoning as a legitimate means in applying religious legal norms. In what follows we will first describe rabbinic criticism of legal reasoning and then the rabbinic embracement of legal reasoning. Among Jewish medieval thinkers, only two are known to us as opponents of the use of legal reasoning—the head of the Suraian academy in the first half of the ninth century, Sa'adyah b. Yosef Gaon (882–942) and the Spanish physician, poet and philosopher Judah ha-Levi (1075–1141). We will portray Sa'adyah's arguments against the use of the *qiyas*.²³ Traditionally, scholars who have dealt with his objection to the *qiyas* have tended to view his stance as deriving from the heated debates he had with the Karaites and from his endeavors to defend traditionalism.²⁴ Sa'adyah condemns the Karaite enthusiasm with the *qiyas* as resulting from secondary rather than from substantive considerations.²⁵ Accordingly, he suggests that the Karaite's stance is caused by their mistaken response to the incompleteness of the revealed law and consequently the bound legal knowledge—'The reason that stimulated the opponents (i.e. Karaites) to believe in intellectual capacity (*al-ra'y*) and analogy (*qiyas*), is that they found things which required knowledge whether permitted or forbidden, and which are not written in the Torah, and likewise (matters which their) quantities and qualities are inexplicit.'²⁶ Subsequently Sa'adyah also notes the agnostic assumption: 'Nevertheless, they know that it is impossible to say of the Creator, may He be exalted and praised, that he left the people perplexed.

²³ Lobel (2000, pp. 59–65).

²⁴ Pines 1994 on the view of tradition as a valid and reliable source of knowledge.

²⁵ Celebrating the *qiyas*, to Sa'adyah, enable the Karaites to elude the binding nature of the tradition—'therefore they (i.e. the Karaites) adopted the belief in *qiyas*, because of (their) desire to save (themselves) trouble and acknowledging the validity of the tradition, and (therefore) they said: the *qiyas* suffice us, and (truly) there is no transmitted tradition from the prophet '(quoted in: Al-Qirqisani, *Code of Karaite Law*, II, 9:1). Accordingly, both Sa'adyah and the Karaites perceive the equilibrium of *qiyas* and tradition.

²⁶ Ibid. II, 9:1.

On the contrary, there is no doubt that He placed before them that which could lead them to their quest.²⁷ Yet it is still doubtful whether these quotations reflect Sa'adyah's principled objection to *qiyas*. Unlike the above polemic context, in a treatise dedicated to jurisprudential analysis, Sa'adyah expands the discussion of the *qiyas*, from which discussion emerges a deeper and richer picture of his objections. According to our proposed reading, his objection to application of judicial analogy derives from his rationalistic theology, and not from the debate with the Karaites.

As a rationalist, Sa'adyah is also concerned with the limitations of rational methods in order to fully respect the independency of reasoning. Paradoxically then his objection to the *qiyas* is the result of his rationalistic insistence. The gist of this paradox is the acknowledgment of reason as a valid source of religious knowledge on the one hand, while acknowledging the fundamental identification of the law with the revealed Word of God on the other. This dialectic invites the heuristic distinction between legal norms which are acquired by reason—rational laws (Ar. *'aqliyyāt*, Heb. *sikhliyot*)—and those given through revelation—revelational laws (Ar. *sam'iyyāt*, Heb. *shimi'yot*).²⁸ Sa'adyah limits *qiyas* only to rational laws and denies its relevance for revelational laws. Hence paradoxically his keen insistence on the validity of human reasoning as source of religious knowledge ultimately reduces the applicability of rational faculties in the framework of religious law. This being so, Sa'adyah's legal theory presents a new perspective on the conceptual meaning of judicial analogy.

6.3.1 *Holistic Jurisprudence and the Intelligibility of the Divine Law*

Sa'adyah's legal theory is primarily an organic one. In this world view, in which 'no things have existence except by way of combination,' the internal relations among the components of the divine law are not contingent, and in practice they determine the possible manipulations within the law. The legal theory that Sa'adyah presents in the beginning of *Kitab Tahsil*²⁹ describes the internal relations within the law

²⁷ Ibid. The controversy between Sa'adyah and the Karaites is thus presented in terms of their different responses to the gnostic circumstances; while Sa'adyah sees the *Mishnah* and the *Talmud* as the guiding hints that God implanted within reality to instruct His believers, the Karaites hold fast to analogy as 'the guide that God established to guide his servants in which is not (explicit) in the Book.' Ibid.

²⁸ In fact, the tradition of rationalizing the Divine laws starts in the Second Temple Hellenistic literature, such as the *Letter of Aristeas*, *IV Maccabees*, and the Philonic thought. In that respect, Sa'adyah's distinction, inspired by the *Mu'tazilite* typology of the laws, is not only reviving a rationalist theology, but also is an innovative endeavor to establish a legal theory based on this distinction.

²⁹ See note 10 above

by ontological categories—substance and accident—by which he characterizes the relationship between the general rules and particular cases.³⁰

From viewing the relationship between the whole and its particulars as essential, Sa'adyah derives the principle of 'unity of knowledge' or, in his words, 'the source of wisdom is one' (מעדן אלהכמה ואחד)³¹ or 'the root of knowledge is one' (אלעלם ואחד) (אצל).³² The significance of this principle may be seen on two levels. First, knowing the substance as a whole entails knowledge of the substance's appearances or accidents. Second, the same essential relations between the whole and its particulars also exist between the subject of knowledge and the modes of its cognition: 'And that which we said regarding substance and accident also applies to the things that are apprehended by the senses. Each one of them is apprehended by the same sense by which its totality is apprehended. There is no sound which is not apprehended by the sense of hearing, nor any color that is not apprehended through the sense of sight.'³³ This being so, the relation between substance and accidents is the relation between the whole and its parts, and therefore poses a three-fold correlation between the subjects of knowledge, the status of knowledge and the modes of cognition.³⁴ This correlation between the metaphysical core of the law and its epistemological modes leads Sa'adyah to examine the justification for judicial analogy against the background of the distinction between the rational and the revelational laws.

As mentioned above, Sa'adyah establishes his legal theory on the distinction between rational and revelational laws.³⁵ The basis of this distinction lies in the idea

³⁰ Sa'adyah's reference to Aristotelian categories follows Al-Farabi's (870–950) holistic metaphysics. It stresses the correlation between the attributes of the laws and their intelligibility. Ontologically, it pertains to the transition, to use Sa'adyah's language, from the 'natural-state-of-affairs' (*halo al-asia al-tibya*) to the 'legal-state-of-affairs' (*hal al-amor al-sharriya*). Therefore, knowledge of the particulars is achieved through the comprehension of their totality, since the totality itself is defined by the particulars that comprise it. Therefore, the holistic metaphysics of the law derive directly from Sa'adyah's understanding the substance as a totality, and it is that which dictates the possibility of apprehension of accidents or particulars.

³¹ *Kitab Tahsil*, 387, r. 9.

³² *Kitab Tahsil*, 388, r. 17.

³³ *Kitab Tahsil*, 388, r. 14.

³⁴ While Sa'adyah does not elaborate on this in *Kitab Tahsil*, he articulates the underlying theological background of this holistic perception in his introduction to *Commentary on the Torah*. Holism is expressed by the principle that 'no things have existence except by way of combination' (כלהא לא תת'בת אלא בתאליף). He also deals there with the relationship between primary-sensory knowledge and secondary-rational knowledge. Accordingly, sensorial perceptions are analyzed by the intellect as parts of a combined object, and as such the analysis promises the comprehension of the essence. See Sa'adyah, *Commentary to Genesis*, Introduction to the Commentary on the Torah, 167–169.

³⁵ This distinction as initially considered a Sa'adyan novelty by which he bridged two religious doctrines—rationalism (*Mu'tazilah*) and authoritarianism (*Ashari'a*). See Altman (1943). Others took it as a synthetic reading of the Aristotelian concept of 'belief' with the Stoic concept of 'consent.' See Wolfson (1942). With the discovery of *Mu'tazilites'* writings over the course of the years it became evident that this distinction preceded Sa'adyah. A similar conclusion reached by Ben-Shammai (1972).

that the intelligibility of the rational laws is absolutely independent, whereas knowledge of the revelational laws depends on revelation. This distinction apparently touches the very heart of the Sa'adyanic attitude towards legal reasoning. Thus, the negation of the *qiyas* is an outcome of exhausting the epistemological implications of the distinction between rational and revealed laws. In that respect, Sa'adyah's objection to the use of *qiyas* with regard to revelational laws strengthens the metaphysical weight of the rational/revelational distinction. Sa'adyah's reflections upon the rational/revelational distinction suggest that its source lies in the fact that different kinds of legal knowledge apply to different kinds of laws. That is to say, the distinction is not the result of the limitations of human ability to comprehend the laws, but rather of a substantive distinctiveness of the rational laws from those that are revealed. Thus when defining the jurists' rational activities, such as exegesis (*tawil*), analogy (*qiyas*), and personal preferences (*istihsan*), attention should be paid to the metaphysical set-up of rational and revelational laws and its application should therefore be limited to the rational laws. Sa'adyah disapprovingly portrays the application of revelational laws to new cases by *ijtihad* or *qiyas* as separating the particulars from their holistic structure. Applying exegesis to the revelational laws is represented as an arbitrary method that substitutes the original study. For this reason, the multiplicity of opinions and schools do not enjoy the same legitimacy that is granted them in the dual-stratum model.

6.4 Against the Dual-Stratum Paradigm

From Sa'adyah's statements in *Kitab Tahsil*, we know that this treatise originally contained ten arguments against the use of *qiyas*.³⁶ Unfortunately, the extant manuscript contains only three of those ten arguments,³⁷ and they reflect the rhetorical transition from negating *qiyas* on theoretical grounds to indicating the weaknesses of the theories that justify it. In fact, Sa'adyah's objection to legal reasoning can be understood as a criticism of the distinction between revealed and derivative laws (the dual-stratum paradigm), which should be substituted by a generic, bipolar distinction between rational and revelational laws. Below, we shall briefly summarize Sa'adyah's arguments against the dual-stratum paradigm.

Normative Differentiation Sa'adyah argues that from the revealed/derivative distinction one needs to derive implications regarding the decisiveness of the different laws. Accordingly, the revealed/derivative distinction should entail different levels of severity vis-à-vis cases of violating the laws. That is, since derivative laws attained by analogies are no more than human attempts to discover the correct answer, it would be inappropriate to treat the violations of laws equivalently. It makes no sense to punish a person who violates a derivative-law prohibition as

³⁶ *Kitab Tahsil*, 394, n. 101.

³⁷ The seventh (r. 71–75), the eighth (r. 75–84) and the tenth (r. 92–100) arguments.

harshly as a person who violates a revealed-law prohibition. In particular, Sa'adyah claims that, in order to be consistent with the dual-stratum paradigm, it is not justified to impose severe penalties, such as capital punishment, on violations of derivative laws, the validity of which are only probable.

Justification of Controversy A further weakness of the dual-stratum paradigm is what might be referred to as 'the ease of justification of controversy.' Returning to the metaphor of seeking the right direction of prayer, multiplicity of opinions is expected and hence justified.³⁸ However, according to Sa'adyah, an *a priori* justification of controversies with regard to derivative law confuses between an *ante factum* justification and a *post factum* acceptance of the multiplicity of opinions. Since the derivative law is neither more nor less than an attempt to find the right answer, one must tolerate the differences of opinion as a necessary evil, but not as something justified *ab initio*.

Master-Disciple Relations Another argument against the dual-stratum paradigm pertains to the social structure, which is liable to be upset in its wake. Justifying judicial analogy in practice implies acceptance of the personal legal reasoning of each legal scholar in its own right.³⁹ Consequently, the hierarchical status of the master in relation to the disciple is likely to be upset. Sa'adyah refers in that respect to the botanical metaphor of roots and branches in order to reflect the didactic relationship between mentor and student, thereby pointing out that a legal theory that justifies legal reasoning unravels the established relationships between mentor and disciple.

The analysis of Sa'adyah is a response to the classical Sunni theory of legal reasoning and demonstrates the extent to which medieval Jewish jurisprudential thought naturally took part in the legal discourse of that time. His criticism of the dual-stratum paradigm is not based on Biblical verses or principles peculiar to Jewish thought, but rather on general philosophical arguments that could equally be made by an Islamic jurist. Indeed, jurisprudence for Sa'adyah is a formal discipline that transcends the particular content of each religion, and therefore allows a shared terminology and conceptual vocabulary. In the discussion below, we will focus on modes of borrowing by which Jewish jurists favored Islamic jurisprudential concepts above traditional categories of Jewish law.

³⁸ The justification of controversies was a crucial topic among medieval Jewish jurists. Controversies allegedly indicate the incoherency of rabbinic tradition and as such were subject criticism and apologetics, see Halbertal (1992).

³⁹ Indeed, Maimonides, who embraced the *qiyas* and saw it as the main mode for the development of the entire body of the Jewish Law, points to the connection between legal reasoning and the elimination of master-disciple hierarchies—'And you should know that prophecy is not effective in investigating and commenting on the Torah and in deriving branches (i.e. new norms) by the thirteen principles (of inference), but whatever Joshua and Pinchas (i.e. the disciples of Moses) can infer in matters of investigation and analogy, Rav Ashi and Ravinah (i.e. the sealers of the Babylonian Talmud) can do too.' Maimonides, *Commentary on the Mishnah*, introduction, p. 29.

Part II
Knowing and Remembering

Chapter 7

Divine Memory

Abstract This chapter explores the idea that memory is not only an epistemological challenge, but also a theological problem. It outlines the heteronomous perception of memory developed by the Rabbis against the Biblical and Hellenic backgrounds. The heteronomous perception of memory is contrasted with the image of internal writing and in continuance with mystical conceptualizations of the *Hekhalot* literature.

As in our previous discussion, the problem of knowing and memorizing involves a multifaceted connection between theology and epistemology. The epistemological problem of memorizing divine knowledge reflects the centrality of memory in the sages' intellectual world and supports the portrayal of their society as a 'culture of memory' and as a 'text-centered' culture rather than as an 'oral culture.'¹

Formulating the problem of knowledge as one of memory raises several theological problems: to what extent may one rely upon the human mechanism of memory to preserve knowledge with a high degree of certainty and accuracy? To what extent is forgetfulness a threat to scholars' knowledge? Is it possible to be immune to this threat and how? These questions relate to practical struggles against obliviousness and to theoretical accounts of the conceptual framework in which memory is understood.²

Despite the lack evidences on direct influence of Hellenic thought rabbinic thought directly, the absorption of Hellenic conceptual patterns is well recognized in various contexts already in Second Temple literature and Talmudic literature. As we shall demonstrate, the shaping of rabbinic thought during the Talmudic period led to new outlooks on memory, new characterizations of forgetfulness and

¹ Characterizing early rabbinic culture as oral is based on the rabbis' opposition to writing down the Oral Torah. Nevertheless, the text which could not be recorded in writing was still a fixed text, carefully repeated without change. Hence, the content recited by the *tannaim* was a precise text despite its being not written. This point is worth emphasizing as the problem of memory emerges more sharply once we accept that the sages' culture was 'text-centered'. In a strictly oral culture, transmitted knowledge lacks any formal uniformity. A characterization of rabbinic culture as oral is done by Sherira although his description seems incompatible with the sages' insistence on the formal uniformity of the laws, see Blidstein (1974, 1980), Jaffee (1999).

² Naeh (2006) has undertaken an analysis of mnemotechnic concepts underlying the sages' praxis of repetition and reinforcing memory. His study revealed the centrality of the metaphor of inner writing in understanding the sages' approach to repetition and recollection and its great similarity to the mnemotechnic approaches developed by the Greeks and the Roman rhetoricians.

obliviousness, and consequently to new theological solutions. Despite the differences between rabbinic and Hellenic worldviews, they shared a detachment from pagan perceptions of memory,³ liberating memory from supernatural control and promoting it as an autonomous human faculty.

7.1 The Biblical Outlook

In his important study on Biblical concepts of memory Childs⁴ approached the various usages and appearances of the root *z.kh.r* (ז.כ.ר). Ultimately, he claims that biblical concepts of memory have nothing new to offer concepts of memory that developed in ancient Greece. Furthermore, his study reveals the dual meaning of memory in the Bible that is well reflected in a lexicographic analysis. On the whole, there are different verbal forms derived from the root *z.kh.r*, which express two distinct meanings of memory. The two forms of the root *z.kh.r*, in the simple conjugation (*qal*) and the causative conjugation (*hiph'il* and *nipha'l*) indicate two distinct meanings of memory: The epistemological meaning and the performative meaning, respectively.

Epistemological Faculty The meaning of the verb *zakhar* is 'recollected'; i.e. a mental process by which images of past facts or events are brought into consciousness. Remembering is thus an internal act within the memorizer's mental expanse that bridges temporal and spatial gaps and allows access to that which no longer exists. The objects of memory are images⁵ or events⁶ experienced in the past which, by means of memory, are reintroduced in the present. Memory, in this sense, is also a religious duty, a reminder of God's past beneficence and an assurance of future fulfillment of His covenant. Accordingly, Israel is instructed to remember God's deeds in Egypt as He will perform similar acts for the land of Canaan in the future;⁷ Israel is obliged to remember that the land is God-given, despite its rebellion against Him since time immemorial;⁸ similarly, Israel must remember its obligations towards God and His priests in the future.⁹ Memory in this sense is extended to include directing one's attention and consciousness¹⁰ not only to past

³ Kaufmann, (1967, pp. 417–435).

⁴ Childs (1962).

⁵ Esth. 2:1.

⁶ Deut. 7:18.

⁷ Deut. 7: 17–8.

⁸ Deut. 9:7.

⁹ Deut. 24: 8–9; 25: 17, 19. As has been observed by Yerushalmi (1989), biblical memory does not utilize by means of documentation such as those which were developed in the Hellenic culture. The epistemological memory is not direct, but makes use primarily of rituals and other legal institutions as a means of establishing memory. An example is the obligation to remember the enslavement in Egypt whose actuality is recognized by the observance of Shabbat and the existence of legal institutions for releasing slaves, see Deut. 5: 11, 14; 15: 12, 15; 16: 2; 24: 18, 22.

¹⁰ See below note 45.

events, but also to present or future occurrences.¹¹ Remembering events or figures¹² entails a series of biblical obligations to remember, or to perpetuate, past events and outstanding deeds throughout the generations.¹³ Nevertheless, the peculiarity of biblical memory lies in the conceptual integration of memory as an epistemological faculty and as performance.

Performative Memory The meaning of *hizkir* is mentioned, and it also refers to deeds and events, though unlike the simple conjugation it has nothing to do with a person's inwardness, but rather reflects an external activity. Thus, remembering as a performative act is intended not to reconstruct or revive images of the past, but to constitute present meaning. Childs' study teaches us that performative memory in the Bible appears primarily in cultic contexts, from whence it is loaned to the legal context. In such contexts, remembering appears as a pure performance, usually in conjunction with the name of God, or the 'Name' (the noun *שֵׁם*, lit. the name, appears both as a direct and indirect object¹⁴). Accepted explanation connects this to the fact that mention of the gods' names was at the very heart of the cult and was considered the climax of the entire ceremony.¹⁵ Remembering in this sense is very close to a magical performance in which the names of the gods or of the dead are cited,¹⁶ whereby their essence becomes alive in the present. Remembering in this sense stands out in the Bible in two cultic aspects: In that of the cultic relationship between Israel and God,¹⁷ but no less in the context of idolatry, whose very definition is that of citing the names of alien gods.¹⁸ Similarly, forgetting in this sense is not simply the psychological act of losing information from one's consciousness,¹⁹ but of bearing illegitimate cultic meaning—idolatry,²⁰ neglect, abandonment,²¹ or violation of God's commandments.²²

¹¹ Isa. 47: 7; Jer. 51: 50.

¹² Ex. 13: 3.

¹³ Deut. 32: 7; 25: 17; Isa. 44: 21; Mic. 6: 5. Yerushalmi further claims that memory as religious obligation was a unique principle of Biblical faith.

¹⁴ Amos 6: 10, and note 18 below.

¹⁵ Grether (1934, p. 19).

¹⁶ Jonker (1995, pp. 1–5).

¹⁷ Ex. 20: 20; Ps. 20: 8.

¹⁸ Ex. 23: 13; Josh. 23: 7.

¹⁹ Childs (1962, p. 18).

²⁰ Deut. 8: 19.

²¹ Isa. 49: 14.

²² Deut. 8: 11. Memory as performance also appears in the legal contexts. As such the act of memory generally relates to 'sin' (Isa. 43: 25) or 'transgression,' (Num. 5: 15; 1 Kgs 17: 18) and refers to making the sin known (Gen. 41: 9) or publicizing it (Gen. 40: 14; 1Sam. 4: 18; Jer. 4: 16). In this spirit, Childs identifies the legal character of the *מזכיר* (lit. reminder) as a significant function in the kingdoms of David and Solomon (1Sam. 8: 16; 1 Kgs 4: 3; 1Chr. 18: 15). It similarly supports the understanding of this office as the figure that was responsible for charging subjects in the Israelite kingdom (a kind of 'general attorney' or 'public prosecutor'). Childs (1962, p. 15) also uses this hypothesis to explain the verses in Ezek. 21: 28–9 and Isa. 62: 6.

7.1.1 *Memory as a Platform for the God—Israel Relationship*

Biblical memory, in both senses, emphasizes the basic role of memory as an expression of the interrelationship between God and Israel. Generally, epistemic memory is activated by earthly scenes and historical reality, with emphasis on past events whose theological significance establishes a religious commitment in the present. The actualization of these events and their representation in the present are a reaffirmation of God's relationship with the people of Israel and of the mutual obligation underlying this relationship. By contrast, the realm of performative memory pertains to the transcendent arena. Memory as performance both bridges and makes present.²³ The remembrance of God or His name by Israel makes Him present among them, on the one hand, while remembering Israel before Him,²⁴ on the other, assures His concern for them. The biblical theology of memory may thus be summarized by stating that the axis of memorizing and forgetting—both of God and of Israel, in both the epistemic and the performative sense—expresses the state of the relationship between Israel and its God. When the relationship is strong, the Israel remembers its God and He them; when the relationship is weak, forgetfulness is manifested on the part of one or other party.

7.2 Hellenic Background

The development of the concept of memory in Greek thought up to the time of the sages is important in two respects. First, the concept of memory in this tradition had a tremendous impact on the shaping of the concepts of memory in early Christianity (primarily Pauline and Augustinian concepts) and thus informed the sages' intellectual worldview. Second, as the attainment of knowledge was a central ideal in both Hellenic culture and that of the rabbis, there is a similarity between them in terms of mnemonic endeavor and memory strengthening praxis.

A highly significant moment in the conceptual history of memory in Greek thought occurs with the appearance of the Platonic doctrine of memory. For many reasons, Plato's doctrine of memory is considered a turning point in the attitude towards memory in ancient Greek culture. Thanks to this Platonic turn, new assumptions were made regarding the relationship between human life and human knowledge, on the one hand, and a human's ability to exert control over and to preserve this knowledge on the other.

²³ Memory as making presence is recognized in the identification of the dead as those who are not remembered, see Ps. 88: 6.

²⁴ God's forgetting Israel is equated with His covering His face—'Wherefore hidest thou thy face, and forgettest our affliction and our oppression?' (Ps. 44: 24).

7.2.1 Ancient Greek Memory

The importance of the role of memory in early Greek culture (twelfth to eighth century BCE) is accountable not only to its being the backbone of an oral culture,²⁵ but primarily to its perceived divine character. The mythological status of memory, as embodied in the titanic figure of Mnemosyne—who enjoyed the title, ‘Mother of the Muses,’ a byproduct of the union of heaven and earth²⁶—is perhaps the most explicit expression of its divine character. Accordingly, memory itself, more than being a technical means of preserving facts from the past or for the efficient storage of knowledge, was considered the ‘deity’s grace,’ whose implementation depended upon the inspiration of divine forces that dominate reality. This deity’s grace was acknowledged as the source of both poetic inspiration and of knowledge. The goddess Mnemosyne, who also holds wisdom (*Sophia*—that is to say, all knowledge of the past, present and future²⁷), is she who allows poets and wise men to attain knowledge of the past which they would be unable to acquire by themselves,²⁸ similar to the manner in which prophets guided by Apollo obtained knowledge of the future which they could not have acquired by themselves.

The peculiarity of memory or the nature of memorizing, within this archaic Greek perception, is deeply related to the Greek notion of time and certainly derives from it. Time in this worldview is essentially related to the special structure of reality; the duration of time was understood as a series of points in the cosmic span. Consequently, the past was not perceived as a passing mode of reality, but as part of cosmic existence in the present. Connecting to past events—or, alternatively, cutting off connection—was understood as taking place within the cosmic realm itself and not as a departure from concrete reality. For that reason, uncovering past events through memory signified revealing things that were, in practice, part of actual reality.²⁹ Memorizing was thus a kind of integration of realms ‘lacking presence’ within reality and which, unless remembered, would be lost to obscurity.³⁰

This understanding of memory, that is, integrating present and past reality, also sheds lights upon the interrelationship of memorizing and forgetting, activities that are not understood as mutually exclusive, but as interwoven forces.³¹ According to this model, connection to the past involved being cut off from the present—i.e. forgetting the present. Hence, in the very act of memorizing as such, memory and

²⁵ Notopoulos (1938).

²⁶ Hesiod, *Theogony*, pp. 53–67.

²⁷ Hesiod describes Mnemosyne as ‘telling of things that are and that shall be and that were aforetime with consenting voice’ (*Theogony*, p. 38).

²⁸ ‘Tell me now, ye Muses that have dwellings on Olympus, for ye are goddesses and are at hand and know all things, whereas we hear but a rumor and know not anything... and though the heart within me were of bronze, did not the Muses of Olympus, daughters of Zeus that beareth the aegis, call to my mind all them that came beneath Ilios?!’ (Homer 1999, pp. 484–492, p. 87).

²⁹ Casey (2000, p. 12).

³⁰ On the different perceptions of forgetfulness and oblivion in ancient Greece and early medieval Greece, see Carruthers (1998, pp. 54–57), Geary (1994).

³¹ Distinct from the common view of memory and forgetfulness as contradictory, the archaic Greek perception viewed them as integrated; see Casey, and Kerényi (1977).

forgetfulness are interwoven or, to be more precise, forgetfulness was drafted into the service of remembering. Even mythological representations of Mnemosyne and Lesmosyne, in which they seem to bear equal value, depict them as united and interdependent:³²

‘Lesmosyne’ derives from the same root as ‘Lethe’ and means exactly the same thing (i.e. forgetfulness). The sphere of the Muses, which arises from the primordial Goddess Mnemosyne, also benefits from Lethe who belongs to the dark side of human existence. Both elements—giving illumination and letting disappear, Mnemosyne and her counterpart, Lesmosyne—make up the entire Goddess, whose name comes solely from the positive side of her field of power. This (is a) *union of the opposites under the domination of the positive*.

7.2.2 The Platonic Turn

The deification of Mnemosyne and of memory did not survive the rise of Greek philosophical thought during the fifth century BCE. The sharp turn away from the mythic perception of memory is manifested in the Platonic doctrine of memory. The first characterization of this Platonic transformation may be seen in the nullification of the temporal dimension of memory. Memory (*anamnesis*), according to Plato, more than relating to a specific past, whether personal or mythic, relates to universal truths and adequate knowledge. In fact, Plato’s theory of memory leaves no role for the sublime image of Mnemosyne.³³ The second characterization of the Platonic turn may be described as a combined process of the idealization and immanentization of knowledge itself. Initially Plato refuted the idea of the transcendent nature of knowledge and its being a deity’s act of grace, granted by the inspiration of its power. Similar to the ancient perception of memory, Plato identified the processes of learning and of memorizing; however, while memory was a mental, or internal, event—an active process by which pre-existing knowledge is derived by means of dialectic logic, knowledge is immanent to reality, pre-existent and accessible to all. Knowledge and memory are not separate from present reality—they only need to be uncovered and brought to consciousness. Even the highest level knowledge does not require the involvement of external forces, but is attained by means of the self-consciousness of man’s mind. Remembering is thus not a matter of accessing and restoring the past, but rather of the restoration of the pre-existing knowledge.³⁴ According to Plato, the objects of knowledge are not concrete events—that is, specific events of the past—or those which surround us, but rather the intellectual forms which are stable, unchanging, and independent of real and concrete things. They are always ‘out there,’ and therefore the processes of knowledge and remembering are not processes through which knowledge may be conveyed or transmitted,

³² Kerényi (1977).

³³ Indeed, Mnemosyne is mentioned by Plato, (*Theaetetus*, 191d) as the source of memory. Though it is doubtful if she is perceived there as source of inspiration.

³⁴ Notwithstanding the removal of the transcendent element of memory, for Plato the ultimate objects of knowledge are nevertheless transcendent in their essence; their transcendence is not derived from their divine source (Mnemosyne), but rather from their idealization as objects in their own right.

but rather processes in which implicit knowledge, unconscious and incomplete, is transformed into explicit knowledge.

One might see the third characterization of the Platonic turn as an impersonalization of knowledge and memory. Plato's doctrine of knowledge refutes the causal connections between perception and knowledge. In this manner, knowledge of experience and experience itself are distinguished from one another: that which is perceived by senses is distinct from that which is thought. The process of knowing or remembering is therefore one in which knowledge, whose source lies in the soul itself and not in its external experience, is raised to consciousness by means of repeated reflection on the causes of a given thing. In this sense, even though memory works and is refined in a personal manner, it is not personal since it relates to the intellectual forms which are essentially universal. A further characterization of the Platonic perception has to do with the relationship between the act of memorization and that of forgetting. The description of remembering as a transition from a state-of-ignorance to a state-of-knowledge, and the identification of memorization as the uncovering of preexisting concealed knowledge, does not allow one to see forgetting as a process that is the opposite of or symmetrical to remembering. Things which are forgotten are simply the changing phenomena of the concrete world, not knowledge but merely beliefs or opinions. Knowledge itself—that is, the nature of things known to the soul—is never lost and never forgotten.³⁵

7.2.3 Aristotle

Aristotle disagreed with the description of memory as the exposure of preexisting knowledge and its elevation to consciousness. He rejected the assumption that knowledge is fundamentally known from the outset and does not involve processes of absorption and internalization by the soul, as he rejected the very identification of the process of memorizing and knowing. In his view, knowing precedes remembering; hence, we need to absorb, to understand, to experience and to learn a given thing before we can remember it. That which is inborn and given *ab initio* is not knowledge *per se*, but the human competence to absorb impressions activated by the concrete objects that surround us. Aristotle agrees with Plato in denying the transcendent source of knowledge, but contrary to him holds that the sources of knowledge lie not in intellectual forms, but in concrete and actual entities—in reality itself. In this sense, one must see the Aristotelian move as a continuation of Plato's anti-transcendental turn, albeit with a certain reservation regarding the immanence of knowledge as an inner entity coined in the soul.

Rejecting the conception of memory as the uncovering of preexisting knowledge and basing it upon the idea of perception as the source of knowledge requires, in order to explain the process of memorizing, a theory of the representation of concrete reality within the inner part of the soul. In this manner, the content present in

³⁵ This summary of the Platonic stance is mainly based on Coleman (1992, pp. 4–14).

the soul during the course of remembering a certain object is no more than an image of that object—that is, a copy of it as it was perceived in the past. The object of remembrance is thus an image similar to the object of past perception and derived from it. The central metaphor for the process of remembering according to this approach is that of an image impressed upon a wax tablet.³⁶ During the perceptual process, the sensory system absorbs the forms of the external objects and impresses their forms upon the soul in the same manner as wax is impressed by a seal. This being the case, memory in Aristotle's eyes, like other psychic processes, is an iconic action: following the absorption of the object by the senses, an internal image is created. The ability to remember is thus dependent upon the images imprinted in the soul, and upon the period of time that has passed rather than on the objects of thought. The soul never thinks without images. Therefore, so long as the perception has taken place but the things were not absorbed, it is impossible to learn, to think, to understand, or to remember anything.³⁷

7.2.4 *The Hellenic Heritage—Summary*

In many respects, the Platonic and the Aristotelian conception of memory influenced the Greco-Roman understanding of memory which later shaped the notion of memory in Late Ancient Jewish and Christian circles. The principle characteristics of memory which influenced the sages' approach to memory can be summarized as follows:

Humanizing Memory Memory in the Hellenic view is first and foremost human capacity. Plato already predicated knowledge and memory on human will, arguing that lack of knowledge is rooted in the lack of will to reconstruct given truths. Nevertheless, in his view memory is an exclusively human faculty, in which only a few, those with the philosophical ability to examine the truth, can attain a level of remembering that is close to the form of goodness. For that reason, only the philosopher-king who rules over the ideal state is capable of reconstructing the nature of things rather than being led astray by false images of earlier situations. For Aristotle, the human aspect of memory is far broader, as memory, by his definition, is a rational faculty. While it is true that Aristotle thought that animals, like human beings, also remember, he nevertheless believed that human beings alone have the ability to recollect, that is, to activate their memories. Recollection and reminiscence are rational mental processes, attained by means of association of ideas. Recollection reaches its high point in memory, but differs from it by the very fact of its being a rational activity which does not rely upon sensory images alone.

The Spatial Dimension of Memory Another significant characteristic of the Hellenic conception of memory relates to an image central to the understanding of

³⁶ In fact Plato also refers to this image (*Theaetetus*, 191d-e) though this metaphor was already used by Homer, see Carruthers (1990, p. 21).

³⁷ *Ibid.*, pp. 16–17; Coleman (1992, pp. 15–38).

memory since Late Antiquity—namely, the spatial image of memory. According to this image, memory is an inner receptacle of impressions and a storehouse of accumulated knowledge that resides within the human soul or mind. As Carruthers has shown, this concept of memory is the dominant one in Western culture and within its context there emerged the image of memory as a kind of inner writing that engraves and preserves knowledge in the inner space of the soul. It was this image that, in practice, saw memory as an inner activity analogous to that by which knowledge is preserved through means of being recorded in writing. In this image, the structure of memory was based upon two elements: The element of writing and the element of place. That which is remembered is that which is recorded in some place in the inner part of the human soul. As has been shown by Carruthers, various mnemonic techniques were fashioned in light of this interior model of the structure of memory, from the ancient period through to the Renaissance.³⁸ In light of this image, there emerged the image of the sage and the knowledgeable person as one who contains an inner library within his soul, in which writings are stored and his extensive knowledge is recorded.

Secularizing Memory The secularization of memory is of course related to the humanization process, and is to be seen as the other side of the same coin. For that reason, there are some scholars who see Plato's doctrine of memory as the beginning of the secularization of memory, and of knowledge in general.³⁹ The secularization of memory was completed in practice by Aristotelian notions, and may be summarized as a three-stage process: In the first stage the Platonic picture challenged the transcendent elements of memory and limited memory to the finite, human realm. In this realm, memory does not provide truths regarding the gods or the ideal forms, but only empirical truths concerning events in an individual's life. In the second stage, Aristotle's conception of memory emphasized the intimate relationship between memory and an individual's past. 'Memory,' according to Aristotle, 'is of the past,' and in this its relation to intellectual forms is denied and is based only upon personal experience. In the third stage, Aristotle identifies memory with the perceptive part of the soul by means of images. In this, Aristotle rejects not only the influence of the gods, but also Plato's attempt to associate memory with ideal knowledge. Memory, for Aristotle, is 'the having of an image regarded as a copy of that of which it is an image.'⁴⁰

This being so, one may summarize the Platonic–Aristotelian contribution by saying that the Platonic perception led to a break with the mythological understanding of memory, but still ignored the imagistic, temporal and apprehended dimensions of memory. The conceptualization of these dimensions was completed by Aristotle, and it was through them that memory was brought down to the earthly and finite realm.

³⁸ The first Jewish composition devoted to memory and mnemotechnics was written by Judah Aryeh de-Modena (1571–1648)—*Lev Ari*. See Bos (1995), Margalyoth (1972).

³⁹ Casey (2000, p. 14).

⁴⁰ *Ibid.* p. 14. n. 52, 54.

7.3 Scripta in Cordibus Hominum

As noted earlier, theological notions of memory in Late Antiquity were influenced by biblical and Hellenic concepts. The biblical concept of memory as cognition or performance is a substantial component of the religious aspect of human existence, one that primarily expresses the mutual connection and obligation between Israel and its God. In Hellenic thought, by contrast, memory, as understood in light of the Platonic and Aristotelian turn, serves as an element that connects subject and reality or subject and true knowledge about reality. But despite the different directions in which the understanding of memory developed in the different cultures, the encounter between the two traditions was fruitful and significant. Its explicit results are recognizable primarily in early Christian theology as shaped by St. Paul and St. Augustine, and less so in rabbinic thought, where the concept of memory developed along different channels. The intellectual encounter between the biblical notion and the Hellenic concept was extremely significant for the future understanding of memory. It may be described as an encounter between the idea of inner writing and the idea of the heart as the abode of memory. This merging point produced an understanding of memory as inner writing upon, or within, the heart.

7.3.1 Memory as Inner Writing

The relationship between the heart and memory, as it appears in the Bible, is derived from the unique status of the heart as representative of the essential self⁴¹—consciousness, memory and will.⁴² It likewise signifies the intentional aspect of human activity,⁴³ which finds expression in the description of the intentions of the heart.⁴⁴ Hence even contexts of memory, consciousness and awareness are described, in the conceptual language of the Bible, through idioms indicating ‘directing attention towards a thing’ or ‘placing something to one’s heart.’⁴⁵

⁴¹ An expression of this can be found in the narrative of Samson and Delilah where the discovery of his power is described as revealing his heart (Judg., 16: 17–8). In the same manner Saul’s appointment as king of Israel is described as a reversal of the heart (1Sam, 10:9).

⁴² Pedersen (1963, pp. 99–181), Dentan (1962). On a similar state of affairs in the NT see Sand (1993).

⁴³ 1Sam, 2:35, 14: 7. Despite Galen’s discovery that perception and recognition are located in the brain, the ancient image of the heart as the abode of senses, imagination and the soul was still dominant.

⁴⁴ Ex. 14: 5, Num. 32: 9, 1 Kgs. 12: 27.

⁴⁵ Ex. 9: 21; 2 Sam. 13: 33. On the identification of the heart with the ‘tablet of memory’ see Prov. 3: 3, 7: 3; Jer. 31: 32; Ezek. 11: 19, 36: 26. The identification of memory, heart and self reflects the association of memory’s content and the subjectivity of the one who carries the memory. In fact, the understanding of the self as textual content was revived in the Freudian school. Still we must not confuse the perception of the self as a text—a fairly modern view, and the heart as a book—an ancient dead metaphor.

Nevertheless, the comparison of knowledge or memory to inner writing was widespread among the philosophical and rhetorical traditions in the Hellenic world.⁴⁶ This image is, as mentioned, analogous to the external writing upon a wax tablet. The tablet represents the memory, the consciousness, or the soul—but not the heart. The centrality of the image of inner writing in shaping the understanding of knowledge in Western thought has been emphasized in modern times.⁴⁷ Among those modern thinkers who turned their attention to this was Derrida, who sought to show the extent to which the metaphor of inner writing influenced the philosophical understanding of language.⁴⁸

As Curtius and Derrida emphasize, the emergence of the image of inner writing involves a revision of the conventional terms for writing—that is, turning the external activity of writing away from the world of reality to the world of metaphor, and more than that, the granting of a superior status to those things written inwardly. The merging of the image of memory as inner writing with that of the heart as the abode of memory occurs in Late Antiquity, in an explicit theological context. As we learn in St. Paul's *Second Epistle to the Corinthians*, the mechanism of inner writing is the same mechanism by whose means the Christian revolution or the revelation of the New Testament took place:⁴⁹

You yourselves are our letter of recommendation, written on your hearts, to be known and read by all men; and you show that you are a letter from Christ delivered by us, written not with ink but with the Spirit of the living God, not on tablets of stone but on tablets of the human heart. . . . who has made us competent to be ministers of a new covenant, not in a written code but in the Spirit; for the written code kills, but the Spirit gives life.

St. Paul draws a conceptual link between the two biblical images of the heart: the image of the heart as a tablet, common in the prophecies of Jeremiah, and the distinction between a 'heart of flesh' and a 'heart of stone' found in the prophecies of Ezekiel. By means of this conceptual association between the two ideas, St. Paul provides a basis for the central distinction found in the New Testament: that between the external law—'the written letter'—and the inner law—'the spirit.' As discussed below, St. Paul attributes far-reaching theological significance to this conceptual link. He sharpens the contrast between inner and outer writing, basing it upon the distinction between life and death—the dead letter written upon a tablet of stone as against the living letter, written upon the tablet of the heart itself. The manner in which St. Paul denounces the external law is similar to the way in which Plato disparages external texts;⁵⁰ in this, one can see signs of the influence of the Platonic turn upon Pauline theology based upon the 'new covenant' prophecies of Jeremiah.

⁴⁶ Plato, *Theaetetus*, 276a.

⁴⁷ Curtius (1990, pp. 302–347).

⁴⁸ Derrida raised the argument that the Western doctrine of semiotics behind the understanding of language from Plato's time to our own day is based in practice upon the metaphor of inner writing. He likewise argued that 'the history of this metaphor' has in practice not yet been written; see Derrida (1976, p. 15).

⁴⁹ 2Cor. 3: 2–3, 6.

⁵⁰ Plato, *Theaetetus*, 278c. See Plummer (1985, p. 81).

The Pauline idea undergoes further development and refinement in the thought of St. Augustine, where the Pauline contrast is expanded into a more comprehensive world view. According to this view, the external world is a material world in which all things are transient, a world of corporal language and dead letters. Against this, the inner world, the world of the soul, is one in which the truth is eternally engraved upon the living heart and memory. St. Augustine adopted with enthusiasm the approach of inner writing upon the tablet of the heart, identifying this act as the fundamental moment of religious experience. For Augustine, the heart is not only the center of authentic human life, but also the locus of religious experience, and it is that which defines individuality: ‘my heart where I am whatever I am (*cor meum, ubi ego sum quicumque sum*)’⁵¹ In effect, for St. Augustine accepting religion means the internalization of the contents of the law and its engraving upon the tablet of his heart.

For that reason, St. Augustine discovered the most important religious insights within himself, engraved upon his heart. Thus for example, he describes the concept of ‘Divine law’ as ‘law written in men’s hearts (*lex scripta in cordibus hominum*), which not even ingrained wickedness can erase,’⁵² the belief as ‘reconfirmation of existing knowledge’⁵³ and the reality of God as present within memory.⁵⁴

In the same manner he also describes his biographical path towards Christian faith—a process whereby he succeeded in internalizing the holy writings of the Scriptures within his heart,⁵⁵ and thereafter turn them outwards, by means of confession, upon the text being written in his hand.⁵⁶ The heart described in the *Confessions* represents, more than it does an inner space, the verbal center of man.

⁵¹ Augustine (1912, p. 10.3.4).

⁵² Ibid. 2.4.9. It is worth considering at this point the Augustinian influence on the doctrine of Christian natural law. According to this doctrine, the validity of natural law derives from its being written on a human being’s heart. An elaboration of this idea is found in Thomas Aquinas’ legal theory (*Summa Theologica*, II, p. 94. 6), which refers to Augustine’s words. Such a reading of Jeremiah’s prophecy also feeds Hobbes political theory that views Jeremiah’s vision as source for the superiority of rationalism and equity; see *Leviathan*, 26:224, 292.

⁵³ ‘... we do not believe it as something new; but when we recall it, we admit that what was said was correct’ (*Confessions*, 10.19.28).

⁵⁴ ‘But where in my memory dost thou abide, O Lord? Where dost thou dwell there? What sort of lodging hast thou made for thyself there? What kind of sanctuary hast thou built for thyself? Thou hast done this honor to my memory to take up thy abode in it, but I must consider further in what part of it thou dost abide. For in calling thee to mind, I soared beyond those parts of memory which the beasts also possess, because I did not find thee there among the images of corporeal things. From there I went on to those parts where I had stored the remembered affections of my mind, and I did not find thee there. And I entered into the inmost seat of my mind, which is in my memory, since the mind remembers itself also—and thou wast not there. ... and of all these things that are mutable; but thou abidest immutable over all. Yet thou hast elected to dwell in my memory from the time I learned of thee. But why do I now inquire about the part of my memory thou dost dwell in, as if indeed there were separate parts in it? Assuredly, thou dwellest in it, since I have remembered thee from the time I learned of thee, and I find thee in my memory when I call thee to mind’ (*Confessions*, 10.25.36).

⁵⁵ ‘... the story of Augustine’s “heart,” or of his “feelings”—his *affectus*’ (Brown 1984, p. 169).

⁵⁶ *Confessions*, 9.13.37, 10.1.1.

St. Augustine listens by means of the ears of his heart⁵⁷ and confesses within his heart, or speaks by its means of his heart's voice.⁵⁸ In St. Augustine's eyes, the heart thus has three textual functions: as conscience—the place where God records His commandments within human beings; as the focus of understanding—in which intellectual activity is concentrated, as a kind of inner reading; and as memory—the heart being the site of documentation of personal experience, as well as the basis for Augustine's own confessions.⁵⁹

7.4 Rabbinic Memory: A New Framework

Regardless of the Hellenic influence, recognized in the sages' conceptual vocabulary and their mnemotechnic concepts,⁶⁰ and even with the constant echoes of the biblical obligation to remember, we can postulate that the rabbinic perception of memory differed substantively from that of both previous traditions. As we shall argue, the rabbinic perception of memory is more encompassing than its biblical and Hellenic counterparts.

7.4.1 *Between Divine History and Divine Knowledge*

The difference between rabbinic memory and that of the earlier cultures may be seen in relation to two basic features. The first and most important relates to the centrality of divine knowledge—both the *written* and *oral Torah*—as the object of the duty to remember. As in the biblical picture, so too among the rabbis the duty to remember is a supreme religious value; however, for the sages this duty does not apply to God or to His historical deeds, but rather to the entire knowledge of the Torah. This modification blurs the distinction between divine memory and divine knowledge. Memory is no longer directed towards remembering the foundational events which constituted the God-Israel relationship, but is now directed towards the Torah as reflecting divine knowledge.

This new definition clearly relates to the ascendancy of Torah study as a supreme religious value and to the reshaping of normative Judaism subsequent to the Temple's destruction and the spread of Christianity. In the absence of a cultic center, Torah study became the ultimate religious ideal and the principle activity, as it coordinates relations between human consciousness and the revealed will of God. The Torah serves as the intermediary between man and God, and the study of Torah is the most sublime way to express human access to Divine power.⁶¹

⁵⁷ Ibid. 1.5.5, 4.5.10, 4.11.16, 4.15.27.

⁵⁸ Ibid. 5.2.2, 9.12.29.

⁵⁹ By this description St. Augustine develops a hermeneutical model according to which his heart is the mediator between the Scriptures and his own writings see Coleman (1992, pp. 95–97).

⁶⁰ Naeh (2005).

⁶¹ In this manner, the mediating function of the Torah is paralleling to the Jesus' mediating function in Christian theology, see Neusner (1975, pp. 7–15).

Consequently, memory as referring to the study of Torah became an inherent part of the definition of divine knowledge, marking its boundaries, defining the foci of its control, and the identity of the community committed to it. As we shall see below, by defining Torah study as the purpose of memory and as a duty, the religious value of memory shifted from the God-Israel relationship to that between scholars and the Torah. This shift raised new questions regarding the role of memory and the religious virtue of remembering: What is the Torah whose memory actualizes a religious ideal? Who are those charged with memorizing the Torah? What are the sources of memory? And, to what extent is it attained or controlled by technical means alone?

Unlike the biblical picture, in which the duty of memory applies to the entire people of Israel, memory in the rabbinic understanding is individualized, pertaining only to those who maintain scholastic study of the Torah. Memory as a virtue serves as an internal value, indicating the proximity and distance to the Word of God within the community of faith itself. By transferring the duty of memory from history to knowledge, the function of memory is also changed; the duty to remember, consequently, no longer *confirms* the intimacy of God and Israel, but rather *expresses* it, and serves as living testimony to its very existence.

The second feature of the rabbinic perception of memory is also derived from the shift of memory from the God-Israel relationship to that of the internal interaction within the community. As we shall further see, not only is the concept of memory redefined, but there also develops a heteronomous perception of memory. Unlike the above two concepts of memory, which exists within the remembering subject, memory according to the rabbis is conditional on external factors. The rabbis' approach to memory is opposed to Hellenic secularized memory and posits memory as deity's abundance. Human memory, therefore, is achievable only thanks to divine mediation and support, not by virtue of human capability. Control over memory, according to the rabbis, is far more limited than in either the biblical or Hellenic tradition. For this reason, memory is not a fundamental religious duty as human memory is so fragile and untrustworthy. The heteronomous conception of memory is thus not a component in God-human relations, but rather a divine response to human circumstances. The examples below offer two rabbinic conceptualizations of memory: memory as (1) divine gesture, and as (2) an expression of a covenantal aspect.

7.4.2 *Divine Gesture—Power and Grace*

Heteronomous memory in rabbinic sources emphasizes the fragility of human memory, and the consequent need for the intervention of heavenly powers. Unlike biblical memory, the actualization of memory does not constitute a relationship with God, but is *derived* from it; moreover, whereas biblical memory facilitates the mutual relationship between God and Israel, rabbinic memory is entirely concentrated in the hands of God and His entourage. Below we analyze several homilies from the period of the Mishnah and Talmud, which also appear in *Midrashim* belonging to

the earliest schools of Jewish mystical literature. The underlying question is: How the Torah as revealed knowledge is attainable by intellectual means?

At least *prima facie*, the biblical emphasis on the transcendent source of the Torah,⁶² illustrated in the expression *Matan Torah* (lit. the giving of the Torah),⁶³ opposes the scientific concept of knowledge as an immanent aspect of reality, acquirable through human reflection.⁶⁴ A major part of the homiletical references relay the biblical narrative of the giving of the Torah at Sinai and the extent to which Moses, an exemplum of human capability, acquired the content of the Torah on that occasion.

Within this representation two competing accounts are observable. According to one account, the Torah as divine knowledge is attainable by the mystical experience of ascending to Heaven (hereinafter: the heavenly ascent). According to the other, divine knowledge is attainable by means of intensive study and attachment to the sages who are proficient in the Torah (hereinafter: the exhaustive study). These accounts are reflected in two *Midrashic* narratives concerning the revelation at Sinai and Moses' knowledge on that occasion.

7.4.3 *Heavenly Ascent—The Torah as a Gift*

You have ascended on High, You have taken captives and taken gifts of men⁶⁵

This verse concisely portrays the story of Moses' heavenly journey subsequent to the revelation at Mt. Sinai and the receiving of the Torah. The Torah is thus conceived as a heavenly property which was 'taken into captivity' by Moses and therefore converted into 'gifts of men.' The extended narrative of this account appears in various *Midrashic* versions and, as has been shown by Halperin,⁶⁶ served at a later stage as source for the topos of heavenly ascent in the *Hekhalot* and *Merkabah* literature.⁶⁷ The shared narrative of these versions begins with the angelic opposition

⁶² Ex. 24: 12, Deut. 10: 4.

⁶³ On the Geonic characterization of divine knowledge as a 'transmittable knowledge' see Chapter 10 below.

⁶⁴ Indeed, the identification of the Torah as scientific knowledge immanent to reality appears already in late-Antiquity Judaism. Identification of the Torah as 'wisdom' is found in the *midrashic* literature (*TanWa*, Vayelekh, II, p. 122). In Philo's philosophical perspective the Torah is described as the 'logos' or the Platonic concept of 'the world of unchanging ideas', see Wolfson (1962, I, pp. 226–281). Later, this perception was simultaneously adopted by the early kabbalists and the philosophers, see Shalom (1976, pp. 36–85), Idel (1994, pp. 47–52).

⁶⁵ Ps. 68: 19.

⁶⁶ Halperin (1988, pp. 301–305).

⁶⁷ In the biblical description Moses is climbing the mountain surrounded by a cloud (Ex. 24: 15, 18). In the narrative of Moses' heavenly journey, the cloud serves as a transformation vehicle—'At the time that Moses was to go up on high, a cloud came and lay down in front of him. Moses did not know whether he was to mount it or to take hold of it. Thereupon the mouth of the cloud flew open and he entered it... And the cloud covered Moses and carried him up.' (*PesR*, 20, 96b; *Fountain of Wisdom*, in *BhM*, I, p. 58). As Halperin has shown (1988, pp. 308–309) the rich description

to Moses' presence in heaven and to his desire to seize the Torah and deliver it to Israel. The angelic opposition is removed thanks to Moses' physical struggles with them,⁶⁸ to God's active assistance in protecting him,⁶⁹ and to Moses' polemics against the angelic opposition to deliver the Torah to corporal creatures. The turning point in this narrative occurs when the angels relinquish their opposition and further provide Moses with esoteric knowledge and heavenly secrets.⁷⁰

At the heart of this narrative lies the idea that the giving of the Torah by Moses was essentially a pursuit that involved smuggling the Torah out of heaven and bringing it down to earthly reality. The Torah is uprooted from its natural, heavenly origins and brought to the earth, notwithstanding the resistance of the heavenly denizens.⁷¹ Moses' leaving earthly reality and ascending to heaven are described as both daring and invasive. From the angels' viewpoint, he trespasses into heavenly domains and violates the heavenly order. The turning point in Moses' heavenly journey is indicated in the verse through the tension between the terms 'captive' (שבִּי) and 'gift' (מתנה). He broke boundaries to take the Torah into 'captivity,' while the angels' agreement turns it into a 'gift.' This turnabout is attributed to Moses' humiliation by the angels,⁷² Abraham's merit,⁷³ or that of Israel in general.⁷⁴ Obviously,

of Moses' ascent is rooted in the homily of R. Yehoshua b. Levi (b *Shab*, p. 88b) and was later developed in the ideological climate of the Hekhalot literature.

⁶⁸ 'When Kemuel still would not let him pass, Moses struck him one blow and made him perish out of the world.' (Halperin 1988, p. 406).

⁶⁹ 'In that instant the compassion of the Holy One, blessed be He, made itself heard, and a heavenly voice came forth and said to Hadraniel ... When Hadraniel heard this, he said directly to God: It is manifest and clear to Thee that I did not know that Moses came hither with Thy permission. But now that I know it, I will act as messenger for him and go before him as a disciple goes before his master. ... the Holy One, blessed be He, came down from His throne, and stationed Himself in front of Sandalphon until Moses passed by.' (Ibid. pp. 406–408).

⁷⁰ b *Shab*, 89a.

⁷¹ Taking the Torah from its heavenly origins incurred the angels' opposition and an heroic struggle. As Halperin demonstrates, the elements of this narrative include the image of Moses as warrior. The angels' hostility to Moses and the delivery of the Torah to human beings is described as a continuum of their hostility to Adam—'In that instant the compassion of the Holy One, blessed be He, made itself heard, and a heavenly voice came forth and said to Hadraniel: Ye angels—know ye?—have always been quarrelsome beings. When I wished to create man, right to My face you became a corps of prosecutors, saying: "What is man that Thou art mindful of him?"' (Ps. 8:5), and you did not let Me go ahead until I burned companies of you in the fire. Now again you rise in quarrelsomeness, and do not let Me give the Torah to Israel.' (1988, p. 406). On the Gnostic background of this topos see Altman, 'Gnostic Background'. It should be noted that in some homilies following this topos, the angels reconciled with Moses and agreed to furnish him with heavenly secrets in addition to the Torah.

⁷² "'You have ascended on High, You have taken captives and taken gifts of men' (Ps. 68: 19)—as a reward for their calling you man (Heb. adam) you have received gifts' (b *Shab*, 89a).

⁷³ *MidR*, Ex. 28: 1, 98.

⁷⁴ 'R. Pinehas said: Indeed Moses, who ascended on high and took the Torah captive and brought it down, was able to do so not by virtue of his own strength, but by virtue of Israel's merit ...' (*PdRK*, 47, 191a).

the Torah within this narrative is a transcendent knowledge,⁷⁵ which the rabbis took as a principle of faith.⁷⁶

The possibility of attaining the Torah as knowledge is tantamount to accessing that selfsame heavenly knowledge. Moses' stubborn journey is therefore paradigmatic for those seeking to gain the knowledge of the Torah. Knowing the Torah and its preservation are therefore a matter of accessibility. The problem of memory and the preservation of divine knowledge is secondary to its accessibility and not even raised within this narrative.

7.4.4 *Intense Study: Memory as Grace*

In this narrative, the acquisition of the Torah as divine knowledge is the result of intense, devotional study. This narrative is probably a rival one. Opposition to the narrative of heavenly ascent revolves not only around the practical means of acquiring divine knowledge, but also around the giving of the Torah as a heavenly journey of Moses:⁷⁷

R. Yose says: Lo, Scripture says, 'The heavens are the heavens of the Lord, but earth has He given to the children of men.'⁷⁸ Neither Moses nor Elijah ever ascended upward, nor did the glory come downward. But the passage at hand teaches that the Omnipresent said to Moses, Lo I shall call you to the top of the mountain and you will come up.

According to this pattern of thought, Moses' ascent was no more than an ascent to Mount Sinai. Similarly, the receiving of the Torah did not involve a journey across worlds, but was an intellectual activity involving study and repetition. The most explicit expression of the tension between these two narratives appears in the following *Midrash* that rejects the above reading of the verse in Psalms:⁷⁹

'And cleave unto Him'⁸⁰. Is it possible for man to ascend to (fiery) heaven and cleave to fire, seeing that Scripture has said, 'For the Lord thy God is a devouring fire,'⁸¹ and 'His Throne was fiery flames?'⁸² Rather, (the meaning is,) cling to the Sages and to their disciples, and I will account it to you as if you had ascended to heaven and had received it (the Torah) there, and not only that but also as if you had ascended and had received it not in peace but only after waging war in order to receive it, as it is said, 'Thou hast ascended on high, thou hast led captivity captive.'⁸³

⁷⁵ *From His right hand You gave him a fiery law* (Deut. 33:2)—to say that words of Torah are compared to fire: just as fire is given from the heaven, so were words of Torah given from the heaven' (*SifDeut*, p. 343, 399).

⁷⁶ 'The following have no portion therein: he who maintains that resurrection is not a biblical doctrine, (that) the torah was not divinely revealed, is an *epikoros* (i.e. heretic).' (m *Sanh.* 10: 1).

⁷⁷ *MdRI*, Bahodesh, p. 4, 217.

⁷⁸ Ps. 115: 16.

⁷⁹ *SifDeut*, p. 49, 114–115.

⁸⁰ Deut. 11:22.

⁸¹ Deut. 4:24.

⁸² Dan. 7:9.

⁸³ Ps. 68:19.

This *Midrash* seeks to interpret the scholars' intellectual activity as a yearning for contact with the deity. Contact with the deity by means of mystical experience is replaced with contact by means of scholarly engagement with the Torah.⁸⁴ The *Midrash* departs from the literal meaning of the verse, interpreting it by means of the metaphor, 'as if you have made war and captured it.' Knowledge of the Torah is not attained through the vertical axis between worlds; it exists in this world, and contact with it occurs on the horizontal, human plane.

Unlike in the former narrative, attaining divine knowledge is contingent on its absorbability in intellectual terms, on its mysterious incorporation by human beings. Intellectual apprehension of the Torah, in this narrative, is made possible thanks to divine grace. Several versions of the narrative focus on the figure of Moses at the time of the Sinai revelation. During the forty day period in which Moses stayed on high, he did not ascend to the heavens, but remained on Mt. Sinai; he did not struggle with angelic forces, but was involved in studying the Torah and committing it to memory. Alas, Moses' sisyphian endeavors were futile until the Torah was given as a gift.⁸⁵

... and Rabbi Yohanan said: Initially Moses would learn Torah and forget it, until it was given him as a gift, as it said 'And he gave unto Moses, when he had made an end of communing with him upon mount Sinai'⁸⁶

This homily suggests the 'gift' relates to the element of loving-kindness entailed in memory: the gift involved in the revelation of the Torah lies not in its substantive content, but rather in the capacity to preserve it. The concept of memory expressed here relates to the natural cycle of learning and forgetting. Human intellectual ability, in the narrative of intensive study, is trapped in a cycle of learning and forgetting. Mastery over the knowledge of the Torah is constantly exposed to the tribulations of human forgetfulness. Forgetting is the daily bread of intellectual activity, from which one is only spared thanks to divine grace.

It is not clear from the above homily of Rabbi Yohanan whether the cyclic nature of learning and forgetting derives from the nature of the Torah or from the frailty of human memory. Other homilies suggest that it is a unique phenomenon in the study of Torah. In a later *Midrash* we find this approach expressed in the words of R. Abbahu:⁸⁷

R. Abbahu said: It refers to the peculiarity of Torah, which is that a man learns Torah and forgets it. The Babylonian Rabbis in the name of R. Isaac the Palestinian and R. Tobiah in the name of R. Isaac said: It is for man's good that he learns Torah and forgets it; because if a man studied Torah and never forget it, he would occupy himself with learning it for two or three years, resume his ordinary work and never pay further attention to it. But since a man studies Torah and forgets it, he will not entirely abandon its study.

⁸⁴ See Fraade (1991, pp. 92–4).

⁸⁵ b *Ned.* 38a.

⁸⁶ Ex. 31:18.

⁸⁷ *EccLR*, I. 13.1, 40–1; III. 10.1, 85.

The sages discuss the advantage created by the dynamic of learning-forgetting in so far as it encourages a constant involvement in Torah study. Forgetfulness, a fact of life against which there is no protection, can actually be viewed as advantageous.⁸⁸

In the above two *Midrashim*, the learning-forgetting cycle is described as unrelated to any particular unit of time. By contrast, in a homily parallel to that of R. Yohanan, emphasis is placed on Moses' frustration at the cyclic nature of studying and forgetting. In this homily, in the name of R. Abbahu, Moses experiences the learning-forgetting cycle every day until graced with the capacity to remember.⁸⁹

R. Abbahu said: All forty days that Moses was on high, he kept on forgetting the Torah he learnt. He then said: 'Lord of the Universe, I have spent forty days, yet I know nothing.' What did God do? At the end of the forty days, He gave him the Torah as a gift, for it says, 'And He gave unto Moses'.

In effect, the narrative of intensive study characterizes the ideal according to which the Torah is an intellectual pursuit whose success depends upon divine kindness. Therefore, knowing the Torah is not the exclusive prerogative of the sages who are themselves incapable of preserving their knowledge without divine assistance. This aspect reveals the educational value of the narrative: Anyone, even weak students, can break loose from the learning-forgetting cycle.⁹⁰

R. Yohanan said: All those forty days that Moses was upon the mountain, he would study Torah and forget it, but at the end it was given him as a gift. Why so? In order to bring back (להחיות)⁹¹ the stupid ones.

7.4.5 *Memory in Early Mystical Literature*

In the narratives above, memory is considered a divine gesture. In the following, we shall note another model of attaining knowledge of the Torah, mostly developed in early mystical writings. This model presents a unique phenomenology of the problem of memory.

As Michael Schwartz demonstrated in his study on the early Jewish mysticism,⁹² the problem of memory was a central theme in the *Sar Torah* literature,⁹³ which

⁸⁸ Marcus (1996, p. 79) presents two possible readings for this homily. According to the first, the *Midrash* shields the advantage of forgetting; according to the second it opposes the magical praxis of strengthening memory by advocating the advantage of forgetfulness. Since the ideology of defending forgetfulness seems inconsistent with the sages' perception of Torah study, he prefers the second way of reading the homily. Yet, he does not acknowledge our above reading, according to which the *Midrash* recognizes the fragility of human memory and thus calls for reconciling with the unfortunate conditions.

⁸⁹ *ExR*, XLI. 6, 475.

⁹⁰ *y Hor.* 3, 48b.

⁹¹ With the connotation of penance or repentance.

⁹² Swartz (1996, pp. 33–50).

⁹³ On dating and characterizing this literature see Swartz (1996, pp. 53–149), Marcus (1996, pp. 70–71).

proposed confronting the problem of forgetfulness by theurgy and magical techniques. One of the striking observations in Schwartz's study indicates that the problem of memory and forgetfulness that troubled the authors of this mystical literature is identical to that which troubled the halakhic sages of the rabbinic mainstream. Among *Hekhalot* circles, it would seem that the study of Torah revolved around the classical rabbinic curriculum—Bible, Mishnah, Talmud, *Halakhot* and *Aggadat*—as they were also troubled by the limits of memory in relation to these disciplines.

In the following, we shall argue that the problem of memory in the early mystical writings lies along the same continuum as the perception of memory as divine gesture, and yet differs from Talmudic perceptions. We shall also argue that these differences are rooted in a different phenomenology of forgetfulness as human weakness or as power play between heavenly entities and human beings.

7.4.6 *Power and Domination*

In the texts below forgetfulness is considered an exceptional phenomenon deriving from the power of heavenly entities. Moses' forgetting the Torah is retold in these sources as an event that occurred in the course of his heavenly journey. In fact, the story about Moses' experience at Mount Sinai in the *Hekhalot* literature is a *mélange* of these previous two narratives. Yet, this is not only a synthesis, but rather a new emphasis in which memory and forgetfulness mark the realm of encounter between the upper and lower worlds, and the place in which they influence one another.

Such a construction is evident in the *Midrash Me'eyn Hokhmah*, which depicts Moses' heavenly journey at the time of the Giving of the Torah on Sinai. Moses' forgetting of the Torah was engendered by the fear that took hold of him because of the angels:⁹⁴

... and God had taught him the entire Torah in forty days, and when he prepared to descent and saw the angels' fright, and battalion of angels of terror (מלאכי אימה), angels of trembling (מלאכי זיע), angels of horror (מלאכי הלהל), angels of revulsion (מלאכי רתת), (he) immediately was caught in horror in one moment. God immediately called to YFYFYH Sar Ha-Torah and delivered him the Torah completely edited and preserved.

This description posits Moses' forgetting of the Torah as independent of the phenomenology of the learning-forgetting cycle. Forgetfulness here is effected by angelic forces and not by the nature of Torah study. Forgetfulness is a consequence of fear of the angels whose function it is to engender terror, fear, horror and revulsion in Moses.⁹⁵ Forgetfulness is not the result of the frailty of human memory, but an expression of the influence of heavenly forces on human knowledge, a reflection of the complex relationship between human and angel.

⁹⁴ *BhM*, I, pp. 58–61.

⁹⁵ The description of Moses' horror is of course inconsistent with the previous description of him struggling with the angelic forces. The above motif was probably added later and not part of the same tradition.

Another description of memory and forgetfulness within the power relationship between man and angel appears in the *Hebrew Book of Enoch* (or *III Enoch*)⁹⁶ and its parallel, the *Alphabet (O'tiyot) of Rabbi Akiva*. In these works too, Moses' forgetting the Torah is an exceptional event, involving a sudden and unexplained loss of memory that occurred during the course of his heavenly journey:⁹⁷

... And as the forty days were ended, he forgot all of them in one moment. Then the Holy One, blessed be he, called to YFYFYH the Prince of Torah, as said 'Thou art fairer than the children of men: grace is poured into thy lips: therefore God hath blessed thee for ever,'⁹⁸ and gave it to Moses as a gift as it was written 'and the LORD gave them unto me.'⁹⁹ Afterwards (the Torah) sustained and not forgotten again. And from where (do we know) that (the Torah) sustained? As said 'Remember ye the law of Moses My servant, which I commanded unto him in Horeb for all Israel, even statutes and ordinances.'¹⁰⁰

Here the remedy for forgetfulness is not divine grace, but the gift given by the *Sar Ha-Torah*. Indeed, the mediating role of the *Prince of the Torah* is one of the striking characteristics of this literature. His stature and function identify him as one charged with reconstructing the divine knowledge that has been forgotten.¹⁰¹ Such descriptions probably relate to earlier traditions in which heavenly forces played a role in the process of the Giving of the Torah and its preservation in human memory. Memory and divine knowledge are not the result of God's freely given grace, but rather of the power of the angels. This power may be channeled into activity by means of earthly techniques, such as magic and theurgy. A description in which divine knowledge is attained through theurgy and by uttering holy names appears in *Hekhalot Zutрати* as a heavenly secret given to Moses during the course of his stay in the supernal realms. Uttering these names spurs into action the heavenly powers that strengthen memory and ensures that a student will not forget what he has learned:¹⁰²

(in the name of God, Blessed are you, the sage of Mysteries). When Moses ascended to God, the Holy One, Blessed be He, taught him: any man whose heart errs should recite over it these names: ... let there be gathered in my heart all that I hear and learn: Scriptures, and Mishnah, Talmud, Halakhot, and Aggadot, and may I not forget, ever—not in this world or the world to come. Blessed are you, YHWA, teach me Your statutes.¹⁰³

This description also attributes the issue of forgetting the Torah to Moses' heavenly journey and reveals the theurgy of memory performed by swearing an oath, using

⁹⁶ Also dated to the second half of the third century, see *EnHe*, pp. 23–43.

⁹⁷ *EnHe*, 175(E), 72(H); *AldRA*, 12.

⁹⁸ Ps. 45:2.

⁹⁹ Deut. 10:4.

¹⁰⁰ Mal. 3:22.

¹⁰¹ One may assume that the Talmudic sources were familiar with the concept of mediated revelation and denied the possibility that additional heavenly forces took part in the giving of the Torah. This is clearly seen in the emphasis on the direct relationship between Moses and God: 'Moses received the Torah at Sinai, not from an angel and not from a fiery being, but from the King of Kings, the Holy One blessed be He, as is said, "These are the statutes, the laws and the teachings"....' (*MdRI*, Shabbata, 1, 340; Pascha, 7, 23; 13, 43).

¹⁰² *SinHekh*, § 336, 142–143.

¹⁰³ Ps. 119: 12, 26, 68.

the holy names that were given to Moses secretly on that same occasion. The theurgy of memory is one of the gifts given to Moses during his stay in heaven which he brought down with him and disseminated among the people.

A further characteristic of the approach to memory in early mystical literature relates to the renewed characterization of the heart as the organ of memory. As stated earlier, there is a long tradition identifying the heart as the organ of memory, with deep roots in both biblical and Greek literature.¹⁰⁴ In early Christianity this identification became merged with the conception of recollection as ‘inner writing.’ Likewise, the perception of memory in the *Hekhalot* literature identifies the heart simultaneously as the abode of memory and as the site at which the angels act to protect and strengthen knowledge.

Notwithstanding its relationship to the Talmudic virtue of Torah study, the mystical approach does not follow the image of ‘inner writing,’ but uses other images to describe activities of memory and forgetfulness. One such image is that of the heart as the abode of wisdom. According to this image, the heart is perceived as an inner space, a receptacle containing knowledge and wisdom, though unsealed so the preservation of the knowledge within it is not assured and may seep out. Maintaining memory and preventing forgetfulness is about control over the passageways of the heart—the garnering of knowledge within and safeguarding it from seeping out. Another central image associated with ethical purification is found in the words of the prophet Ezekiel. Even though Ezekiel’s prophecy is concerned with moral purification and cutting oneself off from sin, the image of replacing the spoiled or foolish heart with a perfect one was adopted by the *Hekhalot* literature as a characteristic of memory.

7.4.7 *At the Gates of the Heart*

The angelic powers that control the passageways of the heart and the internalization of divine knowledge reinforce not only the image of the heart as a permeable vessel, but also the fluid quality of divine knowledge as a substance easily lost. Man’s relation to what he knows is tenuous; he is dependent on angelic protection even after having internalized knowledge. Thus, the secret of memory presented above (*Synopse zur Hekhalot-Literatur*, § 336), involves abjuring invoking the Holy Names to guarantee the internalization of divine knowledge in the heart: *let there be gathered in my heart*. The Holy Names complete the process of attaining knowledge which began with study, but which, without being internalized within the heart, cannot be maintained.

A parallel formula describes the angels’ duty to maintain this knowledge within the heart, in addition to bringing it into the heart: ‘May everything that I hear, whether words of Torah or of worldly matters, be preserved in my heart and never

¹⁰⁴ Since Galenus, the identification of the heart as the organ of memory is commonplace in pre-modern scientific traditions, see Bos (1995a, b; pp. 50–54), (1996, pp. 232–233), Swartz (1996), Chap. 2, n. 2.

forgotten by me forever.’ This image of memory and forgetfulness contrasts the description of the magic of memory in the work *Ma’aseh Merkavah*, which contains a series of magical texts whose purpose is to assure memory by means of eating, drinking and administering oaths to the angels. The angels who are invoked in this ceremony—*Sandalphon*, *Metatron*, *‘Agmatia*, *Michael*, *Nabat Pata*, *Ignassam Baf-sah Par Anah* and others—are asked to guard the Torah within the heart:¹⁰⁵

Fig leaf. I adjure you, Sandalphon, the angel who ties a crown for his Master, to go up and say to Him: two angels, Metatron and A’gamtaya (may they safeguard) wisdom in the heart of N.’ And may I know and may I be wise and reason and study and not forget and learn and not neglect what comes before me and what comes after me. ...

Olive leaf. ... these princes who split the firmament and gave the Torah to Moses by the agency of YHW THW WHH. I adjure you in the name of great Dwellers to safeguard Torah in my heart. ...

Silver cup. ... I shall collect and arrange to these orders of Michael, great Prince of Israel, that you safeguard me for the study of Torah, in my heart.

The heart is compared to a container in the next passage from the same source, from which there follows a description of the heart as a dark vacuum. Thus the request of the angel known as ‘Nabat Pata who dwells in the heart’ to ‘cast in the Torah and make it illuminate the heart’:¹⁰⁶

Wine. NBT PT’ that rests on the heart, and attach a wineskin that rests on the opening of the stomach (???) and cast into me scriptures, Mishnah and Talmud, and enlighten my heart with words of Torah; and let me not stumble with my tongue in all I learn.

Another image accompanying the image of internalization within the heart compares the attainment of knowledge to eating or digesting food. Just as food is inserted into the human body, so too is knowledge.¹⁰⁷ Similarly, just as the aim of eating is the digestion and absorption of food into the body, so the aim of the acquisition of divine knowledge is its successful assimilation into the human being.

Certainly, these images of internalization are quite distinct from the earlier images of memory as inner storage, either within internal architecture or as internal writing. Memory as inner storage is in fact a visual faculty that imitates the presentation, or organization, of external knowledge within one’s mind. In that respect memory expands the acts of knowing within the inner space of the remembering person. However, the form of knowledge, in the mystical model, is neither verbal nor visual, and hence does not depend upon reflecting external presentations of knowledge in reality.¹⁰⁸ Divine knowledge within mystical thought is not imprinted from within, and for this reason the decisive stage in the process of knowing is its entry into the heart and its maintenance. From this follows the conventional image in which the strengthening of memory is compared with the ‘opening of the heart.’ Accordingly, the power of the appointed angels lies in their facilitating the penetration of

¹⁰⁵ *SinHekh*, § 754–756, 219.

¹⁰⁶ *SinHekh*, § 577.

¹⁰⁷ Marcus (1996, pp. 80–97) emphasizes that the equation of eating and acquiring knowledge is derivative to the images of the Torah as peculiar food—honey, milk, oil and flour.

¹⁰⁸ Marcus does not distinguish between the images of eating and internal writings.

knowledge into the heart by opening its gates and removing potential obstacles. An example of this is found in the same collection of memory magic, which describes the imprecation to the *Prince of Torah* that he ‘pave the passageways of the heart to allow the entry of knowledge of Torah’:¹⁰⁹

Egg. L’YGNSM BPSH PR ANH, who is the great prince of the Torah, who was with Moses at Mt. Sinai, and crowned him with a wreath—all that he learned and all that his ears heard¹¹⁰—So may you crown, and come to me, and remove the stone from my heart, speedily, and do not delay.

Memory as the heart opening is a commonplace image in early mystical literature, and is known primarily in the context of magical texts to strengthen the memory, through a ceremony ‘opening the heart.’ Control over the passageways of the heart is dependent upon the successful invocation and mediation of the holy names:¹¹¹

When Moses ascended to God, the Holy One, Blessed be He, taught him concerning any man whose heart errs, that he should recite over it these names: Awesome, YHWH of Hosts, ‘H BHH YH BYH YHW’L, you, these holy names, open my heart; Let all that I hear, be they words of Torah, or any other words in the world, be preserved in my heart and not be forgotten by me forever.

7.4.8 *Replacement of the Heart*

The perception of memory as the site of angelic forces is associated with another image of memory typical of early mystical literature—namely, memory as a replacement of the heart. Unlike in the previous image where divine knowledge is likely both to enter into and seep out of the heart, here acquisition and recall of knowledge are literally connected with the process of change in the heart itself.¹¹²

I adjure you, Puta, prince of forgetfulness, to remove stupid heart and ... serious illness and all the worries and bad diseases and blooming spirits and harming demons and And give me an understanding heart a heart that preserves what I hear and learn, and everything I learn I will not forget....

The image of replacing the heart originates in the prophecy of Ezekiel, which depicts the replacement of a fossil heart with a living heart: ‘And I will give them one heart, and I will put a new spirit within you; and I will take the stony heart out of their flesh, and will give them an heart of flesh’¹¹³; ‘A new heart also will I give you, and a new spirit will I put within you: and I will take away the stony heart out of your flesh, and I will give you an heart of flesh.’¹¹⁴ According to this image, the acquisition of divine knowledge involves preparing the heart to bear knowledge by

¹⁰⁹ *SinHekh*, § 578.

¹¹⁰ Marcus (1996, p. 97).

¹¹¹ *SinHekh*, § 340.

¹¹² Shalom (1980, pp. 278–280).

¹¹³ Ezek. 11: 19.

¹¹⁴ Ezek. 36: 26.

purification and cleansing. In the passages from *Hekhalot* literature discussed here, this image involves a ceremony whereby an oath is administered to the prince or princes of forgetfulness (*Putā sar ha-shikhah; Ma sputa u-Paltaya shehem sarei ha-shikhah*), described as capable of replacing the spoiled heart with a purified one. As the heart is not only the organ of memory, but also the essence of the self, it would seem that the image of ‘exchanging the heart’ in these magical ceremonies was understood as a kind of angelic ‘surgical intervention’ that had far broader consequences than merely correcting the heart. It was in fact more akin to exchanging a spoiled essence for a purer one.

7.4.9 Power Versus Loving-Kindness

The above conceptions seek to reinforce the heteronomy of memory. An illustration of the difference between the Talmudic and mystical conceptions of memory appears in the following homily taken from a work that also belongs to the *Hekhalot* literature, known as *Pirkei Rabbi Nehuniah ben Hakannah*. This homily describes Rabbi Ishmael’s efforts to preserve his scholarly attainments, which he repeatedly forgot. It adopts the phenomenology of the learning-forgetting cycle, though at the turning point where the cycle is broken:¹¹⁵

Rabbi Ishmael said: (When I was) thirteen years old Rabbi Nehuniah saw me in great trouble, affliction, and great danger. A scriptural passage that I was reading one day I would forget the next, and a Mishnaic passage that I was repeating one day I would forget the next. What did I do? When I saw that the Torah was not remaining with me, I took hold of myself and refrained from eating, drinking, bathing, and anointing, and deprived myself of sexual activity, and did not sing or laugh; nor did any word of song or melody pass from my mouth.

Immediately Rabbi Nehuniah my teacher seized me and took me from my father’s house and brought me into the Chamber of Hewn Stone and made me swear by the Great Seal, ... and he revealed the praxis of the secret of Torah. Then immediately my heart was enlightened like the gates of the east, and my eyes gazed into depth and paths of Torah, and never again did I forget anything my ears heard from my teacher of study; nor would I ever again forget anything of the paths of Torah in which I engaged for their truth.

While the turning point in the narrative of intense study occurs with the appearance of divine grace,¹¹⁶ the turning point in the present narrative takes place in wake of the acts of R. Ishmael himself. The acquisition of Torah and the strengthening of memory that begin with ascetic activity, and continue with an oath taken with the great seal and the revelation of the ‘secret of Torah,’ are no more than human manipulations of the angelic forces that allow one to break away from the learning-forgetting cycle. Memory, in the rabbinic mystical model, is not subject to divine grace, but is rather in human hands.

¹¹⁵ *SinHekh*, § 278–9 (677–9). On a different version of this narrative and its relation to the current version see Swartz (1996, pp. 62–74).

¹¹⁶ ‘What did the Holy One blessed be He do? After the forty days were completed he gave him the Torah as a gift, as is said, ‘And He gave to Moses’.’ (*MidR*, Ex. 41:6, 137; *TanBu*, Ki Tisah, 12, 112).

Chapter 8

Covenantal Memory

Abstract Locating memory as an essential component of Biblical covenantal theology is demonstrated in this chapter as a Jewish-Christian polemical matter. Accordingly, rabbinic expressions about the various features of memory are explained as reactions to the Pauline reading of Jeremiah's prophecy (31:31–34) about the metamorphosis caused by the New Covenant. In this way, the polemic about memory is described as a component of the Jewish-Christian polemic about religious legalism and faith.

As discussed above, one of the changes in the perception of memory heralded by the rabbis was their insistence on its heteronomous nature and dependence on a higher power. In what follows, we shall demonstrate that parallel with this perception, is the belief that memory of the Torah is a substantive component in covenantal relations between Israel and God. This perception, whose ideological roots appear in classical prophecy, emerged against the background of two central factors: (1) The centrality of the value of Torah study in the rabbinic world; (2) The development of Christian theology, which redefined the nature of the covenantal connection with God and the nature of divine knowledge or the Word of God.

Basing the concept of memory upon the concept of the covenant exposes an additional complexity in the ambivalent relationship between the rabbinic and biblical theologies. Dealing with the issue of memory within the framework of the covenant and its biblical roots is a typical example of the manner in which biblical models were enlisted to shape a theology that was in fact remote and distinct from the biblical conceptual world. This perception, like the perception of memory as divine gesture, is based on the distinction between receiving the Torah and its retention, as well as on the assumption that forgetfulness is not subject to human control. Nevertheless, these heteronomous understandings of memory are distinguished from one another by the nature of the divine intervention; memory as divine gesture can result from grace or earthly magic. Covenantal memory, on the other hand, assures a fixed and stable framework. Moreover, whereas in the perception of memory as divine gesture, memory is a personal and transient response to the problem of lack of memory, covenantal memory promises permanent protection against forgetfulness which lends assurance that the Torah will never be forgotten.

Another area in which the two perceptions of memory differ relates to the characterization of the problem of memory. Unlike the perception of memory as divine

gesture, in the theology of covenantal memory, memory is not a personal question but an historical problem. The problem of memory in the historical covenant does not merely affect Torah scholars, but is a collective problem with far-reaching social implications.

Just as the perception of memory as divine gesture questions the hierarchical structure, so too the perception of covenantal memory challenges social hierarchy and the status of knowledge within the society. The two perceptions develop two different mechanisms for the reorganization of social hierarchies based on different approaches to the nature of divine knowledge and the possibility of its retention. Further on, we look at the various versions of covenantal memory and reveal the manner by which they helped crystallize the identity of those who saw themselves as protected against forgetfulness through the covenant of memory.

A central source for the idea of covenantal memory is Jeremiah's prophecy (31: 31–34) concerning the new covenant to be made at the end of days. The new covenant is characterized by a drastic change in the nature of divine knowledge and its mode. This prophecy, fundamental to the theological world view of the Qumran sect and early Christianity, contributed to the shaping of other contemporary theological movements. In addition, we show that the post-biblical interpretation of this prophecy redefined the relationship between control over divine knowledge and the nature of the relationship with God.

Another central prophecy that serves as a source of covenantal memory is that of Isaiah:¹

As for me, this is my covenant with them, saith the LORD; My spirit that is upon thee, and my words which I have put in thy mouth, shall not depart out of thy mouth, nor out of the mouth of thy seed, nor out of the mouth of thy seed's seed, saith the LORD, from henceforth and for ever.

This prophecy, like that of Jeremiah, associates God's covenant with the promise of permanency of the Word of God with Israel. Further on we point out three understandings of covenantal memory: the Pauline, early and later rabbinic. The two first readings which may be dated between the first and fourth century are theological interpretations of Jeremiah's prophecy which are conflicting. The later rabbinic interpretation appears in the founding narrative of the Babylonian academies² and reveals that the perception of covenantal memory formed the basis of their self-identity and ideology.

¹ Isa. 59:21. The dependency of this prophecy and that of Isa. 51:7 upon Jeremiah's prophecy is elaborated by Weinfeld (1976).

² The *terminus a quo* of these homilies is post-Amoraic. Scholars disagree about the antiquity of the yeshiva as academic institution, see Goodblatt (2006), Rubenstein (2002), Becker (2010).

8.1 Heteronomy, Promise and Commitment

The concept of the covenant and the idea of the covenant as a foundational element in relations of the Divine with humans form the core of biblical theology. The ambivalent nature of the concept of the covenant in the ancient Near East and biblical worldview lent ambivalence to the relationship between God and Israel. The ambiguity stemmed from the different implications of covenant in two types of relationship: legal relationships with formal obligations, and natural relationships of grace and love.³ The tension between these two types of relationship can be seen in the Bible itself, which fails to provide an unequivocal answer to the question as to whether the covenant between Israel and God expresses unconditional divine choice, or whether it is the result of the Israelites' fulfilling God's will.⁴

A sensitively-constructed theory on the two senses of covenant in the Bible was formulated by Wellhausen thorough his work, *Prologemena*.⁵ According to his thesis, the two forms of relationship, inherent in the biblical concept of covenant, are distinct from one another and should be attributed to two different periods, during which different understandings of the covenant with God were dominant. Accordingly, the inclusion within the text of a variety of covenantal relations reflects the transition from one meaning—one which sees the covenantal relationship as natural and unconditional, to a second meaning—the later legal meaning, that sees in covenantal relationships a mutual commitment, both on the part of Israel to fulfill God's will, and of God to protect and watch over Israel.⁶

This developmental description of the relationship between the two meanings of the biblical covenant has many weaknesses.⁷ Nevertheless, its importance lies not in the description of the historical development of biblical faith, but in its identification of the tension between the different meanings of the covenant between God and Israel. As we shall see below, the relationship between the concepts of memory based upon a covenantal relationship with God and that which sees it as a divine gesture is also based upon the tension between these two meanings. Put it differently, the very

³ Weinfeld (1970).

⁴ McCarthy (1973, p. 55, n. 5) claims that the law-grace problem troubled not only Protestant thinkers but also Catholic theologians.

⁵ Wellhausen (1957, pp. 365–391).

⁶ This theory is influenced by the developmental approach to primitive religions in anthropology and in religious studies, according to which the early covenantal theology is to be seen as a kind of 'taoism' in which there is a blood connection between the Israelites and God and as they literally enjoy the divine abundance. Accordingly, the transition to a 'higher theology' is connected with the prophetic movement and the ideology of 'ethical monotheism,' in which the idea of union with God is not based upon natural relationships, but rather upon an ethical relationship based upon commitment and loyalty. Israel is therefore close to God and His partner in the covenant by virtue of loyalty and the insistence on observing His laws.

⁷ One significant weakness is the striking presence terms of grace-covenant alongside those of a legal-covenant in the prophecies of the later prophets of the last years of the First Temple. Freedman (1964) precedes the tension between the two meanings to the early stages of the Israelite biblical history.

appearance of a heteronomous understanding of memory within covenantal relation indicates the vitality of the biblical theology of covenant, even after the destruction of the Second Temple and the establishment of rabbinic doctrines.

8.2 Covenantal Community in the Second Temple and the Mishnah

The intensive scholarship in the covenantal theology of Second Temple Judaism and of early Christianity reflects the various religious approaches,⁸ or the apologetic tendencies, in the study of the history of religions.⁹ Even in contemporary research this question is subject to debate among scholars. The idea of the covenantal community gave a new meaning to the concept of the covenant between Israel and God. At the basis of this meaning lies the view that the historical covenant of Israel with God—whether a natural, unconditional relationship or one based upon legal obligation—also defines the identity of the members of the community. Thus, the covenantal idea establishes the collective identity as a distinct and separate identity *vis-à-vis* other religious communities that claim to be the ‘true Israel.’¹⁰ By this mechanism of collective identity, the differences between the various religious groups are explained in terms of the quality of the spiritual relationship entered into by the different communities with the same God.

Nevertheless, according to the idea of the ‘covenantal community,’ the community serves as a mediating platform for the parties of the covenant. The idea of a ‘covenantal community’ makes entering and leaving the community possible through joining or rejecting the covenantal connection.¹¹ Joining a religious community, accepting its faith and its norms, implies entering into the historical and eternal covenant that the community represents. The emergence of the idea of the ‘covenantal community’ ought to be seen against the backdrop of strengthening the collective (or national) consciousness towards the end of the Second Temple period.

An explicit example of the emergence of a religious community that took shape during this period on the basis of the theological approach of the ‘covenantal community’ was of course the Christian community of the first century.¹² Another example was the *Yahad* (יחד; lit. together) community known through the Qumran literature. Joining the community of the *Yahad* means entering anew into the ancient covenant between Israel and its God.¹³ The members of the *Yahad* saw themselves as the only legitimate representatives and renewers of that biblical covenant, for

⁸ Klein (1978), Chap. 3.

⁹ Sanders (1977, pp. 233–238), Segal (1987, pp. 147–165).

¹⁰ Weinfeld (1971–1972, pp. 104–105).

¹¹ The Talmudic terms *Ben-Brit* (בן ברית; Lit. allied man), signifies the belonging of a person to the Jewish people or the Jewish faith as if he joins the covenant between God and Israel, see m *BK* 1:2–3; t *Sanh.* 11:1.

¹² Sanders (1977, pp. 33–59).

¹³ Talmon (1994, p. 11).

which reason they referred to themselves as the ‘enterers together into the new covenant’ (יחד באי הברית החדשה)¹⁴ or ‘those who have come into the new covenant’ (אשר באו בברית החדשה)¹⁵ In their view, the community of the *Yahad* was the final link in a long, repeated chain of affirmations of the ancient biblical covenant. This was the same covenant that God established for the first time with Adam, and renewed thereafter at every significant historical crossroads: after the flood with Noah (who at times is referred to as the ‘Second Adam’); thereafter with the patriarchs; again with the entire nation at Sinai; with the Aaronide priests; and finally, upon the establishment of the monarchy, with the Davidic house. According to this self-understanding, *Yahad* members are the remnants of the historic Israel.

In this context there obviously emerges the question of the relationship of rabbinic Judaism to the idea of the ‘covenantal community’ and whether the religious consciousness of rabbinic Judaism during the first century was based upon this idea or rejected it.

Early Christian doctrine claimed that rabbinic Judaism chose to forego its desire to be considered a ‘covenantal community’ in favor of its younger sister, Christianity. Scholarship also tended to follow this line and portrayed early rabbinic thought as representing an attempt to shake off the biblical model of covenantal theology. In a similar manner, Talmon argued that the communal sense of the covenant is completely absent from rabbinic thought. The Pharisaic rabbis, in his opinion, understood their existential situation as fundamentally separate and distinct from that of biblical Israel, and hence did not develop a conceptual structure according to which, in their days and among them, the ancient covenant of Israel comes to realization. In his opinion, this rejection of the covenantal model is connected to the Sages’ consciousness that the biblical period had ended and that their own period represented a different stage in the religious history of Israel. Nevertheless, one must note that this question has not yet been determined within scholarship. Various scholars have opposed this opinion and sought to demonstrate the existence of a religious world-view based upon a covenantal communal consciousness in early rabbinic thought as well.¹⁶

Focusing on the rabbinic worldview of memory and divine knowledge within the framework of the ancient covenantal theology sheds new light upon this debate. In the following, we attempt to see the growth of the idea of covenantal memory against the background of the rabbinic effort to shape an ideology of religious

¹⁴ *CD* 6:19 Talmon argues that despite the cult’s usage of the term ‘New Covenant,’ they ignored Jeremiah’s prophecy in general. Instead, he explained, they established their hopes on the prophecy of Ezek. 4:4–6 which describes the miserable fate of Israel, while Jerusalem was under siege, and the promise of a future restoration according to which their cult is materializing. A different explanation is offered by Wacholder (2007, p. 313).

¹⁵ *CD* 8: 21. Further appearances of the phrase ‘ברית חדשה’ are in *CD* 19:33–4 and 20:12.

¹⁶ Sanders, on the other hand, argued that early rabbinic Judaism did not abdicate on its self-identification as a covenantal community. He also coined the term ‘covenantal nomism’ that is ‘the view that one’s place in God’s plan is established on the basis of the covenant and that the covenant requires as the proper response of man his obedience to its commandments, while providing means of atonement for transgression.’ (Sanders 1977, p. 75). Sanders is thus claiming that all the Jewish streams during the first-century were concerned with covenantal theology (*ibid.*, p. 84).

scholasticism in which divine knowledge and its study are the supreme value of religious life subsequent to the destruction of the Temple. Confronting the problems of memory and divine knowledge—how they are acquired, and what assures their preservation—was basic to the rabbinic project as a whole.

8.2.1 *Sinai and the New Covenant*

One of the vital sources in the development of the concept of covenantal memory is the prophecy of Jeremiah which heralds the coming of a new covenant to be made between God and Israel.¹⁷ The Torah as the Word of God, in this prophecy, is situated within the covenantal relations itself. Perhaps then, it is worthwhile beginning our discussion of covenantal memory with the words of Jeremiah:¹⁸

Behold, the days are coming, says the Lord, when I will make a new covenant with the house of Israel and the house of Judah, not like the covenant which I made with their fathers when I took them by the hand to bring them out of the land of Egypt, my covenant which they broke, though I was their husband, says the Lord. But this is the covenant which I will make with the house of Israel after those days, says the Lord: I will put my law within them, and I will write it upon their hearts; and I will be their God, and they shall be My people. And no longer shall each man teach his neighbor and his brother, saying, 'Know the Lord,' for they shall all know Me, from the least of them to the greatest, says the Lord. For I will forgive their iniquity, and I will remember their sin no more.

The actualization of the new covenant is a tremendous event involving three dimensions: religious, spiritual, and social. The prophecy expresses the prophet's theo-social critique of his contemporaries, and reflects the anticipation of hope in those days. Post-biblical approaches based upon the intrinsic connection between theology, theory of knowledge and social structure view Jeremiah's prophecy as a basis for their ethical worldview and therefore redefine the content of these three dimensions. This prophecy appears within a collection of prophecies of consolation (Chaps. 30–33) written against an atmosphere of dejection and gloom related to the anticipated destruction of the Temple, with which many chapters of the Book of Jeremiah deal. The prophet speaks of a future period that is reminiscent of the terminology for the End of Days (אֶהְרִית הַיָּמִים) which generally indicates the eschatological future.

The Religious Dimension: The new covenant heralded by Jeremiah is described in contrast to the historical covenant made with the Israelites who left Egypt, and which was later renewed in the days of King Josiah. Biblical scholarship discusses the extent to which Jeremiah wished to reject or override the Sinaitic covenant and the extent to which he merely sought to supplement it. In either event, the desire

¹⁷ The Masoretic Text and the *Vulgate* translation of the Bible differ on the numbering of the verses in this chapter. The reason for this difference is not known. Nevertheless, the *Leningrad Codex* (dated 1008) supports the *Masoretic* division, while the *Septuagint* division of verses corresponds to the *Vulgate* version.

¹⁸ Jer. 31:31–34.

to establish a new relationship with God reflects the failings of the Sinai covenant, which was repeatedly violated on account of the gap between Israel and the Torah. This being so, the innovation of the ‘new covenant’ lies not so much in its content as in its restructuring of the relationship between God and Israel. Unlike the early covenant at Sinai, the new covenant would establish a new intimate relationship in which the Word of God is harmoniously integrated with Israel. The prophet describes this new intimacy using the very same formula of the original covenant: ‘I will be their God, and they shall be My people,’¹⁹ which, thanks to the new covenant, will be realized and never again violated. In addition to the new understanding of the covenantal connection with God, the prophet notes a spiritual transformation, and in its wake a social transformation that will take place together with the making of the new covenant.

The Spiritual Dimension: The novelty of the new covenant lies in its being written upon the heart, and not in a book. By this, the prophet expresses his protest against the deification of the written word or the written law,²⁰ and his own longing for the Torah to be repositioned within the heart, and against the Deuteronomic command that it be a written book alongside the Ark.²¹ This prophecy thus heralds the internalization of God’s Torah as a significant spiritual metamorphosis. Likewise, the Torah, as divine knowledge, is transformed from a heteronymous knowledge to an immanent one. Now, since the Torah becomes a quasi biological content scribed in every individual, knowledge of the Torah becomes everyone’s inheritance.

The spreading of divine knowledge has far-reaching significance, and is indeed liable to upset the hegemony of the Sages who claim exclusive dominion over divine knowledge. In addition, the new harmony between the Word of God and Israel realizes the Deuteronomic command: ‘and you shall love the Lord your God,’²² creating an affinity between God’s law and Israel. This affinity nullifies the gap between the divine law and human will, and the merest possibility of opposition between human will and divine will. In other words, the immanence of Torah within Israel nullifies the polarity of either obedience to or violation of the Word of God, raising the questions of human will, responsibility and recompense.

One must also note that the spiritual metamorphosis includes the internalization of the Torah, its preservation and permanent situating. The resituating of the Torah by means of inner scripting (‘I will put my law within them, and I will write it upon their hearts’²³) also signifies a change in the nature of remembering or maintaining divine knowledge—Torah that is placed within man and written upon his heart is one which will never be forgotten. In other words, the new covenant anticipates a

¹⁹ This formula is identical to the covenantal formula in Ex. 6:7; Lev. 26: 12; Deut. 29:12; Hos. 1:9; Ezek. 37:27; Zech. 8:8. Weinfeld (1970) argued that the formula was originated in marital and adoption laws, as it reflects relatedness not based on blood kin, see Greengus (1969).

²⁰ Accordingly, Jeremiah’s prophecy criticizes the celebration of the scribal activity followed by Josiah’s religious reform; see Weinfeld (1976, pp. 254–255).

²¹ Deut. 31:26.

²² Ibid. 6:5; 11:1.

²³ Reinstalling the heart appears also in Jer. 24:7; 32:39–40; Ezek. 36:25–27.

drastic change in the way the Torah is preserved and brings in its wake transformations both in the theological structure and social order.

The Social Dimension: Alongside the establishment of a new covenantal connection and the immanence of divine knowledge, the making of a new covenant also indicates far-reaching changes in the social hierarchy in which a learned elite (scribes or Sages) control divine knowledge and its instruction to people of lesser status (women, children and proselytes). In the wake of the new covenant and the immanence of the Torah, knowledge of it is no longer subject to status, but is the heritage of all, ‘And no longer shall each man teach his neighbor and his brother, saying, Know the Lord, for they shall all know Me, from the least of them to the greatest, says the Lord.’

8.2.2 St Paul: Socio-Theological Critique and Religious Revolution

Christian interpretation, particularly Paulian, sharpened the distinction between the old and the new covenant, undermining the authority and validity of the old covenant. The criticism implied by Jeremiah’s prophecy points towards a new religious reality that remedies the defects of the old reality and ensures that the covenant with God will no longer be violated. The Christian actualization of Jeremiah’s prophecy transformed the vision of the new covenant from social criticism to revolutionary program. The new covenant no longer simply indicates a possible better reality, but the demise of the old social theology in favor of a new theological-social order:²⁴

But now has he obtained a more excellent ministry, by how much also he is the mediator of a better covenant, which was established upon better promises; For if that first covenant had been faultless, then should no place have been sought for the second. . . . In that he says, A new covenant, he has made the first old. Now that which decays and grows old is ready to vanish away.

The collapse of the hegemony of the learned elite and the call to end its rule, as implied by Jeremiah,²⁵ became a source of criticism of the existing reality. Jesus, as mediator of the new covenant, was deemed to have brought about a religious-social revolution based upon a transformation in the understanding of divine knowledge and the nature of the Torah as knowledge. In Paul’s Epistle to the Corinthians, we find a detailed description of how Jesus’ revelation is a realization of Jeremiah’s prophecy. He describes the significance of the spiritual metamorphosis brought about by making the Torah immanent and expressed in the prophetic idea of purifying the heart. The transition from the external book to the tablet of the heart is the

²⁴ Heb. 8:6–7, 13.

²⁵ On whether this vision reflects the aim of the Scribes to educate the lower class population or to disregard their role see Swetnam (1974) and Potter (1983).

new covenant, realized through the figure of Jesus; Jesus, therefore, renders the Sinai covenant obsolete and heralds the new covenant:²⁶

You yourselves are our letter of recommendation, written on our hearts, to be known and read by all men; and you show that you are a letter from Christ delivered by us, written not with ink but with the Spirit of the living God, not on tablets of stone but on tablets of human hearts... who has made us competent to be ministers of a new covenant, not in a written word but in the Spirit; for the written word kills, but the Spirit gives life.

Since we have such a hope, we are very bold, not like Moses who put a veil over his face so that the Israelites might not see the end of the fading splendor. But their minds were hardened; for to this day, when they read the old covenant, that same veil remains unlifted, because only through Christ is it taken away. Yes, to this day whenever Moses is read a veil lies over their minds; but when a man turns to the Lord the veil is removed. Now the Lord is the Spirit, and where the Spirit of the Lord is, there is freedom. And we all, with unveiled face, beholding the glory of the Lord, are being changed into his likeness from one degree of glory to another; for this comes from the Lord who is the Spirit.

The first striking feature of this description is the integration of the images of inner writing found routinely in Jeremiah's prophecies,²⁷ and that of the substitution of the heart, or its purification, as in the prophecy of Ezekiel. This integration expands the nature of the spiritual metamorphosis which is based on moral purification. As we shall see further on, linking the anticipation of the immanence of the Torah with moral purity also characterizes rabbinic interpretations of Jeremiah's prophecy.

This combination of ideas further accentuates the distinction between the Torah which resides in a book and that written on the tablet of the heart. The distinction is not only between 'external' and 'internal,' but between life and death—the Torah that resides in a book is a dead letter, written on a tablet of stone, while the Torah which is impressed upon the heart is a living letter, literally written upon the heart. Paul's manner of reading Jeremiah's vision of the internalization of the Torah as if it were an actual event which had taken place creates an affinity between the sacred text and the message—the Epistle—and its addressees: 'You yourselves are our letter of recommendation, written on our hearts' (v. 2). This identity now becomes a transparent expression, since its addressees themselves are not hidden from sight, but it is 'known and read by all men; and you show that you are a letter from Christ delivered by us' (vv. 2–3).

In addition to the Pauline images of the heart and inner writing, there are images of the face and of seeing. They project the distinction between the revelation to Moses at Sinai and those occurring upon the coming of Jesus. Paul's description of the spiritual metamorphosis shifts the perspective from the divine viewpoint to

²⁶ 2Cor. 3:2–3, 6, 12–18.

²⁷ Viewing sins as ineradicable script is very commonplace in the prophetic literature—'The sin of Judah is written with a pen of iron, and with the point of a diamond: it is engraved upon the tablet of their heart, and upon the horns of your altars' (Jer. 17:1). On the connection between this prophecy and that of the New Covenant see Potter (1983, p. 352): 'As long as the Law is written merely on tablets of stone, so long will sin be written on the tablets of the heart, and so long will forgiveness be impossible. Man's offering cannot be compensating for his sin. In order for God to forgive he must erase the sin written on the heart and replace it with the Law. The notion of God writing on the heart was response to what the prophet saw written there already; only so radical an intervention as one by God himself would suffice.'

the subjective viewpoint of those who received the Torah. In this light, the significance of revelation is not only to impress the Torah upon the receivers' hearts, but also in the manner in which the Torah is received. By contemplating revelation from the viewpoint of those who receive it, Paul places two sets of image against one another, reflecting a faulty against a correct reception: The heart as against the face; reading as against seeing; the written word as against a vision; literary activity (writing and reading) as against visual activity.

The heart is not only the *locus* of inner writing, but also the field of literary activity in general. Revelation as a literary manifestation is expressed not only in the image of inner writing upon the tablet of the heart, but also in its reading—literally—by the receivers. The reading of the old covenant, according to Paul, was defective because of the 'covering of the heart' or 'thickness of the heart' accompanying this reading. 'When the veil is removed or when a man turns to the Lord the veil is removed' (v. 16), the words of God will be directly received, and then the spiritual transformation will take place among those who receive the Torah: 'And we all, with unveiled face, beholding the glory of the Lord, are being changed into his likeness from one degree of glory to another; for this comes from the Lord who is the Spirit' (v. 18).

Another confrontation in Paul's Epistle is that between the image of Moses as the receiver of the Torah, and that of Jesus as the mediator of the new revelation.²⁸ Moses, by placing a veil between Israel and the contents of the old covenant, is accused of spoiling Israel's vision (v. 13) whereas Jesus removes the veil (v. 14), affording the full revelation of the Glory of God (v. 18).

How does the prophecy of the new covenant shape the social and national identity of the early Christian community? Jeremiah already indicates the spiritual metamorphosis involved through internalizing the Torah within the framework of redefining the covenant with God. Just as the Sinai Covenant, over and above the fact of its revelation *per se*, shaped the collective identity of Israel as a chosen covenantal community, so did the adoption of the new covenant as a religious event shape the new collective identity of the 'covenantal community.' We may therefore say that the Pauline interpretation of Jeremiah's prophecy assisted in shaping the early Church as a covenantal community addressed by the new, corrected, eternal covenant.

8.3 Historicizing Memory

Jeremiah's prophecy of the new covenant was very significant also for the rabbis. Moreover, as we demonstrate below, Jeremiah's vision also served to give shape to a heteronymous understanding of memory within the framework of covenantal relationships between Israel and God. In a general way, one can say that the rabbinic readings see in the immanence of the Torah foretold by the prophet a utopian event whose realization is beyond the horizon of reality. The Sages' reading accepts the religious-spiritual-social model proposed by the prophet, but places it in a more

²⁸ Heb. 10:10–7.

distant historical context.²⁹ It is difficult to imagine that the Sages were not aware of the Pauline reading of Jeremiah; it also is likewise difficult to imagine that they felt no need to respond to this reading. The early rabbinic readings of Jeremiah's prophecy demonstrate that the question of memory and divine knowledge lay at the basis of the theological split between rabbinic circles and early Christians. Analysis of rabbinic homilies on the prophecy of the new covenant suggests a high level of identification with the religious-spiritual-social model presented by the prophet, but problems with the Pauline reading. By means of a historicist reading, the Sages attempted to redefine the religious value of studying and knowing the Torah, claiming it as the basis of religious meaning that connects the real Israel with God.

While the rabbinic reading embraced Jeremiah's religious-spiritual-social ideal, it did not approve the abrogation of the Sinaitic covenant or relinquished the transcendent view of divine knowledge. It situated the tension between the two covenants within historical-eschatological timeframe. In this way, the problem of remembering and forgetting the Torah is transformed from a practical religious problem to an historical issue. Covenantal memory reconciles the problem of remembering and forgetting by reducing the religious-cognitive problem to an historical one, in which the poles of the eschatological timeline—past, present and future—represent the state of preservation of divine knowledge within Israel.

8.3.1 *Utopia and Bounded Knowledge*

One version of the concept of the covenant of memory emphasizes the eschatological dimension of the description of the immanence of the Torah heralded by Jeremiah. According to this reading, Jeremiah's words do not challenge the Scribes' dominance of Torah knowledge, nor do they indicate major changes in the manner of preserving knowledge or in the structure of society. Rather, they describe a utopian vision of students of Torah who long to attain knowledge which will no longer be forgotten:³⁰

'On this day they came to the wilderness of Sinai'³¹ ... Note that the text does not say 'on that day,' but 'on this day'—(that is, on this day, freshly given). But though I gave you the Torah to study in this world, all too few labor in it. In the world-to-come, however, I Myself shall be teaching it to all Israel, and they will study it and not forget it, as is said 'This is the covenant that I will make with the house of Israel after those days, saith the Lord, I will put My law in their inward parts, and in their heart will I write it; and I will be their God, and they shall be My people'.³²

By referring to the time as 'this day,' the author of this homily removes the anticipation of the immanence of the Torah from and reduces the tension between

²⁹ Sarason (1988, p. 101), has pointed out on the distinction between ancient and medieval rabbinic readings of Jeremiah's vision. Accordingly, he argued that there is no explicit textual evidence that the Rabbis were acquainted with the Pauline interpretation of Jeremiah's prophecy, and that Jeremiah's vision became a polemical issue only at later stage.

³⁰ *PdRK*, 12, 107a; *TanBu*, Yitro, 13, 76.

³¹ Ex. 19:1.

³² Jer. 31:33

the Sinai covenant and the new covenant to the messianic counterbalance between incomplete present reality and the future, perfected reality in the ‘world-to-come’ (לְעוֹלָם לְבָא). Thus, even the actual problem of memory is no longer a gap that may be bridged in actual reality, but rather one between the imperfect present and perfected future.

This homily creates an opposition between two patterns of divine knowledge: One that emphasizes the giving of the Torah, the labor involved in learning it, and the individuals who engage in that labor (‘I have given you the Torah and only a few labored in it’). This pattern is essential to this world, which is partial and faulty. As against that, one may anticipate the future realization of another pattern in which God Himself teaches all of Israel, which knowledge will never be forgotten. By reducing the tension between the two covenants on the gap between reality and utopia, this pattern negates the Pauline reading that actualizes the immanent of divine knowledge, and likewise negates the social significance derived from it. Placing the far-reaching transformations of the new covenant beyond the limits of actual life to the End of Days expresses anticipation of a different reality while simultaneously confirming the existing situation, the hegemony of the Sages, and the transcendent understanding of the Torah. This utopian homily may be understood in terms of its motivation and as reflecting a rabbinic attempt to provide religious meaning to the failures connected with making the study of Torah a central religious value. According to this reading, the longing for divine knowledge which will never be forgotten offers comfort to those who study Torah, whose labor at times is understood as *sisyphean* and impermanent. The author seeks to draw from the words of the prophet acknowledgement of the limited benefit of Torah study in light of the limits of human memory and the dangers of forgetting. The contrast between Torah studied in the present and Torah learned from God which becomes absolute knowledge immune to human forgetfulness—‘and they learn it and do not forget’—indicates that, in practice, divine knowledge ‘in this time’ is seen as something of limited duration in the eyes of the *midrashic* author. At the same time, the prophet’s words serve as a source of comfort, assuring a future when the Torah will be remembered forever. In other words, not only is there the hope of full divine knowledge in the future, but also a recognition of the frustration arising from the limitations of divine knowledge studied with so much effort in the present.

Denial of the immanence of the Torah and recognition of its limitations can be seen in the following homily which sees divine knowledge attained in this era as ‘vanity’ as opposed to divine knowledge that will be internalized in the future. In the verse, ‘I said to myself, Come now, I will try pleasure, but behold, this too was vanity’,³³ the author attempts to express the lack of permanence involved in the study of Torah in this world because it is subject to being forgotten.³⁴

R. Hezekiah said in the name of R. Simon b. Zabdi: All the Torah which you learn in this world is ‘vanity’ in comparison with Torah (which will be learnt) in the world-to-come;

³³ Eccl. 2:2.

³⁴ *MidR*, Eccl. 2:1, 12.

because in this world a man learns Torah and forgets it, but with reference to the world-to-come what is written there? 'I will put my law within them.'

8.3.2 *Utopia and Evil Inclination*

Another *midrashic* tradition representing the rabbinic reading of the prophecy of the new covenant also pushes the immanence of knowledge of the Torah to the End of Days and, while displaying signs of proximity to the Pauline reading, offers a different rabbinic phenomenology of the problem of memory and forgetfulness. As noted, the Pauline reading combines the immanence of the Torah with ethical metamorphosis, seeing therein a single spiritual change that will lead to the spread of the Torah and the collapse of the hierarchy of the Sages as a class. This *Midrash*, by contrast, denies the connection between immanence of Torah and the dissemination of its knowledge, though approves the connection between the ethical metamorphosis and the dissemination of Torah.³⁵

God said: in this world, because of the evil inclination, you learn and forget, but in the world-to-come I will uproot the evil inclination so you will not forget as it is said 'And I will remove the heart of stone from your flesh and give you a heart of flesh.' Moreover, you will not need a person to teach you, as it is said 'And no longer shall each man teach his neighbor and his brother, saying, 'Know the Lord,' for they shall all know Me, from the least of them to the greatest'³⁶

This homily reconstructs the idea of the dissemination of Torah implied by Jeremiah's words, and in doing so presents an ethical metamorphosis in which the Evil Inclination is uprooted, described as the substitution of the heart of stone by a heart of flesh, rather than the immanence of the Torah, described as inner writing. Thus immanence of the Torah as a precondition for its dissemination is denied. The problem of forgetting the Torah, according to this conceptual model, is not rooted in the transcendent source of the Torah or in the gap between it and human knowledge. Rather, the source of forgetfulness is the Evil Inclination; the solution to the problem of forgetting is the removal of that inclination.

8.3.3 *Restoration and Evil Inclination*

Another homily that has a similar relationship to the Pauline reading of Jeremiah's prophecy suggests another phenomenology for the problem of memory, while denying the actualization of the ideal of immanence. In this homily closeness to the Pauline reading is noted in the assumed connection between Ezekiel's prophecy of substituting the heart and Jeremiah's inner writing. Unlike the above-mentioned *midrashim*, which postponed the idea of immanence until the *Eschaton*, or denied

³⁵ *TanWa*, Ekev, 11, 106.

³⁶ Ezek. 36: 26.

its implications for the problem of memory, the point of departure presented in this *Midrash* assumes that the ideal immanence of divine knowledge already existed in the past, at the time of the revelation at Sinai. Thereafter a ‘fall’ or retreat took place, as a result of which divine knowledge became a limited form of knowledge that was no longer exempt from being forgotten.³⁷

R. Judah said: When Israel heard the words, *I am the Lord thy God*, the knowledge of the Torah was fixed in their heart and they learnt and forgot not. They came to Moses and said, ‘Our master, Moses, do thou become an intermediary between us, as it is says, *Speak with us, and we will hear ... now therefore why should we die* (Ex. 20:16; Deut. 5:22), what profit is there in our perishing?’

They then became liable to forget what they learnt. They said: Just as Moses, being flesh and blood, is transitory, so his teaching is transitory. Forthwith they came a second time to Moses and said: ‘Our master, Moses, would that God might be revealed to us a second time! Would that He would kiss us ‘with the kisses of His mouth’! Would that He would fix the knowledge of the Torah in our hearts as it was!

He replied to them: ‘This cannot be now, but it will be in the days to come,’ as it says, ‘I will put my law within them, and I will write it upon their hearts.’

R. Nechemiah said: When Israel heard the command ‘Thou shalt not have,’ the evil inclination was plucked from their heart. They came to Moses and said to him: ‘Our master, Moses, become thou an intermediary between us, as it says, ‘Speak with us, and we will hear... now therefore why should we die,’ what profit is there in our perishing?’

Straightway the evil inclination returned to its place. They returned to Moses and said to him: ‘Moses, would that God would reveal Himself to us a second time. Would that He would kiss us ‘with the kisses of His mouth’!

He replied to them: ‘this cannot be now, but in the time to come it will be, as it says ‘And I will take away the stony heart out of your flesh.’³⁸

This homily, like those preceding it, bases the tension between the two covenants along an historical-eschatological time axis. But unlike them, and unlike the Pauline reading that describes the relationship between the covenants as linear, this homily describes them in a circular relationship, in which the two covenants meet. The spiritual level obtained by Israel as a result of the new covenant, according to this homily, is the same as it merited at the time of the Sinai revelation. The eschatological structure, according to this homily, is not composed of two stages—i.e., present time (‘this world’) and the *Eschaton* (ἔσχατον; lit. the end of days or the World to Come),—but rather of three, in which the present is an intermediate stage between two utopian realities: the Sinai revelation and the End of Days, which are unified by virtue of the nature of knowledge of Torah. The preacher resolves the relationship between the new covenant and the Sinai covenant; he does not see a superannuation or nullification of the earlier covenant, but rather a restoration. The unique status of the Sinai revelation of the Torah is thus preserved and the prophet’s anticipation of the absolute immanence of the knowledge of Torah adopted. Existing social arrangements are legitimized since divine knowledge at this time is knowledge that is forgotten.

³⁷ *MidR*, Song. 1:2, 4.

³⁸ Ezek. 36:26.

In this homily, as in the earlier one, a phenomenology of the problem of memory is apparent via the connection between Ezekiel's vision of the substitution of heart and the immanence of Torah found in Jeremiah's prophecy. Unlike the earlier *midrashic* reading, where the Evil Inclination is seen as a factor leading to the forgetting of Torah, and similar to the Pauline reading, the reason for forgetting according to this homily is rooted in the Torah's transcendent source and the gap between it and Israel. But unlike the Pauline reading, which identifies the problem of divine knowledge with the Evil Inclination, this sermon sees them as two parallel problems with an identical historical structure.

Upon hearing the voice of God at Sinai, two substantial transformations took place in the heart of Israel: The divine knowledge became immanent ('when Israel heard, I am the Lord Your God,' the study of Torah was fixed in their hearts, so that they learned and did not forget'), and the Evil Inclination was uprooted ('when Israel heard "you shall not have (other gods)" the Evil Inclination was uprooted from their hearts'). These two transformations are described as independent of one another or as two distinct transitions that occurred within their hearts. By virtue of God's voice, the divine knowledge was fixed within their hearts, and the Evil Inclination was taken away from their hearts.

According to these homilies, the situating of the Torah and the nullification of the Evil Inclination came about in wake of the direct and dangerous revelation and are connected to that same dangerous situation likely to bring about their death., Moses' intermediacy, which is presented as required, is connected with the restoration of the cycle of forgetting and the Evil Inclination.³⁹ The crucial verse expressing Israel's withdrawal from its elevated spiritual level upon the occasion of revelation is that which depicts their hesitation in light of the overwhelming power of the voice of God: 'You speak with us and we shall listen, but let not God speak with us lest we die.'⁴⁰ This verse indicates Israel's retreat from revelation and the establishment of Moses as intermediary;⁴¹ it therefore simultaneously serves to mark the distinction between the people and the Sages and to introduce the idea of forgetfulness. Moses' confronting the revelation despite the dangers this involved for Israel explains why God's revelation could not be a mass event, but needed the mediation of a prophet. By connecting the vision of the new covenant with that of the Sinai revelation, our author adopts the idea of the exclusivity of the revelation as an archetype for an approach which sees knowledge of the Torah in exclusive terms. The all-encompassing revelation is interpreted here as the internalization and situating of the Torah in the hearts of Israel; as such, it is accompanied by existential danger and is liable to lead to death. Moses' mediating function is essential. The cycle of memory and forgetfulness, according to this homily, expresses not only human weakness but also human necessity, without which students of Torah would face real danger.

³⁹ On Jesus' role as intermediary see Heb. 8:6; 9:15; 12:22, 24.

⁴⁰ Ex. 20:15.

⁴¹ Kister (1998, p. 137, n. 106, 107).

8.3.4 Forgetfulness and the Rabbinic Reading of Jeremiah

The concept of covenantal memory emerged from Jeremiah's prophecy of the new covenant and from the Pauline reading of this prophecy. Whereas the Pauline reading sees memory as divine gesture, the concept of covenantal memory is found within a historical framework that applies to the Israelite collectivity as a whole. And, whereas the concept of memory as divine gesture sees in the problem of forgetfulness human weakness, covenantal memory sees it as part of an historical plan subject to covenantal relationships with God. The rabbinic homilies surrounding Jeremiah's prophecy must be understood against the background of the Pauline reading. The understanding of knowledge reflected in rabbinic homilies, sees divine knowledge as transcendent knowledge of specific contents, and out of tune with the idea of immanence expressed by Jeremiah and in the Pauline exegesis. This confrontation took place in various ways. One way idealized the idea of immanence of knowledge; another approach pointed to the existential dangers that accompany immanence of the Torah. The immanence of the Torah demands a level of resistance beyond the capacity of ordinary humans, and hence is not relevant in the present reality. Yet another path rejects the idea of immanence and instead presents the idea of ethical purification as the chief requisite for acquiring memory and knowledge of the Torah. This way adopts neither immanence nor the utopian vision. The Rabbis' approach reveals opposition to the idea of the immanence of the Torah, presumably because of the way in which it would affect social order and religious thought. The other side of this denial of immanence implies situating the problem of memory in the boundaries of mastery of divine knowledge. As opposed to the concept of memory as divine gesture in which forgetfulness is a forced state, subject to correction through divine involvement, in covenantal memory forgetfulness is an anticipated result of the rejection of the idea of immanence.

Chapter 9

Mission and Memory

Abstract In this chapter covenantal memory is studied as a constituent in the founding narratives of the Babylonian *yeshivot*. As such the covenantal memory describes the self-perception of the rabbinical schools as playing an historical role in the divine plan. Under this scheme the actualization of the covenantal memory is celebrated by the Rabbis, though in this context the content of the covenant is not the Mosaic Law but rather the Oral Law represented through the Talmudic legal tradition.

Alongside opposition to the idea of immanent divine knowledge, we can observe another rabbinic perspective that argues for a actualization of the divine promise regarding the preservation of the Torah as knowledge. This perspective bases its argument for divinely-granted immunity from forgetting the Torah, not on the idea of the immanence of divine knowledge, but upon a historiosophic view, wherein the Torah is saved from being forgotten by a specific community which carries the historical burden of saving the Torah from obliviousness—a community of relics.¹ This approach appears in the founding narratives of the Babylonian academies, the *yeshivot*. As we shall see, this perspective served not only as a founding narrative in the shaping of the identity of the *yeshivot*, but also as a basis for theorizing the legal aspects of the halakhah. Such a perspective does not compete with the perspective of internal divine knowledge, yet preserves the hegemony of the rabbinic authorities by attributing the notion of covenantal memory to the creative parts of the law—the Oral Torah—and by means of particularizing the theological covenant to Babylonian Jewry. This perspective encapsulates an additional theory of divine knowledge and social understanding. It differs from the two previous models in two respects; firstly, the problem of memory is not formulated in terms of the gap between the Sinai covenant and the new covenant, but in terms of the distinction between the Written Torah and the Oral Torah. Secondly, it is not guided by the conceptual vocabulary of Jeremiah's prophecy, but by the notion of covenantal community.² It rejects both the Pauline idea of internal law and the rabbinic conception of utopian covenantal memory. It argues for the actualization of covenantal memory in relation to the particular history of Babylonian Jewry.

¹ On the sociological foundations and the self-perception of 'community of relics' see Sivan (1995).

² Talmon (1994).

9.1 The Founding Narratives of the Babylonian *yeshivot*

The Babylonian homilies expressing the notion of covenantal memory appear in two main sources which present similar ideas through two narratives. The difference in the two narratives derives from the different explanations of the distinction between the Sinai covenant and the historical function of the Babylonian *yeshivot*. Yet both homilies adopt a historiosophic view according to which the Babylonian *yeshivot* are in fact the historical actualization of the covenantal memory made at Sinai.^{3,4} Like other rabbinic homilies which associate the revelation at Sinai with the concept of Oral Torah,⁵ these homilies again perceive the Sinai Covenant as including the content of the Oral Torah. The association of Oral Torah and the Sinai covenant based on the notion of covenantal memory is an expression of the divine plan to assure its immunity from human forgetfulness.

9.1.1 Analysis of the Homilies

The basic homily is composed of earlier well-known homilies. It is composed of four sections arranged in a logical order: the first part, with which the homily begins, deals with the virtues of the Oral Torah as opposed to the Written Torah; the second part presents the idea that the Oral Torah was the main content of the Sinai covenant; the third part presents the notion of covenantal memory and its relation to the Oral Torah; the fourth part presents the historical realization of covenantal memory in the course of history, past, present and the future.

9.1.2 Praise of the Oral Torah and its Ascetic Nature

And announce to your honor that for the god's love to Israel (He) chose them among seventy nations and gave them Written Torah and Oral Torah, and Written Torah (is) implicit (רמז), and Oral Torah is explicit (מפורש); and Written Torah (speaks in) general (כלל), and

³ Such an exegetical tendency of concretization is typical to the *peshet* style found in the Qumran literature. The *peshet* sees the Biblical text as an expression similar to a prophetic dream, a text containing secrets and esoteric knowledge, while the solution is none other than a revelation of the Divine secrets that are encoded in the text prior to the authorized interpenetration, see Rabinowitz (1973).

⁴ The main source for this discussion is the *Letter of Pirkoi ben Baboi*, a Babylonian Jew who lived in the early ninth century. Pirkoi presents himself as a disciple of Abba, who was Yehudai Gaon's disciple, and his letter celebrates the supremacy of the Babylonian's legal tradition and teachings upon the Palestinian's. He argues that only the Babylonian legal tradition authentically represents the Talmudic Judaism. Pirkoi's letter was analyzed intensively by Ginzberg (1929), Lewin (1931), Spiegel (1965). The founding narratives in Pirkoi's letter are probably associated with Islamic literary genre of 'virtues of the countries' (فضائل البلدان) see Toelken (1978).

⁵ 'R. Yohanan said: God made a covenant with Israel only for the sake of that which was transmitted orally, as it says, *For by the mouth of these words I have made a covenant with thee and with Israel*' (b. *Git.* 60b).

Oral Torah (speaks) specifically (פרט); and Written Torah is very little, and Oral Torah is infinitely wide ...

And what is (the meaning of the verse) ‘neither is it found in the land of the living,’⁶ (does it mean that) it is not found in the land of living, but in the land of dying? However the Sages had interpreted, you will not find Oral Torah by one who seeks living of this world, but by the one who kills himself on it in a *beit-midrash* as it is said *This is the Torah, when a man dieth in a tent*⁷. As R. Simon b. Lakish, as said ‘the words of the Torah are not retained except by one who kills himself on it in *beit-midrash*, for it is said: *This is the Torah, when a man dieth in a tent*’⁸, ... as our Sages taught: ‘This is the path of Torah: A morsel with salt shalt thou eat. Thou shalt drink also water by measure, and shalt sleep upon the ground, and live a life of painfulness, and in Torah shalt thou labor. If thou doest thus, *happy shalt thou be and it shall be well with thee*.’⁹ Happy shalt thou be in this world, and it shall be well with thee in the world to come.’¹⁰

The opening section of this homily already differs significantly from the former version. Version I begins with words of praise indicating that the giving of the Torah to Israel is not recompense for their good deeds, but a result of God’s choosing them. The homily in Version II is not based on the idea of the unconditional election of Israel, but rather on Israel’s agreeing to receive the Torah while the other nations did not. The Written Torah and the Oral Torah are represented as a single complex in which the distinction between the two finds expression in three contexts: Hermeneutic—whether explicit or implicit; logical—general or particular; and quantitative¹¹—infinite or finite. The articulation of these relationships emphasizes the inner connection between the two Torahs and the dependence of the Written Torah upon the Oral Torah. Thereafter there appears a homily that emphasizes the importance of the ascetic life in order to sustain the Oral Torah. Here the author wishes to add a further distinction in the relationship between the two—the Oral Torah, unlike the Written Torah, demands ascetic devotion.

9.1.3 *Sinai Covenant and the Oral Torah*

The second section of this homily represents a different relationship between the Oral Torah and the Sinai covenant in which the Oral Torah is the main element of the covenant. This link, which connects the Oral Torah to the revelation at Sinai, is described completely differently in the two versions of the homily. We shall begin with Version I:

⁶ Job. 28:13.

⁷ Num. 19:14.

⁸ b *Ber.* 64b.

⁹ Ps. 128: 2.

¹⁰ m *Avot.* 6:4.

¹¹ This statement echoes the following talmudic discussion: ‘R. Eleazar said: The greater portion of the Torah is contained in the written Law and only the smaller portion was transmitted orally, as it says, *Though I wrote for him the major portion of (the precepts of) my law, they were counted a strange thing*. R. Yohanan said: the greater part was transmitted orally and only the smaller part is contained in the written law, as it says, *For by the mouth of these words*’ (b. *Git.* 60b).

And the Holy One, blessed be He, established the covenant with Israel through the Oral Law, as it is said ‘According to the tenor of these words have I made a covenant with thee and with Israel.’¹² (Our Sages stated that) He did not write ‘for the sake (of these words)’, or ‘because (of these words)’, or ‘on account (of these words)’, but ‘according to the tenor (על פי) of these words’—for the Oral Law (שבועל פה);

And they did not accept (the) Oral Law for its learning (demands) difficult anguish, comparable to darkness, as it is said ‘The people that walk in darkness have seen a great light.’¹³ These are the masters of the Talmud, who beheld a great light when the Holy One, blessed be he, enlightened them as to what is prohibited and permitted, pure and impure. ...

And the Israelites did not accept the Torah until (He) arched the mountain over them like a vessel ... and the Holy One, blessed be He, told them: if you accept the Torah, well and good; but if not, your grave will be there. And if you would (speculate to) say: (perhaps) He arched the mountain over them because of the Written-Law ... for it is brief and requires no striving and suffering? But rather (He) threatened them because of the Oral-Law, which contains detailed explanations of commandments, both simple and difficult ...

This section contains three homilies on verses connecting the Oral Torah to the Sinai covenant. The first homily emphasizes that the Oral-Torah is a substantive component of the Sinai covenant, an idea originating in a Talmudic homily of R. Yohanan.¹⁴ The practical attitude implied in R. Yohanan’s remarks are explained here as relating to the contents of the Torah (in the *Tanhuma* version: ‘that the Holy One blessed be He did not make a covenant with Israel except for the Oral Torah’) or as a condition of establishing the covenant (Version I of Pirkoi: ‘the (Ho)ly One, Blessed Be He did not make a covenant with Israel until they accepted upon themselves the Oral Torah’).

The second homily relates to the image of study of Oral Torah—the Talmud—as a kind of illumination enjoyed by the ‘masters of Talmud.’ This is inferred from the verse ‘the people who walked in darkness have seen a great light.’¹⁵ In the homilist’s eyes, this image serves the ideal of asceticism which we already mentioned as a characteristic of the Oral Torah, because this image characterizes the pain of those who labor in their studies as similar to those who grope in the dark. In Version I by Pirkoi, this homily is a separate one, opening with the words, ‘and they only received the Oral Torah because of their hard suffering in learning.’ In the version of the *Tanhuma*, on the other hand, this is a continuation of the previous homily.

The third homily is a kind of a secondary commentary on an earlier Amoraic homily, namely, the famous homily of R. Avdimi in which there is no reference to the voluntaristic declaration by Israel, ‘everything which God has said, we shall do and we shall hear.’¹⁶ According to this homily, the Torah was given at Sinai by compulsion, as is inferred from the verse, ‘and they stood at the bottom of (lit.

¹² Ex. 34: 27.

¹³ Isa. 9:1.

¹⁴ b *Git.* 60b: ‘R. Yohanan said, the Holy One blessed be He, only made a covenant with Israel over those things which are said orally, as is said, ‘For according to these words I have made with you a covenant and with Israel.’”

¹⁵ Isa. 9:1.

¹⁶ Ex. 24: 7.

underneath) of the mountain.¹⁷ The author here seeks to apply to Rav Avdimi's homily the distinction regarding the ascetic nature of the Oral Torah as opposed to the Written Torah. According to this distinction, the voluntary declaration by Israel, 'we shall do and we shall hear,' relates to the Written Torah, whereas it was the Oral Torah that was imposed, thereby resolving the seeming contradiction between the two homilies. By limiting Rav Avdimi's homily to the Oral Torah alone, our author seeks an additional way of indicating a relationship between it and the Sinai covenant.

One should note that the *Tanhuma's* version contains another homily that does not appear in Version I of Pirkoi's letter.¹⁸ This homily explicates the relationship between the Oral Torah and the Written Torah on the basis of sections of the *Shema*. According to this homily, the first section refers to Oral Torah and repeating it *with all your heart*, and does not mention any kind of recompense, whereas the second paragraph, which mentions reward, punishment and material recompense in this world, is concerned with the Written Torah.

In Version II of Pirkoi's letter, there is an allusion to R. Yohanan's homily, but the homiletic paraphrase of R. Avdimi's homily is lacking, as well as the explication of the verse, 'the people who walked in darkness have seen a great light.' Instead, there is an exegetical paraphrase of another homily, which in practice fulfills an identical function to that of the homiletic paraphrase in Version I. That is to say, it also imposes upon the previous homily the unique characterization of the Oral Torah as being quantitatively rich compared to the Written Torah. This move appears as a second-order interpretation of another homily of R. Yohanan¹⁹ that is opposed to that of Rav Avdimi, which describes the giving of the Torah to Israel in light of the refusal of the other nations to receive it.

They said: 'Lord of the Universe, Written Law which hold only small content and does not contain much niceties of commandments, we can accept, nevertheless Oral Law, which its niceties of commandments are infinite, we cannot accept'—they insolent God and declined the Oral Law ... and when Israel came and accepted both, the Written Law and the Oral Law, they accepted the niceties of commandments of the Oral Law, which is in fact the meaning of the Written Law. And for this God made a covenant with Israel, on the niceties of the Oral Law

Here, too, the author interprets an early homily concerning the giving of the Torah in relation to the multiplicity of 'niceties of commandments' of the Oral Torah, which demand a far higher level of commitment. The innovation in this homily lies in its explanation of the nations' refusal to accept the Torah. This refusal is explained here in terms of the quantitative gap between the Written Torah and the Oral Torah, in their degree of willingness to bear a burden. The difference between the two versions is consistent, and finds expression in the beginning of the *midrash*. As will be remembered, the beginning of Version I, with the declaration of God's

¹⁷ b *Shab.* 88a.

¹⁸ 832.

¹⁹ 'R. Yohanan says: This teaches us that the Holy One, blessed be He, offered the Torah to every nation and every tongue, but none accepted it, until He came to Israel who received it' (b *AZ* 2b).

choosing Israel, does not appear in Version II. Likewise, in the section connecting the Oral Torah to the Sinai covenant and the explanation of the circumstances of the giving of the Torah, we find the two opposing approaches: according to the one, it was God who chose Israel and imposed upon them the Torah, whereas according to the other, it was Israel who chose the Torah when the nations of the world refused it.

9.1.4 The Source of the Covenant

In the third unit, which is common to Version I and II, we find the exposition of the verse upon which the idea of the covenant of memory of the Torah is based:

And the Holy One, blessed be He, also made a covenant with the Israelites that neither they nor their descendants, unto the last generation, would forget the Oral Law, as it is said: As for me, this is my covenant with them, saith the LORD; My spirit that is upon thee, and my words which I have put in thy mouth, shall not depart out of thy mouth, nor out of the mouth of thy seed, nor out of the mouth of thy seed's seed.²⁰ It is not written (in this verse) 'from thee', but rather 'out of thy mouth, nor out of the mouth of thy seed, nor out of the mouth of thy seed's seed, saith the LORD, from henceforth and for ever.'

The prophecy of Second Isaiah explicated here seems to bear kinship with the prophecy of Jeremiah discussed above; it too articulates a covenant with God whose significance is the situating of God's words within Israel. But unlike the case in Jeremiah's prophecy, the organ of the body in which God's word and Spirit are situated is not the heart, but rather the mouth. In this way, the prophet provides an interpretation of the term 'Oral Torah' as referring to the Word of God which was placed within the mouths of Israel, literally. In addition, the situating of the Torah in Isaiah's prophecy does not carry implications for the conception of knowledge or for the social concept described in Jeremiah. In the case of Isaiah, the covenant of memory is not described as a move leading to the dissemination of Torah or as bringing social changes in its wake, and for this reason does not contain any potential for criticism of the hegemony of the Sages. The homily that appears in Version II differs only slightly from that in Version I, in that it emphasizes that the Word of God described by Isaiah relates to the Oral Torah, specifically:

God made a covenant with Israel for the Oral Law so the Oral Law will never be forgotten, as it is written 'As for Me, this is My covenant with them, says the LORD: My Spirit which is upon you, and My words which I have put in your mouth shall not depart from your mouth, nor from the mouth of your offspring, nor from the mouth of your offspring's offspring, says the LORD, from now and forever.'—that is the Oral Law that never being forgotten by Israel as it is written: 'it will never be forgotten by their descendants'²¹

In addition, Version II contains three other homilies that continue the ideological line emphasized in this version, according to which the Oral Torah is the subject of the covenant of memory:

²⁰ Isa. 59: 21.

²¹ Deut. 31: 21.

But if you say that it refers to the Written Law—behold he (i.e. Moses) wrote it and therefore it will never be forgotten. But if you say that it refers to the Written Law—behold the Written Law is in the hands of the nations, and if it will not be forgotten by the nations, all the more so by Israel. Come and see, the LORD said to Moses: ‘Come up to Me on the mountain and remain there,’ and I will give you both the Written Law and the Oral Law. And he ascended the mountain and stayed with God forty days and forty nights and received the Oral Law. And if you say that he received the Written Law, for this one day would suffice as he indeed learned on the mountain as said ‘write all these words’, but rather what he learned forty days and forty nights was the Oral Law

The third homily contains an additional argument that strengthens the relationship of the Oral Torah to the Sinai covenant, according to which, if the Written Torah alone had been given to Moses at Sinai, he would not have required forty days on the mountain to learn it. In addition to this homily, there are two further exegeses, according to which it is impossible to see the Written Torah as the object of the covenant of memory. The guiding principle of all these explications is that written or widespread knowledge (in the author’s language: ‘in the hands of all the nations’) is not likely to be forgotten; only knowledge which is not recorded and which is not widespread—such as the Oral Torah—is liable to be forgotten, and is therefore protected through the covenant.

9.1.5 *The Actualization of the Covenant of Memory*

The next unit in these homilies attempts to show that the centers of Torah in Babylonia are the historical realization of the covenant of memory. They present an historical narrative according to which the centers in Babylonia are the site of Torah and of redemption. Here too, in the descriptions of the historical realization of the covenant of memory, we find different homilies in the two versions, such that one may speak of two different narratives. The narrative of Version I begins with a description of the halakhic activity that occurs in the Babylonian *yeshivot* as the direct realization of the ancient covenant of memory:

And therefore the Holy One, blessed be He, established two academies (*yeshivot*) for Israel (*Sura* and *Pumbedita*) where they study Torah both day and night, and they meet together twice a year in the months *Adar* and *Ellul* (with scholars) from every place and engage in the ‘battle of Torah’ until they had (solved the problem encountered in the Torah) and reached a definitive decision concerning them, and introducing evidence from Bible, Mishnah, and Talmud so that Israel might not come to stumble by following erroneous precepts.

According to the author’s remarks, the historical realization of the covenant of memory finds expression in the institution of the *yarhei kallah* (special study months) which took place twice a year, during the month of *Adar* and *Elul*. This institution was well-known during the post-Talmudic period, and may also have had roots in the Talmudic period. These gatherings are described in sources from the Geonic period as semi-annual meetings of the students of Torah outside of the *yeshiva* with the *yeshiva* heads and their students. In effect, this institution served as an expression of the supreme centralized authority of the *yeshiva* in halakhic

matters—the halakhah was established in the *yeshiva* and the Jewish periphery was obligated to observe it. According to what is described here, these gatherings were intended to clarify doubtful halakhic matters and to decide on them in order to create halakhic uniformity on subjects regarding which there was no uniform practice: ‘And they discussed matters back and forth, engaging in the battle of Torah, until they clarified the matter fully and determined the correct halakhah.’ Drawing a connection between the centralized activity of the *yeshiva* during these months and the covenant of memory gave historical-social significance to the institution of *yarhei kallah*, seeing it as providing assurance of the preservation of the Torah and saving it from forgetting or error. Hence, these semi-annual gatherings were understood by our author as an opportunity to identify incorrect customs and deviations from ‘the true halakhah ... so that Israel not stumble in matters of Torah.’ In any event, the idea of the covenant of memory signifies the historical function of the *yeshiva* as an institution charged with clarifying the correct halakhah and preventing Israel from erring in halakhic matters. Thus, the understanding of the covenant of memory also served in practice as a source of legitimation for the centralized authority of the *yeshivot* and their being the supreme authority in creating a unified halakhah for all of Jewry. As against this description, there is the famous description by R. Nathan ha-Bavli, in which the *yeshiva*’s activity during the *yarhei kallah* is not presented as an institution for clarifying and unifying the halakhah, but rather as a centralized mechanism allowing the *yeshiva* heads to dominate in matters of study and textual versions:²²

And (they) come and gather from all places during *yarhei kallah* ... and every one of the students recite and study all these months the tractate that the head of the *yeshiva* instructed them on their departure ... and they all come and seat in front of the heads of the *yeshivot* during the months of Adar and Elul and their head of *yeshiva* examines their studies ...

According to this description, the *yeshiva* head dominates the program of study of that which is learned outside the walls of the *yeshiva*. It should be noted that in Version II, the Babylonian *yeshivot* are not shown as manifesting the concrete realization of the covenant of memory, but rather of Babylonia as a remnant.

9.1.6 *The Historical Narrative*

The historical narrative of the covenant of memory is presented in this unit of the homily. Here, in practice, there is an expansion of the claim regarding the actual realization of the covenant of memory, not only at a particular point in time, but also in terms of a divine plan that was fixed from the beginning and which is revealed throughout the actual history of the Jewish people.

This narrative connects the Torah centers in Babylonia with the remnant that survived the destruction of the First Temple. The core of this historical narrative of the covenant of memory lies in the embodiment of the divine promise among the remnant—which refers to a select group within the Israelite nation—that the Torah will not be forgotten. Study of and engagement in Torah is protected by virtue of

²² *SeOZu*, 87.

the covenant, and for that reason it is not violated even when there is religious and political persecution. The remnant is generally identified with the world of Babylonian Torah or, more particularly, with the two leading *yeshivot*, Sura and Pumbedita. These embody the covenant of memory within historical reality, and are protected because of it. Reconstruction of the past in light of this narrative lends new insight into the Exile following the First Temple period, which is considered the time when the Torah centers in Babylonia were created:

Hence, these two *yeshivot* experienced neither captivity, persecution, nor pillage; and neither Greece nor Rome ever conquered them.

The Holy One, blessed be he, led the people out of Jerusalem with their written and oral torah twelve years before its destruction, as it is written: ‘And he carried away all Jerusalem, and all the princes, and all the mighty men of valor, even ten thousand captives, and all the craftsmen and smiths: none remained, except the poorest sort of the people of the land.’²³ Is there might among men being led into exile? These were the mighty ones in their knowledge of Torah, as indicated in the verse ‘all that were strong and apt for war’²⁴—these who battle the war of Torah, as it is said: ‘Therefore it is said in the Book of the Wars of the LORD.’²⁵

What do the words craftsmen and smiths imply? The word ‘craftsmen’ (חרש) indicates that when one of them spoke, all the others were made speechless (חרשים) by the power of his arguments. The word ‘smiths’ signifies that when one of them closed a case (מסגר - סגר) on purity or impurity, prohibition or permission, no one in all the world was able to reopen the argument. This was in fulfillment of the verse ‘And the key of the house of David will I lay upon his shoulder; so he shall open, and none shall shut; and he shall shut, and none shall open.’²⁶ he has also taken the mighty of the land.²⁷ ‘The mighty’ here alludes to the noble of the tribes of Judah and Benjamin, concerning whom it is said: ‘Thus says the LORD, the God of Israel; Like these good figs, so will I acknowledge them that are carried away captive of Judah, whom I have sent out of this place into the land of the Chaldeans for their good.’²⁸

And elsewhere it is written: ‘And the LORD has hastened the evil, and brought it upon us: for the LORD our God is righteous in all his works.’²⁹ How can these verses be explained? After all, if the Holy One, blessed be He, is righteous, is it likely that He would hasten the evil and bring it upon us? This verse implies that the Holy One, blessed be He, performed a kindness for Israel by causing the exile of Yechoniah to precede that of Zedekiah so that the Oral Torah might not be forgotten by the Israelites.

And their oral practical halakhah, which they learned from their masters, and their masters from theirs up to Moses, our master—halakhah to Moses from Sinai. They resided in Babylon, with their Torah, from that day unto this, and neither Rome nor Greece has ruled them or forced them to convert

The central section of this passage contains three exegeses of verses that revolve around the description of the exile of Yechoniah, according to which his exile was an escape plan of the remnant group in order to save them from the disaster of the destruction of the First Temple. The exegesis of these verses is guided by the view

²³ 2Kgs, 24: 14.

²⁴ 2Kgs 24: 16.

²⁵ Num. 21:14.

²⁶ Isa. 22: 22.

²⁷ Ezek. 17: 13.

²⁸ Jer. 24: 5.

²⁹ Dan. 9: 14.

that, since the exile of Yechoniah, the centers of Torah in Babylonia were constantly protected against captivity, destruction, and religious persecution by the Hellenistic and Roman governments: ‘And these two *yeshivot* suffered neither captivity nor destruction nor being despoiled, and were not dominated by either Greece or Rome.’ ‘And they sat and engaged in Torah in Babylonia from that time to this day, and were not dominated by either Rome nor by Greece, and destruction was not decreed upon them.’ The overall claim of ongoing protection of these *yeshivot* somewhat obscures the cause and effect relationships emphasized in the previous section, for which reason the strength of these *yeshivot* is understood as the realization of the covenant of memory and as an indication of their being the objects of the covenant.

As noted earlier, there are exegeses of three verses describing Yechoniah’s exile as a Divine Plan of escape. The first homily is based upon use of the term *gibborei hahayil* lit. mighty men of war used to refer to the exiles, according to which the ‘mighty men of war’ are the halakhic Sages: ‘What heroism is there in people who go into exile? Rather, these were heroes of Torah ... who engage in the battle of Torah.’ The description of halakhic activity as a battlefield and the halakhic scholars as warriors fits the description of halakhic activity in the *yeshiva* during the months of the *yarhei kallah* (ירחי כלה) as a battle, whose purpose is to clarify the true halakhah. According to the second exegesis, the terms *ha-harash veba-masger*, ‘the smith and the metalworker,’ express the final and inclusive authority of the halakhic authorities of the *yeshiva*: ‘The smith—the moment one of them releases something, all of them become as if released. The metalworker—once one of them closes a matter of purity and impurity, or of what is permitted and what is forbidden, there is no one in the world that can open the matter and purify it.’

The third exegesis finds in a verse from Daniel support for the view which sees the exile of Yechoniah as a ‘divine plan’ to save the Torah and protect it from being forgotten. Daniel praises the disaster which comes from God, ‘and God kept watch over the evil and brought it upon us, for the Lord our God is righteous.’ The praise of the disaster is explained here in terms of the divine plan, because of which the exile of Yechoniah preceded that of Zedekiah, ‘so that the Oral Torah not be forgotten from Israel.’ According to this exegesis that appears in the Babylonian Talmud as well,³⁰ there is an additional version in *Tanhuma Tazria*’a containing an interesting addition:³¹

(God) performed kindness by advancing the exile of Yechoniah to Babylon with all the craftsmen and smiths and with all the mighty men of valor, and they went down to Babylon and established an academic host for the Torah, for otherwise the Torah would have been forgotten during the exile of Zedekiah. The people who left (with Jehoiachin) were those who trusted Jeremiah’s prophecies, and they left with the Torah, thousand craftsmen and smiths.

According to this addition, the divine plan was revealed to the broad public in Jeremiah’s prophecy. The escape plan was therefore not simply the hidden hand of Providence, but also a human initiative of those who believed in the prophecy of Jeremiah. According to Version II, the *yeshivot* are not seen as the concrete

³⁰ b *Git.* 88a; *Sanh.* 38a.

³¹ *TanBu*, *Tazria*’, 13, 14; *TanWa*, *Tazria*’, 9, 21.

realization of the covenant of memory. Nevertheless, prior to the story of the flight of the exile of Yechoniah, it is emphasized that the chain of tradition of the Oral Torah begins with Moses at Sinai. We may therefore say that the realization of the covenant of memory, as follows from Version II, is its historical realization, which may be recognized first and foremost in the existence of the chain of tradition from Moses at Sinai—a chain of tradition which was not even truncated in wake of the destruction of the First Temple—thanks to the escape of the remnant to Babylonia twelve years prior to the exile of Zedekiah:

And our rabbi Moses descended and taught (the Torah) to Joshua b. Non and to (all) the Elders, and to the rest of Israel. And Joshua and the seventy Elders (taught the Torah) to the wise scholars of their generation, and so it was (taught) in every generation until Jechoniah. And since Jechoniah went into exile, God carried them all, Israel and their scholars, away into exile in Babylonia twelfth years before the destruction of the Temple so the Oral Law will not be forgotten by Israel, as it is said:³² ‘and then he (i.e. Nebuchadnezzar) led away into exile ... all the leaders of Jerusalem ... ten thousand expatriate, all heroes makers of war’—i.e. scholars heroes of Torah. And ‘seven thousand mighty men of valor and the craftsmen’—i.e. seven thousand heroes of Torah.

And by virtue of the covenant God made with Israel that they should not forget the Oral Torah, He carried them away from Jerusalem to Babylonia in peace with their Torah, their bodies, their wives, sons and daughters as it is said ‘Ho, Zion! Escape, you who are welling with the daughter of Babylon’³³

Here too, the story of the escape is described as derived from the covenant of memory. The words of the prophet Zechariah thus make a connection between Zion and Babylonia by means of the escape and serve as prophetic support for the historical program of escape from Zion to Babylonia. The plan of escape to Babylonia is none other than an expression of Divine affirmation of the historical continuity of the revelation at Sinai so that the Oral Torah not be forgotten.

9.1.7 *The Yeshiva in Messianic Days*

The identification of the realization of the covenant of memory with the Torah centers in Babylonia can also be seen in the future age. We thus find continuity in the two narratives of the different versions also in their characterizations of the functions of the Torah centers in Babylonia at the time of Messiah. Version I, which has at its center the Babylonian *yeshiva* in which the covenant of memory is realized, sees it also as the source of future redemption.

And on the messianic days they do not feel the birth-pangs of the Messiah as it is said: ‘Ho, Zion! Escape, you who are welling with the daughter of Babylon’—escape from Edom (i.e. Rome) and Greece and from their oppressive decrees. And Zion (ציון) is none other than the *yeshiva*, which (its scholars) are outstanding (שמצויינין; transl. *metzuyanim*) in Torah and in commandments, as it is written: ‘Writhe and cry out, Daughter of Zion, like a woman in labor, for now you will leave the city and camp in the open fields ... You will go to

³² 2Kgs. 24: 14.

³³ Zech. 2: 11.

Babylon; there you will be rescued; there the LORD will redeem you from the power of your enemies.³⁴ To teach you that from there redemption will begin, and from there they ascent to Jerusalem, as it is said: 'Those who have been rescued will go up to Mount Zion in Jerusalem.'³⁵

In this unit one can also see the difference between the two versions. While Version II interprets the words of Zechariah as referring to the historical flight involved in the exile of Yechoniah, in Version I this verse is interpreted as referring to the future, expressing the promise of constant protection against the sufferings of Messiah and subjugation to the kingdoms of Greece and Edom. 'Escape from Edom and Greece and from their oppressive decrees.' The application of Zechariah's words to some future time also requires metamorphosis of the expression 'Zion,' which in this homily is applied to the *yeshiva*: 'and Zion is none other than the *yeshiva*, which is outstanding (*metzuyanim*) in Torah and in commandments.' The identification of the *yeshiva* as Zion is repeated an additional time in this homily with regard to the words of the prophet Obadiah—'and redeemers will ascend to Mount Zion'—which is also taken as referring to the Babylonian *yeshivot*. Moreover, in this homily, the claim is also made that the *Shekhinah* is found in the *yeshiva*. As against the description of the influence of the covenant of memory upon the messianic future, the description in Version II emphasizing the continuity of the chain of tradition is the main expression of the covenant of memory; it also expounds the verse from the prophet Micah, but only with regard to the flight of the remnant which turns the chain of tradition from Sinai to Babylonia:

And they settled in Babylonia until this day, and until Messiah, the son of David, will come and redeem Israel as it is written: 'Writhe and cry out, daughter of Zion, like a woman in labor, for now you will leave the city and camp in the open fields ... You will go to Babylon; there you will be rescued; there the LORD will redeem you from the power of your enemies.'³⁶ From this verse you learn that Messiah and redemption start from Babylonia.

³⁴ Mic. 4: 10.

³⁵ Obad. 1: 21.

³⁶ Mic. 4: 10.

Chapter 10

Theorizing Knowledge

Abstract This chapter reconstructs the theories of knowledge underlying the accounts of the Mishnah's redaction provided by the late Geonim—R. Sa'adyah and R. Sherira. Contrary to accepted opinion, we depict a systematic dispute between the two scholars relating to their descriptions of the literary history of the halakhah. Our analysis highlights the different approaches and indicates their distinct views on the transition from memory to repetition as crucial moments in the history of the halakhah.

The theory of knowledge taught by the Babylonian Geonim is revealed in the tenth century Geonic reflections on halakhic tradition and canonic literature. Indeed, their accounts indicate that the Mishnah and the Talmud were at the focus of rabbinic identity as a whole.¹ Nevertheless, the Mishnah, as an independent opus, challenges the rabbinic claim regarding the antiquity of the halakhah and its transmission in a continuous and reliable tradition. The Mishnah is a self-sufficient independent composition, in the sense that its authority and legitimacy stem from itself. Its independence of the Scriptures enabled it to be understood not only as secondary, but also as complementary to the Scriptures.² Obviously, this assessment strengthened the Karaites' claim that the rabbinates utilized the Mishnah to free themselves of their commitment to the Bible.

Against this background, the apologetic challenge confronting the Rabbinates was to deny the normative independence of the Mishnah and to explain how, notwithstanding its independent appearance, the Mishnah reflects the legal norms that preceded its redaction. The project of redacting the Mishnah was not understood as an internal process of transmitting the Torah, nor as the creation of new legal content, but rather as a turning point in the preservation and transmission of the halakhah.³ The writing of the Mishnah is thus a crucial moment in the history of the

¹ Karaite and Muslim writers refer to the Rabbinates as 'sons of Mishnah', (בני משנה) expressing their ultimate commitment to the Mishnah. Another meaning of this expression refers to the Mishnah as second or secondary. According to Abu al-Hasan al-Husayn ibn Ali al-Mas'udi (896–956) the Rabbinates carry this name because they celebrate the importance of the Second Temple, and thus became a 'second religion' to the biblical religion (Pinsker 1860, pp. 7–8).

² See above p. 16, n. 19 on how the meaning of Mishnah implying its secondary status to the Bible was preserved even as late as the end of the Geonic period.

³ Yefet ben A'li (tenth century Karaite scholar)—'I have discovered the defects of the Mishnah and the Talmud, legislated by rebellious unwise (people), with no Divine inspiration and no

transmission process of the Torah, which signified the transition from preserving the halakhah through memory to knowledge set down in a legal code—the Mishnah. The question to which the Rabbinates responded was: What was the basis for composing the Mishnah and altering its preservation from memory to repetition? In other words: in what sense did pre-Mishnaic knowledge differ from that which followed its redaction?

In the following, we compare the Sa'adyanic account against that of Sherira, emphasizing the manner in which each characterized the theoretical problem which required composing the Mishnah.⁴ We demonstrate that in addition to the question of timing, the rabbis' respective explanations reflect different approaches to the link between the shaping of the Mishnah and halakhic content as divine knowledge. Consequently, the formation of the Mishnah was not merely an historical or ideological matter, but also pertained to the nature and extent of the intellectual capacities of the Mishnaic and Talmudic Sages.

10.1 R. Sa'adyah Gaon—The Hazard of Obliviousness

Sa'adyah's position regarding the formation of the Mishnah and the Talmud appear in two different sources.⁵ Despite differences between the two sources in several details, the general picture that emerges from them is identical. Sa'adyah's account of the formation of the Mishnah and the Talmud is based upon the distinction between two modes of preservation—memory and repetition. While the earliest method of preserving the Torah—through memory—was subject to forgetting, its preservation through repetition of fixed formulae, by contrast, is far more resistant to this danger.

trustworthy evidence, and which was not inherited by the successors of “innocent dove”.’ (Pinsker 1860, supplements, p. 20).

⁴ Perceiving the redaction of the Mishnah as a critical moment in the history of the halakhah is also seen in the questions addressed by the Sages of Kairouan to the Pumbeditian yeshiva, in response to which Sherira wrote his famous *Epistle*. The discussion about the ‘scribing’ of the Mishnah in the *Epistle* is not about writing, but rather about collecting the sages’ sayings and editing them in a fixed composition. Abramson (1965, 52, n. 3) has shown that the meaning of the Hebrew term כתב for Nissim Gaon, is not necessarily writing, but equivalent to the Arabic term *mdawna* (root *دون*) which denotes composing and organizing. Likewise he showed (Abramson 1989) that the same applies to Sa'adyah's saying about the redaction of the Mishnah. Levin (*Sherira's Epistle*, intro. p. 6) argued that the questions of the Kairouan Sages to Sherira were based upon Sa'adyah's approach, holding that the formation of the Mishnah took place prior to the early days of the Second Temple Period. The confrontation between Sa'adyah and Sherira has been refuted by Abramson (1989, pp. 28–38), who demonstrated that Sa'adyah did not predate the writing of the Mishnah, but merely predated its literary formation. Yet, the questions of the Kairouan Sages must be understood against the background of a view similar to that of Sa'adyah.

⁵ The first articulation of his position appears in *The Book of the Expatriate* (Hebrew title: ספר הגלוי; Arabic title: *Kitab al-Tarid*), in the introduction to that work in the Arabic translation; in the second chapter of the Hebrew version of this work; and in a quotation of his words by an early Karaite scholar. The second articulation appears in Sa'adyah's commentary, which is also extant in a paraphrase by the Karaite sage Yefet ben A'li.

The Mishnah and Talmud thus do not reflect different contents, but rather different modes of preservation of the same knowledge. These transitions—that is, the organization of the memorized knowledge as an object of repetition—took place when the danger of forgetfulness threatened the survival of the Torah. The earliest mode of preservation, by memory, is described by Sa'adyah in *The Book of the Expatriate* as 'tradition' (Jud-Arb. אֱלֵמִנְקוּל), and in his *Commentary on the Torah* as 'instructional knowledge' (Jud-Arb. אֱלֵעֵלֶם אֱלֵתֵלִיקִינִי). The fixing of the Torah and its transformation into something that was repeated is termed *madwana* (Jud-Arb. מִדְּוֹנָה; Stemming from the root דּוּן = take record of, put down, compose, redact, edit) and *mthvutah* (Jud-Arb. מִתְּבֻחָה; stemming from the root תְּבַחַח = to fix).⁶ The transition from memory to repetition, as described in *The Book of the Expatriate*, is situated in a historical framework that reflects the proportional relationships between the prophetic era—a 1000 years⁷—and the era of the Mishnah and the Talmud—500 years:⁸

And the second gate (includes) the chronicles. How long lasted the prophecy (among) our nation, and I elucidated that it took a thousand years. And how long ended the compilation of the Mishnah, and I informed that it took five hundreds (years) after that. And for how long the Talmud ended, and that all these did not stop being transmitted until the time of their becoming fixed (Jud-Arb. לֵם יוֹלָא מִנְקוּלִין אֱלֵי וְקַת אֵת בְּאַתְהָא).

In the introduction to *The Book of the Expatriate* Sa'adyah does not mention the argument concerning the fear that the Torah will be forgotten. It is emphasized, however, that the relation between the earlier knowledge and the redaction of the Mishnah is like that between the tradition and its being fixed: 'and that all these did not stop being transmitted until the time of their becoming fixed.' At a later point Sa'adyah introduces an extensive explanation according to which the redactions of the Mishnah and the Talmud were intended primarily to fix the knowledge and prevent its being forgotten:⁹

And when the millennium (started at) *matanah*¹⁰ filled, from the days of 'Moses the man of God'¹¹ until the latest prophets of the Median Empire had ceased, and prophecy had sealed in the fortieth year to the reestablishment of the capital with few people. When our ancestors saw that the masses were dispersed in all the lands and they feared lest the vocalization of the text be forgotten, and they gathered every word that had been copied since ancient times... and they named them Mishnah. And the matters hoped to be preserved while being in the land had remained, for they are branches of the law.

⁶ On the meaning of this term see Abramson (1989, p. 31, 36).

⁷ The tradition of counting millennia of prophecy might be reflected in the Jewish tradition quoted twice by al-Bīrūnī (973–1048), according to which it was 1000 years from the time of Moses to the conquest of Alexander the Great. See Biruni, *The Chronology of Ancient Nations*, p. 20, 86.

⁸ *The Book of the Expatriate*, pp. 152–153. My translations are based on Harkavi's edition with several exceptions and corrections.

⁹ *Sa'adyana*, p. 3.

¹⁰ Al-Bīrūnī mentions a tradition according to which the name of the Book of Deuteronomy is *Almathna*. See Biruni, *The Chronology of Ancient Nations*, p. 22.

¹¹ Deut. 33:1.

(Nevertheless), we continued to go even further astray and to be scattered, and after five hundred years from the first time they feared its being lost and gathered them as well and called it Talmud.

This description associates the problem of remembering the Torah with specific historical events, placing the phenomenon of the Torah's being forgotten on an historical timeline of theological significance. Accordingly, the danger of forgetting the Torah is closely connected to the Jews' exile. The redaction of the Mishnah occurred in wake of the First Exile—'when our ancestors saw that the masses were dispersed in all the lands and they feared for the tradition of vocalization'. Likewise, the composition of the Talmud is connected to the Second Exile, 'and we continued to go even further astray and to be scattered, and they feared it would be lost.' The existence of the Torah and its being forgotten depend upon the demographic concentration of the Jews or its dispersion. Knowledgeableness is, therefore, dependent upon the Biblical notion of recompense, of living in the Land or being exiled from it.

In the previous description from the opening of *The Book of the Expatriate*, the dispersion of Israel and the Sages' recognition of the dangers of forgetfulness are not mentioned at all. Instead, the project of compiling and fixing the Torah is derived from a predestined symmetrical structure in which the years of prophecy are proportional to those of the Mishnah and the Talmud, in a ratio of 1000 to 500. The ending of prophecy is described as an event that occurred forty years subsequent to the establishment of the Second Temple. Apparently, this event would chronologically seal the 1000 years of prophecy and be unrelated to the danger of obliviousness in connection to the Torah. However, in a quotation from an early Karaite Sage who paraphrased the words of Sa'adyah, it seems that in addition to Exile, the cessation of prophecy was also a danger:¹²

And you should know that the Head of the Yeshivah (i.e. Sa'adyah) said in his book... that the ancestors started in fixing the Mishnah (אברו בתרוין אלמשה), from forty years to the establishment of the Second Temple until hundred and fifty years after its destruction, total of five hundred and ten years...and he thought that they were urged to compose (פאתוהם אלצביא) (the Mishnah) for the sealing of prophecy (ידונהא/ידונהא) among them, and since they saw themselves scattered (מבדרין) they feared to forget the tradition and trusted the written word (אלמכתוב), therefore they collected (ג'מיע) the preserved opinions (מעאניה) (אלמחפוט'ה) and fixed it and named it (ואסמיה) Mishnah.

It follows from this account that as long as there was living revelation through the prophets, the fear of obliviousness did not arise. The need to compile the Mishnah and to codify legal knowledge arose from the absence of prophecy, which had served to reinforce the Torah as divine knowledge.

10.1.1 *Mishnah-Talmud as Roots-Branches*

Sa'adyah's statements about the redaction of the Mishnah offer different pictures as to the relationship between the Mishnah and the Talmud. From the introduction

¹² *The Book of the Expatriate*, pp. 193–194.

to *The Book of the Expatriate*, one may infer that he is speaking of two distinct works, whose editing was completed at different times: the sealing of the Mishnah some 500 years after the cessation of prophecy, and the sealing of the Talmud at some other, unstated date: 'And I clarified... after how many years the assembling of the Mishnah was concluded, and I made known that it was five hundred years thereafter. And after how much (time) the Talmud was completed...'. The redaction of the Talmud, as described in the *The Book of the Expatriate*, not only follows chronologically the redaction of the Mishnah, but also completes it: 'And they gathered every word which they had copied from ancient times... and they called it Mishnah, and the things remained... and they gathered them together as well, and called them Talmud, five hundred years after the First End.' The representation of the Mishnah and the Talmud as consecutive and complementary projects explains the proportional relationship between the end of prophecy and the final redaction of the Talmud, which is none other than the completion of the process of fixing the laws which began at the beginning of the Second Temple period with the end of prophecy.¹³

Apart from this, the gap between the Mishnah and the Talmud is described by Sa'adyah in terms of the distinction between roots and branches. Thus, while the project of the Mishnah included the principles of the law—the roots, the Talmud also included their branches. This is of course a botanic metaphor wherein the law is compared to a flourishing vegetative organism.¹⁴ As soon as the danger of forgetfulness arose, the transition from memory to repetition took place whereby the roots of the law were fixed in the Mishnah while the branches were preserved through memory. With the increased danger of forgetfulness following the Second Exile, the branches of the laws were also fixed, in the Talmud.¹⁵

As long as the children of Jacob were agreed on it in the chosen land the king and the priest would preserve and guard the transmission and particularly during the presence of the prophets. However, when we were first exiled and prophecy had been lifted the sages feared that the instructional knowledge (אלעלם אלתליקיני) would be forgotten so they turned

¹³ A similar presentation, in which the five hundred years signify a single process of redaction, stands out even more strikingly in the words of the Karaite Sage who completely omits the Talmud and the distinction between the redaction of the different contents. In this description, the redaction of the Mishnah was a single process, started in the fortieth year of the establishment of the Second Temple and concluded five hundred years later: '... for the fathers began to fix the Mishnah from forty years after the (construction of the) Second Temple until one hundred and fifty years after the destruction of the Temple—all together, five hundred and ten years... They gathered together the preserved opinions and fixed it and named it Mishnah'. On the various calculations see *Zikhron la-Rishonim*, V, 195, n. 6; III, 26–27, n. 65, 68. Facing the vagueness in Sa'adyah's descriptions regarding the relationship between the Mishnah and the Talmud, Abramson (1989, p. 32) provided a reading that blurs the gap between them and views them as two stages in the process of compiling the laws. However, the complementary description, as demonstrated in *The Book of the Expatriate*, is supported by the accounts on the formation of the Mishnah found in his *Commentary on the Torah*. The gap between the Mishnah and the Talmud is described there as a conscious outcome of the early Sages' intention to leave over certain things, in the hope of their preservation, 'and they left over things which they hoped would be preserved when they dwelt in the land.'

¹⁴ On the botanic metaphor see the account of al-Ghazali above.

¹⁵ *Sa'adyah's Commentary on Genesis*, pp. 15–16, 186.

their attention to it fixed it (פאת' בתורה), calling it the Mishnah. They left off the branches with the hope that they will be preserved after this with this commitment in writing of the gist and this was so: The remaining branches were preserved until we were exiled a second time when we were dispersed even more than the first. The students then feared that what these predecessors did not fix (יה' בתורה) would be forgotten so they fixed it and called it the Talmud.

These remarks, similar to his words in the second part of *The Book of the Expatriate*, explicitly indicate that the Mishnah and the Talmud are two distinct projects which received their names under different historical circumstances. Both relate to the danger of the Torah being forgotten in the wake of two exiles. However, the danger of forgetfulness was greater during the Second Exile, so that while during the First Exile it was sufficient to record the roots of the law, after the Second Exile the branches of the law received the same treatment. The difference between Mishnah and Talmud, in content and in essence, is like that between the roots of the Torah and its branches, so that whereas the Mishnah encompasses the roots, the essence, the Talmud includes the branches. The connection between fixing the laws and the assurance of their protection from oblivion becomes even sharper upon reading the following quotation from Sa'adyah as quoted by the Karaite Yefet ben A'li (end of tenth century):¹⁶

These laws and teachings remained with our people from the time that employed them and ruled with them were not fixed nor recorded but they were preserved in the minds of the entire nation, but when they were exiled the first time the sages feared lest it be forgotten and dressed them in words and committed them to writing and called it the Misnah (משה) (תכ'רף אצלעלמא אן תנסא פכסוהא כלאמא ואת' בתוהא וסמוהא וסמוהא). Whoever first gave ruling in any of them, they fixed it in their name in order to encourage (ליחת'ו) the students to preserve it. Yet, few simple details that were expected to be remembered were left, for their principles were fixed (את' בתו אצולהא). And when the nation exiled for the second time, the students feared lest the rest of the braches to be forgotten and the fixed them as well and called them Talmud (עלי אלפרוע אלבאקיה אן תנסא פכסוהא כלאמא ואת' בתוהא איצ'א וסמוהא תלמוד).

As in Sa'adyah's sayings in the *Commentary on the Torah*, we find the disciples hoping that knowledge of the branches will be preserved in their memory even after the roots are fixed in the Mishnah. The recording of the laws in the Mishnah and the Talmud is a constraint resulting from exile, the decline in the faculty of memory and thus the heightened danger of the Torah's being forgotten. Yefet explicitly brings up the relationship between the fixing of legal knowledge and the danger of forgetting:

His sayings teach that the oral teaching (אלתלקין) is forgettable (יתאסא), and for that the students feared, and the fixed thing is clear of worry for forgetfulness. And he was right in that. For this reason, we hold that the written text is completely accurate.

The editing of the Mishnah and the Talmud, according to Sa'adyah, reflects a significant moment in the history of the knowledge of the Torah—a transition from preservation by memory to the practice of repetition.¹⁷ Along with his perception

¹⁶ Ibid., p. 186, n. 103.

¹⁷ The transition from memory to repletion is also alluded on the account of the Biblical transmission. Both, Sa'adyah and Yefet ben A'li argued that initially the Sinaitic commandments were preserved by memory and only at the fortieth year they were written, see Ibid., p. 15, 185, n. 101.

of memory, divine knowledge is constantly in a state of retreat and erosion. This perception of memory is diametrically opposed to that embodied in the founding *midrashim* of the Babylonian *yeshivot* based upon the idea of covenantal memory, so that the Oral Torah not be forgotten from Israel. The Sa'adyanic perception does not make a distinction in contents between the Oral Torah and the Written Torah. Memory, for Sa'adyah, is not a gift of God's grace; its preservation is rather the result of the Sages' fixing their knowledge in the Mishnah and the Talmud.¹⁸

10.2 R. Sherira Gaon—The Intellectual Metamorphosis

The above reading of Sa'adyah on the redaction of halakhic literature invites comparison with Sherira. Although we have no clear evidence that these Geonim disputed the question of the antiquity of the Mishnah, we can reconstruct their different accounts of the redaction of the Mishnah and its meaning. The questions addressed to Sherira by the Sages of Kairouan make no explicit reference to Sa'adyah's views about the Mishnah, but suggest knowledge of Sa'adyah's opinions.¹⁹

The question of leaving the laws to the later Sages increases the proportional gap between the Mishnah references to the early Sages and the later ones. In light of this gap, Sherira attempts to relocate the focus of the redaction project from the earlier generations to the later ones. The need to shift from memory to repetition was thus not the outcome of the sealing of prophecy and exile, but rather of the intellectual modifications that took place towards the end of the Temple period and following its destruction. The numerous references to the later Tannaim as opposed to the earlier ones reflects the greater proportional weight of the later generations in fixing the laws and redacting the Mishnah. The need to fix the laws in the Mishnah thus did not come about with the First Exile, nor was it prompted by the early halakhic sages, but rather it arose as a result of the intellectual decline of later generations:²⁰

¹⁸ Perhaps the distance of the Sa'adyanic perception and the theology of covenantal memory reflect the distance of his educational background in the Egyptian intellectual milieu from the founding ethos of the Babylonian academies.

¹⁹ The predominance of later generations of Sages in the Mishnah, particularly R. Akiva and his disciples, (*Sherira's Epistle*, p. 5, r. 4–14), challenges Sa'adyah's account. Another puzzling aspect of the Kairouan questions, which may also be explained in light of Sa'adyah's opinions, relates to the estimation that most of the Mishnaic project was done by the late tannaim and not by the earlier ones. If indeed the danger of obliviousness and the need to fix the laws emerged already at the beginning of the Second Temple period, why are the majority of laws cited in the Mishnah attributed to much later Sages?—'For what reason did the earlier Rabbis leave over (שבקו) most (of Mishnah) to the later ones?' (*Sherira's Epistle*, p. 5, r. 14–15). The forms of the verb ק.ב.ש have a variety of different meanings—among them: to abandon, to depart or take leave, to separate, to inherit, and to leave over, (*Arukh Completum*, en. שבק). In this context, its meaning seems to be 'to leave behind.' In fact, Sherira uses this verb in his Epistle to mean abandonment. For example in reference to the halakhic material that was not included in Rabbe's composition (*Sherira's Epistle*, p. 30), and the decline of Sura yeshiva and its abandonment (*Sherira's Epistle*, p. 118).

²⁰ *Sherira's Epistle*, pp. 30–31.

Using this approach, Rebbe arranged the six orders of the Mishnah. This does not mean that the more numerous earlier sages were abandoned for the later ones. Rather, the earlier sages had no need for compiled material and the things that we learn by memory. Every single one of the (earlier) Rabbis knew these things through chain of transmission. They had no need to compile them and write them down among themselves, until the Temple's destruction. Then came (these earlier sages') students, who were not as knowledgeable, and found it necessary to make compilations.

The emphasis in Sherira's account is rooted in a distinction between the generations: *that they were not like them*.²¹ For that reason the modification of the knowledge is not only in how the knowledge is preserved, but in the transition from one mode of Divine knowledge to another.

In contrast with the Sa'adyanic theory of the Torah's being forgotten, Sherira attempts to describe the relationship between the early Sages of the Mishnah and the later ones in terms of intellectual metamorphosis. According to his account, this metamorphosis affected the transmission modes of the Torah and lay at the basis of the transition from memorization to repetition. The two accounts differ from one another in their characterization of the transformations: was it a theological transformation (the end of prophecy) or a demographic-political one (Israel's dispersion) that created the need to fix the laws? Or was it perhaps an anthropological transformation reflecting the decline in wisdom of the Tannaim?

In what follows, we sketch Sherira's perception of divine knowledge as reflected in his remarks concerning the redaction of the Mishnah and the halakhic activity of the Talmudic sages. We show that divine knowledge, according to Sherira, means knowledge of *reasons* (טעמי תורה). Sherira's insistence on the centrality of these terms (טעמי משנה, טעמים) sharpens the distinction between the two accounts of the nature of divine knowledge and concretizes the processes of the intellectualization of halakhic activity in the tenth century.

10.2.1 *The Typology of the Early Knowledge*

Sherira's account of the transition from memory to repetition is based on the distinction between different forms of knowledge (earlier and later), outlined below:

1. Uniform Knowledge

Early knowledge of the Torah, according to Sherira, was uniform; there were (1) no differences of opinion among the Sages and (2) no internal contradictions among the various laws. There are a number of terms used to describe this characteristic in Sherira's conceptual language: lack of dispute, widespread opinion or single opinion, and equality in reasons. Of course, the term that most clearly indicates the uniformity of the knowledge is 'equality of reasons' (שוויון בטעמים). As we saw above in the quote of Yefet ben A'li, the sages' names were mentioned for emotive reasons, which did not pertain to the transition from memory to repeti-

²¹ This is in the French version. The Spanish version, on the other hand, emphasizes their different modes of knowledge—'דלא הוו ידעי כותהון'.

tion per se. In contrast, for Sherira the scant mention by name of earlier Mishnaic sages derives from the uniformity of their thought, which rendered their mention unnecessary:²²

This was the situation: the early sages were not known by their names, except for the *nesiim* (i.e. presidents) and the *avoth beit din* (i.e. presidents of the courts), because there were no disputes among them. Instead, they knew clearly the reasons of the Mishnah and Torah (טעמי משנה ודאורייתא). And they also knew the Talmud clearly, with all its detailed discussions and inferences. ... this informs you that even the discussions of Abbaye and Rava (i.e. the latest amoraim) were not construed by (these two sages). Rather, (all such discussions) originate from the earlier sages.

As long as the Temple was standing, each one of the sages taught his students the reasons of Torah, Mishnah and Talmud (טעמי תורה, משנה ותלמוד), using words which he composed for the occasion; and the sages would render halakhic decisions for their students as they saw it fits. Wisdom was abundant, and they were not troubled by other distractions.

Sherira bases the connection between mention of the names of the Sages of the Mishnah and the existence of controversies among them on the Mishnah *Hagigah*. (2:2), which contains a list of those sages mentioned at the beginning of Mishnah *Avot* who dissented on the issue of *semikhah* (laying of hands on a sacrificial animal). According to this logic, only differences of opinion among mishnaic sages were documented and recorded. It is worth mentioning again that, unlike the usual approaches found in rabbinic literature²³ and in the founding *midrashim* of the Babylonian *yeshivot* discussed above, in which recognition is made of the differences in content between the Oral Torah and the Written Torah, the Geonic approaches in general deny such duality and attempt to present the halakhah as a uniform body of knowledge. Indeed, Sherira, like Sa'adyah, interprets the duality of the Written Torah and Oral Torah not as the representation of different contents, but rather as different formulations of identical contents. To this end Sherira draws a distinction between the uniformity of Torah content as transmitted from one generation to another, and its uniformity of form, arguing that one is not dependent upon the other;²⁴ hence, uniform knowledge of the Torah is possible even when the formulation of the laws is not. According to this distinction, the enterprise of editing the Mishnah was an attempt to create formal unity of the divine knowledge as a result of the increasing lack of uniformity of its contents. The transition that took place with the editing of the Mishnah, according to Sherira, represents an attempt to preserve the uniformity of the halakhah by preserving its formal unity.

2. High level of Clarity

The second characteristic of the earlier knowledge of the Torah was its level of clarity. In Sherira's words, 'clear (or luminous) knowledge' whose subjects were: 'the reasons of Torah and of Mishnah' and 'Talmud.' We shall attempt to understand the meaning of the various terms used here.

²² *Sherira's Epistle*, pp. 8–10.

²³ On the various meanings and constructions of the two categories see Neusner (1990).

²⁴ Our analysis here is consistent with Blidstein's (1980).

Clear Knowledge alludes to knowledge in which there is no room for doubt or confusion. Sherira does not develop this concept during the course of his *Epistle*; hence, there seems to be no reason to attribute to it any meaning other than its literal one. In one place he seems to take exception to this literal meaning, stating that the earlier sages had knowledge through which ‘the reasons of the Torah’ were clear to them like the ‘Verbal Mosaic Tradition’ (הלכה למשה מסיני), lit. Law given to Moses at Sinai), and there was no-one who ‘challenged or substituted or disagreed.’

Already in earliest rabbinic literature the concept ‘Verbal Mosaic Tradition’ carried metaphorical significance beyond its literal meaning.²⁵ The epistemological and ideological meaning of this term which determined the manner in which Torah was conveyed in Talmudic and post-Talmudic literature, is a subject discussed elsewhere.²⁶ Here we merely state that the term as such challenged the traditional claim that ‘all of the commandments, both light and weighty, deliberate violations and those committed by error, general rules and details, the essence of the laws and the fine points, were given to Moses at Sinai;’²⁷ had all the laws been given to Moses at Sinai, what would have been the significance of a special category, ‘Verbal Mosaic Tradition’?

The tension between the term, *halakha le-Moshe mi-Sinai*, and the traditional claim that the ‘entire Torah was stated at Sinai—its general rules, its details and its fine points’—was a focus of both external criticism²⁸ and inner reflection²⁹ upon the rabbinic halakhic tradition. For that reason, every attempt to render an account of the structure of the halakhah needed to clarify this concept and anchor it within the framework of a traditional rabbinic worldview. Sherira gave the concept of ‘Verbal Mosaic Tradition’ a new meaning. For him, the term signified the quality of early divine knowledge in two senses: 1) The degree of clarity of the reasons of Torah, as these were made known to the early Sages of the Mishnah; and 2) The absence of controversy from this knowledge.

Regarding the first meaning, one should note that, in practice, Sherira understood this term in a metaphorical sense, as concretizing the high level of clarity

²⁵ Hayes (2000) concludes her survey by stating that the Palestinian Talmud tends to metaphorize this expression much more than the Babylonian Talmud which sometimes sticks to its literal meaning (103). Her explanation is associated with the Babylonian Talmud’s concern with its rabbinic authority and its avoidance of strategies that undermine its authority (116).

²⁶ David (2008).

²⁷ *SZutNu*, p. 247.

²⁸ The twelfth century Karaite, Judah ben Elijah Hadassi, criticizes the Rabbinate for the internal contradiction of their theological creed: ‘and how do you say that the Mishnah and the Talmud are from God while you (acknowledge the narrower category of) *halakha le-Moshe mi-Sinai*?! This is a deception of your shepherds’ (*Eshkol ha-Kofer*, p. 86b).

²⁹ Maimonides’ typology of the various legal categories begins with confronting this concept and the rabbinic ethos that ascribes the entire body on the Oral Torah to Sinai: ‘... a person could ask: ‘if these explanations of the Torah, as we have enumerated them, were received from Moses ... that the entire Torah including its generalities, specifics and minutiae were given at Sinai, then what are these special laws that are referred to as Verbal Mosaic Tradition?’’ (*Commentary on the Mishnah*, Intro. p. 38)

of knowledge of Torah. Sherira hints that the term *halakha le-Moshe mi-Sinai* is not to be understood as a normative category indicating one of the legal categories of the Torah,³⁰ but rather an epistemological category indicating a certain level of knowledge. This is different from the Maimonidian approach.³¹ However, it seems that the conceptual core of the Maimonidean theory of halakhah underlying the characterization of *halakha le-Moshe mi-Sinai* as ‘laws which were not subject to controversy’³² may be found in the words of Sherira, ‘they clarified the reasons of the Torah according to the halakhah given Moses at Sinai, and there was no change or controversy.’

The Reasons of Torah, Mishnah and Talmud Another interesting term that appears in Sherira’s description of the nature of the early divine knowledge relates to the original connection that he draws between the idea of ‘reasons of the Torah’ and the early Sages’ knowledge. Sherira in practice removes the issue of the reasons of the laws from their theological context and turns them into a central component of the divine knowledge and the theoretical activity of the early Sages. In that sense, this move may be seen as an attempt to place the basic concept of knowledge of the reasons of the Torah at the center of the theory of rabbinic legal thought. In order to understand this move, one must take into account that knowledge of the reasons of the Torah does not appear as the purpose of Torah study in the world of the Sages. Examination of the usage of the term *ta’amei Torah* (‘the reasons of the Torah’) in Talmud and Midrash suggests that, specifically through their means, the Rabbis formulated a policy of concealment, according to which it is impossible to attain full intellectual understanding of the reasons of the Torah, because they are hidden and only revealed to a select few, unique individuals. Knowledge of the reasons of the Torah is thus an exclusive esoteric kind of knowledge withheld from the mass of Jews in general, that served as the exclusive prerogative of the fathers of the nation—Abraham³³ and Moses³⁴—or of the outstanding Sages, such as

³⁰ ‘... laws that have been called Verbal Mosaic Tradition and no proof (אִסְתְּדִלְאֵל) exists for them This, too, is something without controversy’ (*ibid.*, p. 40).

³¹ The Maimonidean meaning of *halakha le-Moshe mi-Sinai* should be understood in relation to his aim to distinguish between Sinaic and post-Sinaic laws. This distinction allows him to view the latter laws as the product of deductive reasoning and thus subject to controversies. *Halakha le-Moshe mi-Sinai* therefore refers to laws that lack any human involvement—interpretive or inferential: ‘therefore, only something that has no scriptural allusion (לִיס לְהָא אֲשָׁרָה פִּי אֲלֵנִי) nor hint (וְלֹא לְהָא עֵלְקָה), and that cannot be derived from the Torah by any manner of deductive reasoning (וְלֹא יִמְכַן אֵן תַּסְתַּכְרִיגְ בְּקִיאָס) is called *halakha le-Moshe mi-Sinai*.’ (*Ibid.* 39). See Levinger (1965, pp. 50–56), Halbertal (1992).

³² These laws are divided into two subcategories: ‘The first category consists of explanations that were received from Moses (אֵלֶּתְפָאֲסִיר אֶלְמֵרִוּיָה עֵן מֹשֶׁה), which are alluded to in scriptures (אֶלְנִיָּן), or may be derived by deductive reasoning (בְּקִיאָס) (יִמְכַן אֵן תַּסְתַּכְרִיגְ בְּקִיאָס). Here no difference of opinion exists; rather if someone states ‘Thusly I have received it,’ one should not question it further (אֶרְתַּפֵּעַ אֶלְכְּלֵאֵם). The second category consists of laws that have been called ‘Verbal Mosaic Tradition’ and no proof (אִסְתְּדִלְאֵל) exists for them This, too, is something without controversy’ (*Ibid.*, p. 40).

³³ t *Kid.* 5: 21.

³⁴ *MidR.* Num. 19:6, 157.

R. Akiva.³⁵ In this sense, the context of knowledge of the reasons of the Torah is gnostic, involving concealment of religious truth and its disclosure only to a select few.³⁶

‘And they shall take to you’³⁷. ... R. Yitzhak and R. Yossi said in the name of Rebbi: The Holy One, blessed be He, said—Moses, to you I reveal the reasons of the Torah, but to others it is an edict (קִרְוָה).

Analogous to the status of knowledge of the hidden truth in Gnostic circles, the *ta'amei Torah* serve to make a social distinction between those who are privy to them and those for whom the Torah is an expression of divine fiat. The rabbinic policy of concealment of the *ta'amei Torah* calls upon people to accept the lack of intellectual satisfaction entailed in the knowledge of the Torah, whereby Israel as a whole remains behind a ‘veil of ignorance,’ and knowledge of the Torah is knowledge of laws and statutes without reason. The gap between understanding the Torah as a collection of divine edicts or as a coherent system of laws expresses a certain theological tension within rabbinic values. On the one hand, the rabbis posited the knowledge of the Torah as a supreme religious value, but on the other they placed barriers against a full understanding of its reasons. The revelation, in this homily, of the *ta'amei Torah* to Moses reveals the split between the hidden and the revealed Torah, and describes its disclosure to Moses as an exceptional event.

In rabbinic thought, knowledge of the *ta'amei Torah* is not generally attained by personal effort or intellectual techniques. Rather, it depends upon personal revelation from God—i.e., it is theophonic knowledge. The revelation of the *ta'amei Torah* expresses God's domination over the true and hidden meaning of the divine laws in light of the danger involved in their revelation to the masses. Most of the examples of knowledge of the *ta'amei Torah* among rabbis are of a revealed knowledge, rather than knowledge apprehended through personal intellectual efforts.³⁸ The censorship of the meaning of the divine laws and their concealment was justified by the suspicion that broader knowledge would lead to contempt for their observance. The example of King Solomon, who violated certain prohibitions that applied to the king, is taken as illustrative of the destructive consequence of knowledge of the reasons of the Torah.³⁹

One can see the gnostic logic underlying the Sages' policy of concealing the reasons of the Torah; concealing the reasons of the Torah derives from the suspicion that excessively broad and widespread knowledge of the reasons of the divine

³⁵ *PesiqR*, 14, p. 64b.

³⁶ *PesiqR*, 14, p. 64a.

³⁷ Num. 19:2.

³⁸ In that sense, the medieval policy of concealment was different from that of the early rabbis. Whereas in the Middle Ages social distinction derived from the structure of esoteric understanding was between those who knew hidden things and those who knew revealed things, during the period of the Sages the distinction drawn was between those to whom the *ta'amei Torah* were revealed and those who did not enjoy such a revelation and for whom the Torah was in effect an edict.

³⁹ ‘R. Isaac also said: Why were the *ta'amei Torah* not revealed?—because in two verses reasons were revealed, and they caused the greatest in the world (king Solomon) to stumble.’ (t *Sanh.* 21b).

commandments would increase the rebelliousness of those commanded to perform them. According to this logic, hiding the reasons of the *mitzvot* is a religious value and a central component in establishing the authority of God as legislator; excessively broad transparency of His laws is likely to render His supreme authority superfluous.

Nevertheless alongside this approach, there also exists another approach within rabbinic thought regarding the policy of concealment, according to which knowledge of the reasons of the Torah is based upon a semantic distinction between theophonic disclosure and one resulting from human activity. Thus, the policy of concealment reflects the tension between God's intention and human actions. According to this approach, the significance of disclosure does not lie in the removal of divine censorship over knowledge of the esoteric level of the Torah, but rather in the uncovering and dissemination of this level by Talmudic scholars. An explicit expression of this view appears in the Talmudic homily in which the 'reasons of the Torah' are counterpoised to the 'secrets of the Torah.' The context is an interpretation of the words of the prophet Isaiah regarding the wealth of the city of Tyre, which will in the future be given to 'those that abide before the Lord... that they may eat their fill and clothe themselves elegantly' (Isa, 23:18):⁴⁰

And what is meant by 'but it shall be for those who sit before God'? R. Elazar said: this refers to the one who knows his colleague's place in the academy. There are those who say that R. Elazar said: this refers to the one who greets his colleague in the academy.

What is meant by 'and for one who covers the ancient'? This refers to the one who conceals the things that the Ancient of days concealed. And what are they? What are the things that God concealed? They are the secrets of the Torah (סֵתֵרֵי תוֹרָה). And there are those who say: this refers to the one who reveals the things that the *A'ttiq Yomin*⁴¹ concealed. And what are they? The *ta'amei Torah*.

Those who abide before the Lord are the scholars who dwell in the yeshiva, where they engage in the hidden levels of the Torah. The difference between the above homilies reflects two opposing tendencies regarding the divine policy of concealment: cooperation—'this refers to one who covers up those things that were hidden by the *A'ttiq Yomin*'; and, against that, subversiveness—'this is one who reveals things concealed by the *A'ttiq Yomin*.' In either case, the policy of concealing the reasons of the Torah is transferred from God's hands to those of the Sages.

Sherira's use of the term 'reasons of the Torah,' taken from the Sages' doctrine of concealment, places it in semantic proximity to the human significance of uncovering the reasons of the *mitzvot*. In this sense, making the concept of 'reasons of the

⁴⁰ b *Pes.* 119a.

⁴¹ Arm. עֲתִיק יוֹמִין; lit. Ancient of Days. The expression is originated in Dan. 7: 9, 13, 22, and during the middle-ages the Zoharic term *A'ttiqa Qadisha* (Arm. עֲתִיקָא קַדִּישָׁא; lit. the holy ancient one) developed form thereof. *A'ttiqa Qadisha* signifies the deity in which occur a 'transition from absence to existence' (Shalom 1976, pp. 79–180). Within the neo-Platonic theology the term *A'ttiq Yomin* referred to the *Shekhinah*- (שְׁכִינָה; lit. divine presence). See Sirat 1975, p. 51). Conversely, within the medieval anti-messianic thought it signified the second century BC, Maccabee leader, Mattathias ben Johanan the Priest. See a quote of R. Haim Galippa (1310–1380) in Albo, *Book of Principles*, IV: 42, 368.

Torah' the central characteristic of theoretical activity of the halakhic scholars improves upon the rabbinic model that praises 'one who uncovers things that had been hidden by the Ancient of Days.' However, Sherira's use of the term reasons of the Torah' not only expresses the perfection of the above-mentioned rabbinic model, but is also connected to the relationship between myth and halakhah in the world of the Geonim. Another midrash involving the theme of 'reasons of the Torah,' and which was evidently also one of which Sherira was aware, is a mystical *midrash* describing the eschatological vision of the Feast of the Righteous in Paradise. This vision describes a series of events to take place in the messianic future, their climax being the feast at which God will sit together with the righteous and reveal to them the reasons of the Torah. This vision appears in a number of different versions in the *midrashic* literature of the mystical circles between the third and seventh centuries. The relationship between this vision and the conceptual sources of Sherira's use of the term *ta'amei Torah* is particularly strong because this vision was doubtless widespread in rabbinic circles and in the Babylonian *yeshivot*. This vision describes the stages of the heavenly feast anticipated for the righteous in the Days to Come: the revelation of the reasons of the Torah, the heavenly feast in the presence of God, the study of Torah, and the recitation of *kaddish*:⁴²

In the Days to Come God reveals to Israel *ta'amei Torah*—for which reason it is prohibited to marry two sisters, (to mixture) milk and meat, (the prohibition of) pork and *kil'ayim* (i.e. the prohibition crossbreed seeds, animals and wool with linen).⁴³

This description is of course consistent with the policy of concealing the *ta'amei Torah* in the earlier *midrashim*, and likewise confirms the need to conceal the *ta'amei Torah* and the religious alienation caused in its wake. The revelation of the *ta'amei Torah* to Israel thus symbolizes the annulment of this alienation in the future age; it is the high point in Israel's approximation to God, and from this point on their relationship is transformed into an intimate friendship, portrayed as those who sit down at a common table. We may learn of the widespread nature of this vision in rabbinic circles from those cases in which the halakhic Sages were attacked by the Karaites due to their descriptions of excessive intimacy with God.⁴⁴ It would therefore not be an exaggeration to say that Sherira was aware of the policy of concealing the reasons of the Torah as formulated both in the amoraitic homilies

⁴² *Seder Rav A'mram*, p. 13.

⁴³ Another version of the revelation of *ta'amei Torah* as heavenly event is found in the mystical midrash, *Alphabet of R. Akiva*: 'In the later days God will sit in Eden and explain (the laws) while all the good ones will sit in the front, and the celestial family will stand on His right, and sun with constellations and moon with all the stars to His left, and God Lord will explain the laws of the *New Torah*, which will be given by the Messiah.' (*AldRA*, pp. 25–26). Nevertheless, the term *ta'amei Torah* here refers to a 'New Torah' and not an existing one.

⁴⁴ See the critical comment of Abu-Yusuf Ya'qub Al-Qirqisani (first half of tenth century): '... and they (i.e. the Rabbinates) say in these Letters (of R. Akiva) that the Creator dances in front of the good ones in a dinner that He prepares for them in the Garden of Eden and say to them: I am not coming but to eat and drink with you'. (*Kitab al-Anwar wa-al-Maraqib*, I, 4.2, 32). Likewise, his contemporary, Ben Yeroham (b. ~910), attack the Rabbinates on the same point: '(They claim that) to the Garden of Eden He shall come to celebrate with His congregation and (He) shall drink and dance with His companions in these dinners ... woe to those who say such things for they ascribe God corporal features'. (Ben Yeroham, *The Book of the Wars*, p. 14, 110–111).

and in the eschatological vision of the mystical homilies when he made use of the term ‘reasons of the Torah.’ The significance of this point is that Sherira in practice copies the term ‘reasons of the Torah’ from the Sages’ policy of concealment and from the eschatological-mystical vision, adopting it as a key concept in his own description of the Divine knowledge.⁴⁵

3. Personal Transmission: “As a Man Who Tells his Friend”

A further respect in which the earlier knowledge is distinct from the later relates to the manner of teaching and transmitting the Torah. Sherira emphasizes that teaching and transmitting the Torah in a personal manner was a substantive feature of the early knowledge. As opposed to its teaching in later times, which was accomplished through the intermediacy of the Mishnah and the Talmud, the early mode of transmission was based upon a direct and personal relationship between the master and his disciple. As noted, Sherira wished to base the distinction between form and content on the relationship to the early way of knowledge of the Torah and to argue that the content conveyed was not originally dependent upon its form. The early knowledge was characterized as uniform in its content but, because it lacked formal unity, it was transmitted in a non-fixed, spontaneous manner ‘each of the rabbis would teach his disciples the reasons of the Torah (אורייתא טעמי) [ד] and of the Mishnah and of the Talmud using words which he composed for the occasion’.⁴⁶ This lack of formal unity also determined the nature of the didactic relationship in those days, relations which were personal and informal. The act of teaching is likewise described as a kind of personal report of the Master (‘and he made known to them as it was’),⁴⁷ or as a conversation between friends (‘and each one would teach it to his students, like a person who tells his neighbor in whatever language he wishes’),⁴⁸ conducted in a free and non-fixed form (‘each one taught to his disciple in whatever way he wished and with whatever work that he wished’).⁴⁹

4. Personal and Inner Knowledge—“Reasons Gathered in the Heart”

The fourth characteristic of the early manner of Divine knowledge is associated with its characterization as consisting of personal and inner knowledge. In order to understand this characteristic, we need to return to the words of Sherira, in which we find the early knowledge identified with the concept of Oral Torah (*Torah shebe'al peh* = *Torat ha-peh*)⁵⁰—that is, knowledge without any formal unity (*one mouth [and one tongue]*).⁵¹

⁴⁵ Elsewhere I explore the awareness of Sherira to mythical themes and his effort to apply their meaning on the historical description of the halakhah. See David (2005).

⁴⁶ *Sherira's Epistle*, pp. 9–10.

⁴⁷ *Ibid.*, p. 10.

⁴⁸ *Ibid.*, p. 22.

⁴⁹ *Ibid.*, p. 18.

⁵⁰ As Blidstein (1980) and Jaffee (1992) showed, the effort to explicate the term ‘Oral Torah’ is a central motif in *Sherira's Epistle*. Against the Karaite criticism on the conceptual coherency of the idea of ‘Oral Torah,’ the Geonim aimed to provide better definitions of this concept.

⁵¹ *Sherira's Epistle*, p. 22.

During Rebbe's lifetime, the sages were spared all persecution due to the friendship between Antoninus and Rebbe. (Rebbe) then decided to arrange the laws in order that our sages would recite and teach uniformly, not to recite each one in his own style.

For the earlier sages—prior to the destruction of the Temple—did not need this, because (their teaching was as) oral teaching (תורה פה), and they did not spell out the reasons of well-known matters, as is done in textual teaching (תורה דכתיבא); rather, they knew and thought over their rationales gathered within their hearts, and each one taught these to his students as a man teaches his companion, using whatever words he chooses.

When they assembled in the Hall of Hewn Stone and in the academies, they were prepared to say (their teachings) immediately. And (enjoying) sovereignty, without distress or fear, and heavenly help, the underlying reasons of Torah were clear to them as the Law given to Moshe at Sinai. There was no disagreement or controversy among them.

Sherira distinguishes between the purpose of editing the Mishnah—namely, to arrange the laws that had been taught by the Sages in a uniform way, and the early knowledge, which was in the style of oral teaching. In doing so, Sherira describes the early knowledge based on oral teaching as fundamentally opposed to a knowledge based on textual teaching and recorded in writing. Oral knowledge, for Sherira, is an inner knowledge, distinguished from textual-external knowledge by its being able to preserve the uniform content even without formal uniformity: 'And they did not possess any fixed texts or set Mishnah which everyone knew by heart. But rather those reasons and traditions, despite the unanimity among the sages, each sage taught his students in whatever composition and with whichever method he preferred.'⁵² In this sense recording the Torah in writing is clearly seen as an attempt to preserve the uniformity of the knowledge.

The distinction between inner-oral knowledge—'gathered within their hearts'—and external-textual knowledge—'reasons of well-known matters, as is done in textual teaching'—is that which, in Sherira's opinion, sets apart the earlier knowledge of Torah from its later form. The early knowledge was personal and its source lay in the personal knowledge of the sage. This type of knowledge is not subject to change as it is on a higher level of clarity; for that reason, too, its being transmitted did not demand any formal unity. The intellectual transformation that led to the need for redacting the Mishnah implied the erosion of the earlier type of knowledge, and its substitution by a type of knowledge dependent upon textual compositions. This erosion, according to Sherira, corresponds to a process of diminution in the wisdom ascribed to divine assistance and benign political circumstances.⁵³

⁵² *Sherira's Epistle*, p. 22. For further analysis on Sherira's efforts to conceptualize the idea of Oral Torah see Jaffee (1992).

⁵³ The interconnection between benign political circumstances and high-qualified knowledge of the Torah is presented in Pirkoi's letter and further writings of the Babylonian Geonim. Sherira describes the riots of the 'great revolt' against the Romans (66–73 AD) as the cause for the loss of legal knowledge and hence the raise of halakhic doubts: 'During all these years all the laws that were left unresolved in the academies, and all the legal doubts that had arisen during those riots, were clarified and solved, for they feared the great loss that was caused by the destruction of the Temple'. (*Sherira's Epistle*, pp. 17–18). Likewise, the period of calm followed the destruction of the Temple (or the failure of Bar Kochbah revolt?!) as an opportunity to restore the laws that were lost during the riots: 'The reprieve after the destruction of the Temple was and important time (זמן חשוב), for the sages then convened in order to retrieve the laws that were nearly lost in the turmoil and rescuations and the strife between the house of Shammai and the house of Hillel'

10.2.2 *Talmudic Scholasticism*

The second focus in the *Epistle* in which Sherira grants a central place to the concept of ‘reasons’ is found in the description of the enterprise of the Talmudic sages. One might describe Sherira’s use of the term ‘reasons’ in this context as a legalization of the concept. Initially Sherira borrows the term ‘reasons of the Torah’ from the Sages’ esoteric theory whereby he attempts to explain the nature of the early knowledge. Later, Sherira sees it as central to understanding the scholastic activities of the Talmudic Sages, as a prime example of any halakhic scholasticism. Thus, the Sages’ policy of concealing certain things associated with ‘reasons of the Torah’ completely vanishes; indeed, finding out the reasons of the Torah becomes their intellectual challenge. However, the term ‘reasons of the Torah’ in Sherira’s description of Talmudic scholasticism is to be seen against other characterizations of Talmudic scholastic activity, which have already been discussed above—namely, syllogistic activity. It is thus, for example, that one ought to understand the following words of Sherira regarding the importance of the *beraitot*:⁵⁴

And the Amoraic sages who (lived) after Rebbe greatly needed these *beraitot*, because from them they derived (understanding of) all the deep matters which were stated in the Mishnah in a succinct language, through hints.

And principles, and branches, and novellae, and derivations which Rebbe mentioned their principles (but) did not draw their analogies. And the sages needed to use dialectics (פלפולין) and reasoning (סבארא). And they learned from them what (cases) needed (to be analogized) to these things, and to draw analogies to similar things, and to relate (a case to) its principles ...

And the sages praised one who has studied many (*beraitot*), because the reasons of Torah become revealed to him. Since he has learned and knows many teachings, he has learned things which were (presented) succinctly and things which were elaborated. Hence something which is deep in one Mishnah is clear (to him) from a different Mishnah.

As it is said ... What is the meaning of the verse ‘with strategies you shall make war’?⁵⁵ It means, in whom do you find (the skill to conquer in) the war of Torah?⁵⁶ In him who possesses bundles and bundles of Mishnah.

In the above remarks, Sherira describes the importance of the *beraitot* even after the time of Rebbe and the sealing of the Mishnah. In so doing, he characterizes the literary relationship between the Mishnah and the *beraitot*, as well as the scholastic activity of those Sages in relation to Rebbe’s composition. By doing so, Sherira emphasizes the analogical reasoning in respect to Rebbe’s sayings. The conceptual language and lexicon of terms chosen by Sherira to describe this analogical reasoning is consistent with the characterizations of the analogical reasoning described

(*ibid.*, p. 13). Similarly, the persecution of the sages as the cause for the diminution of wisdom: ‘R. Akiba sacrificed his life after the death of R. Yossi ben Kisma; and then R. Hannina ben Teradyon was executed and the wisdom of the sages decreased ...’ (*ibid.*, p. 13).

⁵⁴ *Sherira’s Epistle*, pp. 43–44.

⁵⁵ Prov. 24:6.

⁵⁶ The term ‘war of Torah’ appears also in the descriptions of the halakhic activity in the founding narratives of the Babylonian *Yeshivot* (above p. 153.), though the intellectual activity there is of confirming the existing laws, while here is about finding out the *ta’amei Torah*.

above.⁵⁷ Here, too, Sherira utilizes the botanic metaphor of ‘roots’ and ‘branches’ in connection with novellae and their derivations, which evidently serve as synonyms: ‘and branches, and novellae, and derivations which Rebbe mentioned their principles (but) did not draw their analogies.’ Accordingly, Rebbe’s Mishnah includes only the principles, while the branches are derived by the Sages’ dialectic reasoning.⁵⁸ Further on, Sherira enumerates three types of analogical reasoning performed by means of dialectics and reasoning. One type relates to the identification of the analogy’s objects, i.e. the identification of the rule applied to the new case or the identification of the case that needs to be analogized (‘what (cases) needed (to be analogized) to these things’). Another relates to identifying the similarities between the new case and the original ruling (‘and to draw analogies to similar things’). A third type links the principle rule to its branches (‘and to relate (a case to) its principles’).

The importance of analogical reasoning is apparent from the repetitions of this description during the course of the *Epistle*. According to Sherira, the *beraitot* served as a tool to interpret the Mishnah, which was written in a succinct, allusive and general fashion. Thus, the importance of the *beraitot* lies in their serving as a means to uncover the ‘reasons of the Torah’ that are implicit in Rebbe’s teaching. Further on, Sherira describes Talmudic scholasticism according to these two parameters: the uncovering of the ‘reasons of the Torah,’ and analogical reasoning.⁵⁹

When the early sages taught their laws, each one in his own style, these principles were their studies, to reveal the underlying reasons of Torah.

As it was said: R. Abhu said in the name of R. Yochanan: R. Meir had a disciple by the name of Sumchus who, for every rule concerning ritual uncleanness, supplied forty-eight reasons of its uncleanness, and for every rule concerning ritual purity, forty-eight reasons of its purity.

Their studies also took on other forms—to make (halakhic) novellae and derivations and branches. To understand how these are derived, and how they are analogized, and how the branch is related back to its principle.

Sherira attempts here to define the nature of Talmudic scholasticism which is divided into two kinds of activity: uncovering the ‘reasons of the Torah,’ on the one hand, and analogical reasoning, on the other. Similar descriptions of Talmudic scholasticism are routine throughout the course of the *Epistle*, and in this sense present a systematic conceptual system related to the nature of the earlier divine knowledge, the intellectual transformation involving the decline of wisdom, and the Talmud’s mode of confronting the phenomenon of disputation.

10.2.3 Summary

In this chapter we dealt with the problem of knowledge of the Torah from the viewpoint of the theoretical aspects of memory. The first point that emerged from our

⁵⁷ See above.

⁵⁸ See above.

⁵⁹ *Sherira’s Epistle*, pp. 48–50.

analysis pertained to the gap between the halakhic sages' efforts to deal with the problem of actual memory (through mnemonic means) and their confrontation with memory as a theological problem. While on the concrete level the Rabbis adopted the Hellenic art of memory, on the theoretical level they developed a heteronomous approach that demonstrated a distancing from the Greek understanding. This lack of symmetry in the description of the Sages' thought in relation to Hellenic thought derived from its placing the subject of memory and knowledge of the Torah at the very heart of the polemic of Pharisaic theology versus Pauline theology.

This understanding derives from our recognition of the centrality of Jeremiah's prophecy concerning a new covenant (Jeremiah 31:31–33) as a core text shaping approaches to knowledge and memory during the formative period of Pauline doctrine. We argue that this was one aspect within the Jewish-Christian polemic in Late Antiquity, and that differences in outlook between those who continued the Pauline theology and those who adopted the rabbinic theology have roots in different social approaches. According to this view, the immanent approach to memory served to universalize religion and alienate it from the legal significance of religious life, while the heteronomous approach to memory contributed to preserving the hierarchical structure of Pharisaic society under the leadership of the Sages.

Analysis of the Sages' words relating to the significance of memory in Torah study underscores the renewed emphasis on the religious dimension of memory and the perception of its being conditional upon divine power or its being a divine gift. We noted two central models for the Sages' understanding of memory: the model of ascent to heaven, and the model of intense study. While these two models reflect different strands within rabbinic thought, they express a shared belief in, the necessity of divine intercession in order for students to remember Torah,

Our analysis of the Sages' understanding of memory revealed a continuum between the Sages' approach to memory and approaches that were widespread in ancient mystical thought. This continuum is rooted in a heteronomous understanding of memory which explains the centrality of knowledge and memory in *Hekhalot* literature and the Sages' use of magic to reinforce memory.

From early mystical literature, we turned to memory reflected in the founding *midrashim* of the Babylonian *yeshivot*. Analysis of these *midrashim* brought to light an approach unique to the world of the Babylonian *yeshivot* during this period. They understood memory and knowledge of the Torah as deriving from a belief in the existence of a covenant of memory realized in the *yeshivot*. The theology of the covenant of memory thus served to justify the *yeshivot* claim to hegemony, and gave historical validity to their activity as institutions that preserved the original knowledge of the Torah for all Jewry. This approach places the rabbinic theology of memory on a different track: Memory, according to these *midrashim*, is not a religious matter having implications for the structure of society, but rather a basic element of the ideology of Babylonian hegemony. The remembering of the Torah, according to this outlook, is no longer a problem whose solution is reserved for the End of Days, but a concrete historical reality indicating the purpose of the remnant that was exiled to Babylonia prior to the destruction of the Temple, and which constituted the basis of the Geonic *yeshivot*.

Our discussion of the approaches to memory of the Sages and of the Babylonian *yeshivot* emphasizes, in a different way, the relationship of the theology of memory to social ideology. As opposed to seeing memory as an epistemological problem that pertains to the mode of knowledge of the individual, in the contexts discussed here the doctrine of knowledge constitutes a public matter of the highest order, in which the implications of understanding memory have consequences for the structure of society.

Another matter discussed in relation to the theology of memory is its place in Geonic theories of knowledge of Torah. Our research looked at the theories promulgated by two Babylonian Geonim of the tenth century: Sa'adyah and Sherira. The theory of knowledge of Torah of these Geonim was reconstructed through examination of their explanations of R. Judah ha-Nasi's redaction of the Mishnah. In contrast to the accepted belief that Sherira's words in his *Epistle* and those of Sherira regarding the Mishnah's redaction are not contradictory, we demonstrate a systematic dispute between the two relating to their descriptions of the history of the halakhah and the redaction of the Mishnah. Our analysis highlighted the differences in their approach and revealed the central place that transition from memory to repetition holds for them in the history of the halakhah.

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