

**The History of Halakhah, Views from Within:
Three Medieval Approaches to Tradition and Controversy
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Introduction

Few texts within halakhic literature attempt to describe the history of halakhah. The ones that do, vary from short comments focusing on a particular period to comprehensive and ambitious attempts to structure a chain of knowledge leading from Sinai down to the author's own time. Prominent examples of such text include: Igeret R. Shrira Gaon, the introduction by R. Nissim Gaon to his Sefer ha-Mafteach le-Manulei ha-Talmud, Shmuel ben Hofni's Mavo la-Talmud, Abraham ibn Daud's Sefer ha-Kabbalah, Maimonides' introduction to Perush ha-Mishnah and the Mishneh Torah, Meiri's introduction to Avot and to Berachot, Sh'arei Zion by Yitzchak di-Letas, the Introduction by R. David ha-Kokhavi to Sefer ha-Batim, Chisdai Crescas' introduction to Or ha-Shem, Meggilat Yochasin of Abraham Zakut, Maharshal's introduction to his commentary on Hullin, Naziv's Hakdem Sheelah - his introduction to his commentary on Sheiltot, and few others. Among the concerns expressed in these texts are: establishing an order of transmission of knowledge; analyzing crises within those complicated chains;

understanding and describing the emergence of debates and controversies within the body of halakhic knowledge; establishing relations of authority between different generational layers of the tradition. My aim in this essay is not to examine these texts in constructing a history of halakhah, although many of them would be of great value in such an endeavor. My question, is rather: how is the history of knowledge viewed by such texts themselves, and what guides them in their description of the history of the body of halakhic knowledge? The aim of this essay is thus an analysis of certain moments of self-reflection articulated by halakhic authorities concerning the history of halakhic learning, focusing not on the history of this body of knowledge per-se, but as it is viewed from within.

There is yet another more basic question which bears far-reaching implications on our analysis. The history of halakhah is not a traditional subject treated within the framework of halakhic learning [this statement may be true about any historical writing within traditional Jewish sources], and for that reason, moments of self-reflection on history of halakhah in the writings of halakhic authorities are both rare and precious. Since articulating any view whether partial or comprehensive of the history of halakhic learning is not part and parcel of halakhic study itself, in addition to understanding the substantive picture outlined by an author, we must address a more fundamental issue: i.e., why the author is engaged in such an attempt in the first place, and what connection might be between the way an author structures the history of halakhah and his own work.

I would like to examine three radically different models of the history of halakhah as they are presented from within by medieval authors: Abraham ibn Daud, who follows Geonic tradition; Maimonides who diverts from this tradition; and Nachmanides, who does not offer a complete account of the problem but does seem to have made some important comments leading in a new direction, to be

developed further by his students. This controversy concerning structuring the history of halakhic knowledge is rooted in alternative theological concerns, which in turn help to recreate the histories of knowledge. I will like to show how the various methods of structuring the history of halakhah as told from within, affect basic notions of the halakhic process such as the role of legal reasoning, notions of authority, the conception of halakhic "truth" and the place of controversy and its status. The models sketched by each author shape and reformulate the fundamental aspects of the system in a completely different manner.

A. The Retrieval View

Let us turn, first of all, to the view I will entitle the 'retrieval model' held by Abraham ibn Daud, who follows a long tradition among the Geonim. According to this model, the halakhic process is understood as a orally transmitted body of revealed halachah from generation to generation. Moses received the entire written and oral Law, and at its source, tradition was complete and perfect. The entire halachah was revealed and transmitted to us through a continuous unbroken chain of scholars who received from one another. Through time, forgetfulness and carelessness (due also to harsh political circumstances) caused this knowledge to erode. Halakhic reasoning became essential, not merely to organize, justify and transmit given knowledge, but as a vital tool in the desperate attempt to reconstruct, through argumentation, the lost portions of a once complete body of knowledge. The main advantage of such a view lies in the elimination of human creativity in the halakhic process and the grounding of the oral Law in God's revelation. From that perspective, there is no difference between the source of authority - both the oral and the written Torah are founded on direct revelation. It is no wonder that the birthplace of some of the most important articulations of this picture are created in the context of anti-Karaite

polemics.[1]

This view of the history of halakhic knowledge, also determines the aim of writing a history of halakhah. The task of such an undertaking is to establish the chain of transmission as continuous with no lapses from Moses to the author's own days. It thus retraces the present halakhah to its source and grounds it in God's revelation to Moses. This aim is expressed in the programmatic statement made by Abraham ibn Daud in his introduction to Sefer ha-Kabbalah:

The purpose of this Book of Tradition is to provide students with the evidence that all the teachings of our rabbis of blessed memory, namely, the sages of the Mishnah and the Talmud, have been transmitted: each great sage and righteous man having received them from a great sage and righteous man, each head of an academy and his school having received them from the head of an academy and his school, as far back as the men of the Great Assembly, who received them from the prophets, of blessed memory all. Never did the sages of the Talmud, and certainly not the sages of the Mishnah, teach anything, however trivial, of their own invention, except for the enactments which were made by universal agreement in order to make a hedge around the Torah.

Sefer ha-Kabbalah seeks to establish the chain of transmission beyond any doubt, and to prove that besides from some takanot, there is no human component in the halakhah. Ibn Daud's view which is certainly connected to anti Karaite polemics continues a long trend in Geonic writings; all of them subscribe to the same view of structuring the history of halakhah and perceive the project of writing such a history as a confirmation of the ongoing chain of transmission.

R. Shriria Gaon structured the history of halakhah on the same model, although

his account is more complex than the mere mention of the links in the chain of tradition. The question posed to R. Shrira Gaon by Kiruan community articulates the problem: the overwhelming presence of R. Akiba's students in the Mishnah and the fact that the Mishnah was written only in the days of R. Yehudah the Prince, would seem to support the Karaite challenge that the Mishnah is a late invention of the rabbis. In essence, the question troubling the Kiruan community was: If the Mishnah is a received tradition, why did the early sages leave so much of the task of formulating and presenting it in the hands of later generations? In his response, R. Shrira Gaon cannot merely refer to a chain of transmission, but must address the troubling challenge of Karaism to such a view; the model he formulates is thus complex. Although he adheres to the contention already voiced by Sa'dia that the Mishnah is a received tradition,[2] he claims that the particular halakhot were ordered and formulated in different versions by different schools and that R. Yehudah the Prince based his Mishnah on R. Akiba's version. The halakhot taught by different sages were essentially identical but each had his own manner of presenting and ordering them. The presence of Akiba's students in the Mishnah is not a proof that the halakhot are their own invention but that their version of the Mishnah serves as the basis of R. Yehuda's Mishnah. According to R. Shrira Gaon, there is a human component to the oral tradition of halakhah , but this component affects only the version of the norms and the method of their organization, but not their content.[3] This variation on the strict notion of tradition enables R. Shrira to explain the presence of relatively late generations in the Mishnah. In his introduction to *Maftach le-Man'ulei ha-Talmud*, R. Nissim Gaon follows the same line of argument: "...We have no need to bring evidence which proves the authenticity of the sages' tradition (kabbalah) ...since our predecessors made it clear, but I will clarify the time in which the Mishnah and the Talmud were written and I will show that the preserved kabbalah and tradition never faded from the nation.." R. Nissim then

describes the Mishnah in the following terms: "He (R. Yehudha the Prince) made up his mind to gather everything they had in their hands from the tradition ...".

The main problem with such a model is the presence of controversy within the body of halakhic knowledge. If halakhah is independent of the fluctuations of human legal reasoning which naturally produce controversy, why are there controversies in the Mishnah and Talmud? This problem is immediately raised by ibn Daud, and his answer is that neglect on the part of a certain segment in the chain gave rise to controversy:

Now should anyone infected with heresy attempt to mislead you, saying: "It is because the rabbis differed on a number of issues that I doubt their words," you should retort bluntly and inform him that he is "a rebel against the decision of the court"; and that our rabbis of blessed memory never differed with respect to a commandment in principle, but only with respect to its detail; for they had heard the principle from their teachers, but had not inquired as to its details since they had not waited upon their masters sufficiently. As a case in point they did not differ as to whether or not it is obligatory to light the Sabbath lamp; what they did dispute was "with what it may be lighted and with what it may not be lighted." Similarly, they did not differ as to whether we are required to recite the Shema evenings and mornings' what they differed on was "from when may the shema' be recited in the evenings" and "from when may the Shema' be recited in the mornings." This holds true for all of their discussions.[4]

In other words, ibn Daud argues, all halakhic knowledge was available and explicit in the earliest stages of tradition, and it is the students, who did not clarify the complete details of all the rules from their teachers, who are to blame for the crisis in the transmission of tradition and for the rise of controversy. . From

then on halakhic reasoning evolved as an attempt to uncover a lost body of knowledge due to students' neglect.

The existence of controversy obligates authors who hold such a model to recognize some sort of crisis within the chain of transmission. It includes an implicit dangers as well. Demonstrating the presence of crisis, threatens to cast doubt on the credibility of the process of transmission as a whole. If both neglect and forgetfulness eroded a given body of knowledge transmitted from Moses onwards, what guarantees the credibility of the core of tradition itself? Authors who hold such a view naturally tend to marginalize the extent of controversy within halakhah in order to preserve the credibility of the chain of transmission. Ibn Daud claims that no controversy exists concerning the main body of halakhah: "...Our rabbis of blessed memory never differed with respect to a commandment in principle, but only with respect to its detail".

The picture of the history of halakhah presented by the Geonim reappears in later constructions of the history of halakhah. In Nieto's *Mate Dan (ha-Kuzari ha-Sheni)*, the main elements of ibn Daud's account are repeated. Nieto cites the talmudic passage which accounts for the emergence of controversy: "When the disciples of Shammai and Hillel who had insufficiently studied , increased in number, disputes multiplied in Israel and the Torah became as two Torot (T.b. Sanhedrin 88b). He offers the following explanation: "'They studied insufficiently' i.e., they didn't stay with their teachers long enough to receive the interpretation of the principles and thus controversy emerged" (p. 63) One innovative element in Nieto's account - although it naturally follows the internal logic of the scenario - is his conception of the authority of the ancients. According to such a model, the source of the authority of early generations of sages over sages of later generations is in the proximity of the earlier generations to the first stages of the

transmission before the process of erosion was enhanced. Karo's argument that the authority of the Mishnah stems from the legally binding agreement made by the Amoraim not to argue with the Tanaim, is explicitly rejected by Nieto. He contents instead that: "...since they [the Amoraim] thought that all the words of the Tanaim are received (kabbalah) and because the Tanaim had received from earlier generations there was no controversy in what they said" (ha-Kuzari ha-Sheni p. 67).[5]

The retrieval picture of the history of halakhah raised by the Geonim, and articulated by ibn Daud and later authors, thus shapes basic elements of the halakhic process: the account of the emergence of controversy, a clear conception of authority and a definite secondary role for halakhic reasoning. All these are challenged by Maimonides, who presents a different structure of the history of halakhic knowledge.

B. The Accumulative View

Maimonides departed from the Geonic picture of the history of halakhah and from ibn Daud's formulation.[6] He was the first to claim that alongside the received tradition from Moses, the sages introduced new interpretations of the Torah of their own invention. The halakhic process in Maimonides' eyes, is therefore accumulative, each generation adding substantive norms derived by their own reasoning to the given, revealed body of knowledge.[7] In the previous model, the relation between halakhic reasoning and revelation was that of an attempt to uncover lost data, or to attach received oral material to its source in the written Torah. In Maimonides' view, the relation is one of derivation. The sages, equipped with rules of derivation, deduce from the given material of revelation - both oral and written- new norms which in turn become part of the

accumulative material of halakhic knowledge. Only in relation to the newly derived halakhot controversy emerges, since these hermeneutical inferences are not strictly logical inferences where a deduction necessarily follows from given premises.[8] In the received normative material transmitted by the sages of each generation controversy according to Maimonides never occurs. In his view, the phenomenon of controversy is therefore restricted to the normative material which is newly derived by hermeneutical inferences.[9] On this point, in addition to his unique view of the accumulative nature of the history of halakhah and the power of derivation inherent in hermeneutical meta-norms, Maimonides diverts from ibn Daud's account of the emergence of controversy. Maimonides issues a direct and blunt attack on ibn Daud's conception:

"But the opinion of one who thought that also the laws wherein there is disagreement are received from Moses, and that disagreement took place due to an error in receiving the tradition or due to frightfulness, i. e., that one [disputant] is correct in his tradition and the second errs in his tradition, or he forgot or he did not hear from his teacher all that he should have; and he [who holds this opinion] offers as evidence for this what they said, "When the disciples [of Shammai and Hillel who had insufficiently studied, increased in number, disputes multiplied in Israel and the Torah became as two Torot" . Behold this, as God knows, is a despicable and very strange position, and it is an incorrect matter and not compatible to principles. And he {who holds this position} suspects people from whom we received the Torah and this is falsehood."

Controversy, as Maimonides explains in the next passage, actually arises due to the inherent limitations of legal reasoning, while he describes the ibn Daud's model in harsh terms as 'despicable and very strange'. The students of Hillel and Shammai are not to blame for neglect in transmission of tradition:

And when the study of their students became less and the methods of argument became weakened for them in comparison to Shammai and Hille, their teachers, disagreement befell them during the give-and-take on many issues, because each one of them reasoned according to the power of his intellect and according to the principles known to him...And in this manner befell disagreement, not that they erred in their receiving of tradition and one's tradition is true and the other's false... .

It seems that the problem which concerns Maimonides is that by the attempt to ground the Mishnah and the Talmud in the solid foundation of revelation and tradition, tradition itself is put into question. By explaining controversy as neglect and forgetfulness in the process of transmission, proponents of the retrieval model thus cast doubt on the reliability of tradition. In Maimonides own words one who make such a claim "suspects people from whom we received the Torah". Paradoxically, ibn Daud's minimization of human inventiveness in the history of the halakhic process results in the undermining of the authority of tradition. On the other hand, Maimonides' attempt to guard the purity of the process of transmission in the history of halakhah, detaches a major portion of the legal material from its direct grounding in revelation and gives rise to a contingent foundation for the authority of the oral law.

According to Maimonides, while no argument can be raised against the received material of halakhah, a later generation can in principle debate the newly derived halakhot of previous ones. The authority of the Mishnah cannot rest solely on tradition, since in those areas of debates there is no tradition; its authority, rather, rests on the fact that the Mishnah and the Talmud were widely accepted by the nation of Israel as a whole. Theoretically Amoraim could have argue with

Tanaim, and Geonim with Amoraim, concerning the newly derived halakhot which constitutes most of the material of the Mishnah. The Mishnah's and Talmud's authority is thus founded on the historically contingent fact of acceptance, a ground for authority that was rejected by later adherents to the geonic approach. The Maimonidean accumulative model, which opposes the geonic tradition, provides an alternative understanding of legal reasoning and its role both in controversy and intergenerational authority. According to the Maimonidian accumulative view, the role of legal reasoning is not to retrieve but to derive; controversy arises in the process of derivation rather than through a crisis in transmission, and the authority of the Mishnah and Talmud is based not only in manifesting an ongoing chain of tradition but also in the historically contingent fact of widespread acceptance. These two variant accounts of the history of halakhah especially the emergence of controversy, provide completely different understandings of its fundamental aspects.

It is important to stress, that according to both ibn-Daud's and Maimonides' accounts, the spread of controversy is viewed as a fall, since both - for completely different reasons - assume a notion of truth in halakhah. Ibn Daud's conception, can be described as a simple correspondence theory of halakhic truth. An halakhic opinion is defined true or false relative to the complete revelation of Sinai. For example, in a controversy concerning the proper time to recite the Shema at the evening, the determination of the true opinion or the false one is dependent on the question which opinion corresponds to the rule which was given at Sinai and was lost in the process of transmission. As we saw Maimonides rejected this correspondence theory of halakhic truth, since he asserts that in case of controversy there was never a prior received tradition which can serve as a criterion to examine the correctness of the matter. Nevertheless, Maimonides does assume a conception of halakhic truth which is

analogous not to correspondence theory of truth but to what in modern philosophy is called coherence theory of truth. According to Maimonides, a margin of debates is inevitable in human legal reasoning, since such a reasoning is not conducted within the framework of strict logical deductions. Yet, in principle, a high quality of deductive powers combined with shared premises and methods of deduction, a correct and agreed upon answer can be reached. Such an answer will be correct in the sense that it successfully coheres with the earlier premises which this new conclusion has been derived from. Its correctness is not a function of its not in the sense of corresponding to a prior given halakhic tradition grounded in the complete revelation. According to Maimonides, it is for this reason that Hillel and Shammai who shared the deductive method and high quality of deductive powers had only very few halakhic disputes:

...for when two people are identical in understanding and in study and knowledge of the principles from which they learn, there will not occur at all between them disagreement in what they learn by one of the hermeneutic principles, and if there will disagreements they will be few just as we have never found disagreements between Hillel and Shammai other than in a few laws, for their methods of study in all they would learn by one of the principles were similar to one another, and also the correct general principles which were held by one were held by the other

Maimonides then proceeds to explain why in the period of the students of Hillel and Shammai disputes increased: "And when the study of their students became less and the methods of argument became weakened for them in comparison to Shammai and Hillel, their teachers, disagreement befell them during the give-and-take on many issues,...". Maimonides claims that the students of Shammai and Hillel cannot be blamed for the increase in disputes, in the way ibn Daud

implies. Unfortunately there is a natural gap between intellectual skills of different scholars and no one can be blamed for not reasoning above his skills. Yet, in case of high quality of intellectual capabilities with the application of correct legal reasoning, disputes could be significantly minimized. The retrieval view of ibn Daud and the accumulative approach of Maimonides imply a different conception of what counts as a true correct halakhic opinion.[10] Let us turn to the third model which altogether breaks with the very conception of a correct halakhic answer.

C. The Constitutive View

Although less developed, the third model can be traced to the writings of Nachmanides and his students, the fourteenth century Catalonian scholars Yom Tov Ishbili (Ritba) and Nissim Gerondi (Ran). This approach, which I will call the constitutive model, has its source in the explanation Nachmanides provides for obeying every legal ruling made by the court even if it says "of the right that is left and of the left that is right": "...Scripture, therefore, defined the law that we are to obey the Great Court...For it was subject to their judgment that He gave them the Torah, even if it appears to you to exchange right for left". This explanation does not recognize an a-priori right and left; rather, the court itself defines what is right and what is left. In other words, the court cannot be mistaken about the halakhah, because it has the privilege granted by the author, to constitute the very meaning of the text.[11] According to the constitutive view, legal reasoning does not retrieve a given lost body of knowledge, nor does it derive new norms from a fixed body of transmitted tradition, but rather it constitutes those norms. Nachmanides' explanation - "For it was subject to their judgment that He gave them the Torah" reappears in his students' work who provide new account for controversy. While both ibn Daud's and Maimonides' attempt to explain the rise

of controversy focused on the story of the students of Hillel and Shammai which describes controversy as a sign of decline Ritba comments instead, on a talmudic statement with a different orientation to the problem:

'These and these are the words of the living God'. The French Rabbis of blessed memory asked how it were possible that both positions could be the words of the living God when one prohibits and the other permits, and they answered: When Moses ascended to heaven to receive that Torah they have shown him forty nine reasons for prohibition and forty nine reasons for permission concerning each rule. He asked God about this and God answered that the matter will be given to the sages of Israel in each generation and the ruling will be as they decide.[12]

The same question is raised by Nissim Gerondi in his *Derashot ha-Ran*, and his answer explicates in fullness the constitutive account of the history of halakhah:

It is a known fact that the entire Torah, written and oral, was transmitted to Moses, as it says in the tractate Meggilah, R. Hiyya bar Abba said in the Name of R. Yohanan: The verse: "...and on them was written according to all the words.." teaches that the Holy One blessed be He showed Moses the details prescribed by the Torah and by the Sages, including the innovations they would later enact. And what are those? the reading of Meggila. The 'details' provided by the rabbis are halakhic disputes and conflicting views held by the sages of Israel. Moses learned them all by divine word with no resolution every controversy in detail. Yet [God] also gave him a rule whose truth is manifest, i.e., 'Favor the majority opinion'....as the sages of that generation saw fit, for the decision had already been delegated to them as it is written: 'And you shall come to the priest the Levites, and to the judge that shall be in those days' and 'You shall not deviate....'.

Unlike ibn Daud's explanation that controversy arises through a crisis in the process of transmission and unlike Maimonides who claimed that controversy begins with the introduction of the human component in the creation of halakhah, both Ritba and Nissim Gerondi describe controversy as rooted in the very structure of revelation. The body of knowledge transmitted to Moses was not complete and final as ibn Daud described it, but rather open-ended, including all future controversies as well. Moses passed on this multifaceted body of knowledge and left it to the court in each generation to constitute the norm. The process of the dissemination of knowledge is thus perceived as the inverse of ibn Daud's model. Ibn Daud represents a complete and a clear cut body of knowledge at tradition's starting point, which gradually erodes and becomes open-ended through neglect. In the Ritba and Ran's account open-endedness and multifacedness is the starting point while in time this open-ended body of knowledge becomes definitive, each generation constituting - out of the multiplicity of options transmitted to them - clear-cut norms. In this respect the constitutive model differs as well from the Maimonidean accumulative approach, and in his argument that controversy arose through the attempt to derive newly reasoned norms from a clear-cut body of knowledge.[13] In addition to a completely different account of controversy and history of knowledge, this approach offers an alternative view of legal reasoning. Legal reasoning is not used to reconstruct and restore a lost, perfect moment, nor is it used to derive new norms by way of induction from given clear premises. Instead, it constitutes and shapes an open-ended body of material. This model affects notion of authority as well. The authority of the scholars in matters of halakhah, does not rest on proximity to the source, which is open-ended in any case. It is based on a privilege given by the Torah itself that norms should be constituted by the sages. A challenge to the interpretative process through an appeal to true 'true' meaning

of the text is ruled out, since it is the court that constitutes this meaning out of the multiplicity of given options. It comes as no surprise, then, that in the constitutive view generational gaps are in theory not crucial. Indeed, the Ran continues to say: "Permission has been granted to the rabbis of each generation to resolve disputes raised by the Sages as they see fit, even if their predecessors were greater or more numerous. And we have been commanded to accept their decisions, whether they correspond to the truth or to its opposite".

Nachmanides was the first halakhist to introduce the bold conception that the Torah was given: 'subject to their [the sages] judgment that He gave them the Torah'. As was shown above, this statement provided the foundation for the constitutive approach among his school. Yet, it is important to stress that the statement was understood differently by Ritba and the Ran. In addition it received a third explication by another author who belonged to Nachmanides school the anonymous author of Sefer ha-Chinukh. Ritba understood revelation as completely open-ended and pluralistic, attributing from God's point of view equal weight to each side of the debate. The sages have in such a case a strong constitutive power to determine and shape the law out of multiple equal options. In contrast, the Ran argues that although God revealed the Torah with different opposing options, from God's own perspective there is a right answer. Such a right answer can even be accessed for example by a prophet, or expressed directly by God through a 'bat kol' a heavenly voice. The Ran argues innovatively that although there is a right answer, from God's point of view, and although the sages are aware of that right answer, they have to follow their own understanding since 'Torah is not in heaven'. The Ran's position is manifested in his explanation of the famous story of 'Tanuro shel Achnai', where the sages refused to follow the heavenly voice which ruled according to their opponent R. Eliezer:

..they all saw that R. Eliezer follows the truth more than them, and his miracles were all true and right and it was ruled from heaven according to his [R. Eliezer's] opinion, nevertheless they acted according to their ruling. Since their reason tended to declare [the oven] impure, even though they knew that their rule opposite the truth they did not want to purify, because if they ruled [the oven] pure they would have transgressed the words of the Torah. This is the case because their reason tended to [rule the oven as] impure and the ruling was granted to the sages of the generation - whatever they decide it is what God commanded.

According to the Ran, the sages who argued with R. Eliezer knew God's contrary opinion on the matter through the heavenly voice induced by R. Eliezer, nevertheless they followed their own understanding. The rule that the 'Torah is not in heaven', grants the sages a constitutive privilege, even against God's own choice. The sages constitute the truth of the matter from the human point of view aided by their reasoning, autonomously from their knowledge of God's opinion. Thus, the Ran differs from the Ritba in understanding the constitutive privilege of the sages as formulated by Nachmanides (both use Nachmanides own terminology). Ritba, on the one hand grants a greater constitutive power to the sages, since they shape the truth of the matter out of a completely open-ended revelation. On the other hand, although the sages constitutive power - according to the Ran - is more limited in its scope, it is more daring in its application. Since, according to the Ran, the sages constitute halakhic answers even against what they know to be God's view of the matter. Yet, in spite of their differences the Ritba and the Ran share the constitute approach. Both describe controversy as rooted in revelation itself, and both assume a constitutive power of the sages.[14] In that respect they deeply differ from the retrieval and the accumulative models of Ibn-Daud and Maimonides.

Each of these three 'histories' has a history of its own in the writings of halakhic authorities after the Middle Ages which needs further exploration. Among them I would like to present a fascinating responsum of R. Yair Bakhrakh. In this responsum which appears in Bakhrakh Havot Yair, all three models are juxtaposed. Through his attempt to find his own way among the different alternatives, Bakhrakh sheds light on internal problems inherent in each model, and his discussion is of great value for further explication of what is at stake in the way the history of halakhah is perceived.

In the first part of his responsum Bakhrakh marshals an impressive amount of counter-evidence, to Maimonides view that on laws that were given to Moses at Sinai there is no controversy. Through his long and detailed criticism of Maimonides' position, R. Yair Bakhrakh shows that the Talmud is full of controversies concerning such norms. Among the interesting talmudic material Bakhrakh uses are not only the actual controversies that exist throughout the Talmud on 'halakhot le-Moshe me-Sinai', but aggadic material as well that attests to the pervasiveness of forgetfulness. Three thousands halakhot were forgotten after Moses' death, and even Moses himself forgot halakhot that were given to him at Sinai. Forgetfulness is imminent from the very moment of reception and tradition can only erode further in each subsequent stages of transmission. Bakhrakh's explanation for the rise of controversy is thus similar to ibn Daud's and the motif of forgetting is present throughout his responsum. He concludes: 'It is clear that forgetfulness and controversy are present in halakhah le-Moshe me-Sinai'. (Havot Yair, 192)

After refuting Maimonides position, Bakhrakh has a wonderful formulation of what is at stake in this debate:

Behold, the Rav [Maimonides] built a fortified wall around the oral law - in writing that concerning [the received traditions from Moses] forgetfulness never exists. Would that we could strengthen and rebuild such a wall! What in my [Bakhrakh's] opinion is impossible. Indeed, all that was gained [in Maimonides' position that there are no controversies concerning the norms Moses received] was lost, through his declaration that the remainder of the Sages' controversies - which constitute most of the oral Torah and almost all of the Mishnah- are not from Sinai.

Bakhrakh points out that the price paid by Maimonides' position, which strengthens the credibility of tradition by ruling out the possibility of controversy, is to exclude most of the oral Torah, replete as it is with controversies, from its divine source at Sinai. Bakhrakh, supported by massive evidence from the Talmud itself, opts for a counter-Maimonidean history of knowledge which roots the entirety of oral law in revelation. He thus arrives at a position very similar to that of ibn Daud's. But in the heat of his debate with Maimonides, Bakhrakh distanced himself from the retrieval model on an important point. As I mentioned earlier this model typically marginalizes the place of controversy. Bakhrakh's affirmation - central to his argument against Maimonides - that most of the Mishnah and the oral Torah is replete with controversies - is a diversion from the retrieval model . This argument, used so skillfully against Maimonides, seems, in fact to undermine Bakharakh's own position. If Bakharakh is right in simultaneously asserting two positions i.e., that all of the oral law was given at Sinai and that the Mishnah is composed almost entirely of debates, it follows that most of the oral law was forgotten. It makes sense to base the authority and meaning of the oral law in revelation at Sinai if we marginalize the place of controversy, as ibn Daud and Nieto asserted. If most of the oral Law was indeed

forgotten, not much is gained by claiming that it was all given at Sinai. Under the pressure of this problem, Bakhrakh explores the constitutive approach - that all of the oral law was given at Sinai including controversies. His examination of this view reveals other internal conflicts in the attempt to portray an ideal structure of the history of knowledge:

And concerning the statement in the first chapter of tractate Berakhot, that the Mishnah and Talmud were given to Moses from Sinai, there is yet a vital issue demands investigation: Does that mean that all the opinions mentioned in the Mishnah and Talmud and their counterparts were revealed to Moses? As it is said in the tractate Hagigah, the verse "all were given by one Shepherd", refers to the opinions of those who defile and those who purify, those who disqualify and those who approve, those who prohibit and those who permit, those who obligate and those who acquit. And the Ritba said that the expression "These and these are the words of the living God" means that God told Moses that ruling should be handed over to the generation's sages... .

Bakhrakh then proceeds to criticize the constitutive view:

..This is questionable, since what advantage could come from the sages' decision that something is pure if it is truly impure and that [truly impure thing] has the power to arouse the Kelippah and defilement and the Sitra Akhra? Of what good is a physician's contention that poison is the elixir of life? We could content ourselves with what, in truth, is an unsatisfactory explanation, saying that impurity and the evil husks do not gain strength with every instance of contact or eating or intercourse or any loathsome act, but only because certain acts are evil and despicable in the eyes of God; and if God would say that the court can decide the matter as they wish, no harm would be done... .

Bakhrakh's discussion of the constitutive model links the view of the history of halakhah with the problem of the meaning and effect of the mizvot. According to Bakhrakh, the claim that the Torah was given open-ended and left to the sages' future decisions is incompatible with a strict ontological conception of the commandments. According to such a conception, halakhic categories such as pure and impure do not reflect mere legal concepts. They are, rather, causally connected to the very nature of reality. The proper analogy to impurity is poison. This view of halakhic categories defines a strict notion of truth in the legal process. Something is truly impure if it affects reality in a negative manner and vice versa. Therefore, such a view of the causal impact of halakhic categories makes those categories completely independent from human decisions. Just as a physician's pronouncement that a poison is curative is devoid of sense so the sages' ruling that something truly impure is pure has no meaning.[15] The constitutive approach is thus completely foreign to a strict ontological conception of mitzvot. The problem of the place of human creativity in halakhah, as reflected in opposing accounts of its history, is thus connected to a deeper issue of the ontological status of halakhic legal categories.

Bakhrakh, who adheres to the ontological view, attempts to reconcile it with the constitutive approach. According to his reformulation, reconciling the two, the ontological impact of halakhic categories ought to be mediated through God's will. There is nothing in the nature of impurity as such that affects reality. Rather, it is because impurity is despicable in God's eyes that it has a negative impact on reality. Therefore, if God grants the court the privilege to distinguish pure from impure, that will in turn bear a causal impact on reality. According to this reformulation of the causal connection, there is nothing "truly" impure as such, but only through God's will. Bakhrakh's discussion of the constitutive view

introduces the tension between the ontological qualities he attributes to halakhic categories, and the open-endedness of revelation, which depends on future human decisions. Although he formulates an ontology that seems to solve the problem, Bakhrakh is dissatisfied with the solution. In the continuation of the responsum he returns to explore the Ritba's formulation and rejects it:

Concerning what is written in the first chapter of Erubin, 'These and these are the words of the living God' , and in the fourth chapter of Hagigah "all of them [conflicting opinions] were spoken by one God": The Ritba wrote that God gave Moses forty nine arguments for [a ruling of] impure, and forty nine for [a ruling of] pure, and that the final decision should be left to the sages of Israel....How very strange it is to say that God did not express His true opinion and will concerning the halakhah and the interpretation of scripture. In fact, the opposite is more reasonable - that in apprehension of controversy God should have clarified the norms and made His will known.Therefore on what basis can one fabricate the contention that God pronounced a mistaken opinion along with the true opinion? Perhaps He said only the truth but it was forgotten... .

In a pattern very similar to his criticism of Maimonides' accumulative history of halakhah, Bakhrakh criticizes Ritba's constitutive approach. The Ritba's attempt to ground all of the oral Law, including contradictions, in open-ended revelation undermines the element of truth in revelation. It is interesting to note that R. Yair Bachrach faces a tension inherent to his kabbalistic background. On the one hand, the theology of Kabbalah that pictures God as a multi-dimensional organic being, allows for a conception of an open-ended revelation filled with many contrary opinions mirroring God's own inner multiplicity; and indeed many formulations of an open-ended pluralistic revelation are cast in kabbalistic terminology.[16] On the other hand, the ontological view is at the center of kabbalistic conceptions of

halakhah. Bachrach opts for the strict ontological view, and claiming that open-ended conceptions of revelation undermine the ontological causal effect of halakhah. Faced with this dilemma, Bakhrakh returns to the retrieval model: truth was given in complete and definitive form at Sinai but it was forgotten. By juxtaposing all three models Bakhrakh's fascinating discussion reveals the internal tensions inherent in all three of them. Do we have to safeguard tradition at the expense of the exclusion of debates from revelation, debates which make up most of the Mishnah? Must we include controversies in the open-ended revelation at the expense of the very idea of halakhic truth and the ontological effect of legal categories? The alternative to the accumulative and constitutive models - the retrieval model - is what Bakhrakh chooses. Yet the undeniable impression remains that the pervasive presence of forgetfulness in the retrieval model troubles Bakhrakh all through the responsum. At times he seems to be less like a proponent of any one position, than a juggler who would like to keep all three of them in the air at the same time.

We have examined three different histories of halakhah and especially the emergence of controversy as they are described from within. Each structures the basic conceptions of the halakhah in its own way through the story it tells about its history.[17] The role of legal reasoning, the emergence and account of controversy, and notions of authority - elements that are fundamental to any legal system - are shaped differently in each of the three versions. In addition essential to each model is a different understanding of truth in halakhah. Ibn Doubt's retrieval model assumes a correspondance theory of halakhaic truth, Maimonides' accumulative model implies a coherence notion of halakhic truth, and the constitutive model as presented by the Ritba, undermines the very idea of an a-priori criterion for examining such an issue. In R. Yair Bakhrakh discussion a fourth conception of halakhic truth was introduced, that of ontological causal

affect on the state of the world. As told from within these histories attempt not to uncover the past for its own sake, but to organize the complex legal reality into a coherent structure. In this respect, they function like mythologies which account for the most fundamental aspects of human reality - death, birth, labor, evil and so on. The complex matrix of life cannot be reduced to one story, and for that reason the body of halakhic literature present us with multiple ones.

The History of Halakhah, Views from Within: Three Medieval Approaches to Tradition and Controversy

by Moshe Halbertal

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FOOTNOTES

1. On the background of Karaite polemics to Ibn Daud's view see G. Cohen, Introduction to Sefer ha-Kabbalah (Philadelphia, 1967) and also see B. M. Levin, **Igeret Rab Shrira** Gaon (Jerusalem, 1972) pp. 3-7.

2. See *ibid.* p. 6-8, and also the material from the Geonim quoted in notes 3,6.

3. See *ibid.* p 18-19.

4. Sefer ha-Kabbalah, pp. 3-4

5. Ibn Daud mentions another source for the sages' authority which is universal agreement, but this principle is restricted only to enactments not to the Mishnah as such. For an extensive discussion of the complicated problem of intergenerational authority in halakhah see I. Ta-Shma, "Halakhah ke-Batrai" **Shnaton ha-Mishpat ha-Ivri** vol. 6-7 1979-1980, and I. Yubal, "Rishonim ve-Achronim" *Zion* 57 (1992) pp. 369-394.

For a modern debate on the source of the authority of the Talmud see: R. Elchanan Vasserman's opinion in **Kovetz Shiurim**, *Divrei Sofrim* pp. 96-97. Hazon Ish, **Kovetz Inyanim** pp. 194-7. For an extensive discussion on the problem see S. Z. Havlin, "al ha-Chatimah ha-Sifrutit" in **Mechkarim ba-Sifrut ha-Talmudit**, (Jerusalem, 1983) pp. 148-192.

6. Maimonides innovative approach in relation to the Geonim was pointed out by C. Tchernowitz, **Toldot ha-Halkhah** (New York 1948) vol. I p. 88, see also the extensive discussion on the problem in I. Twersky, **Introduction to the Gode of Maimonides (Mishneh Torah)** (New Haven, 1980) pp. 62-74.

7. Maimonides repeats this point in his introduction to the commentary of the Mishnah and his introduction to the Mishneh Torah. In the introduction to the Mishneh Torah he describes this category in the following terms: "The norms that

were innovated in each generation - laws that were not received by tradition - but [were derived] through a midah of the thirteen midot".

8. On the relationship between Ibn Daud's account of controversy and Maimonides account see D. Hartman **Maimonides Torah and Philosophic Quest**, (Philadelphia, 1976) pp. 112-116.

9. On the nature of interpretation as derivation and rules of interpretation as rules of inference and the consequence of this conception of interpretation and controversy see M. Halbertal, "Sefer ha-Mitzvot la-Rambam" **Tarbiz** 59 (1990) pp. 457-480.

10. On notions of halakhic truth, see A. Sagi, important discussion in "Halakhic Praxis and the Word of God: A Study of Two Models" in **J. Jewish Thought and Philosophy** vol. 1 (1992) pp. 305-329.

11. See also Ramban, **Sefer ha-Mitzvot** Hasagah le-Soresh Rishon.

12. **Hidushei ha-Ritba**, Erubin 13b. The tosafist R. Samson of Sens might have been the source of Ritba's conception of an the open-ended revelation. According to R. Samson this conception provides the reason why the Mishnah records minority opinions: "...Although the individual's claim were at first not accepted and many disagreed with him, at other times many may come to agree with his reasons and Halakhah will follow them. The whole Torah was given to Moses with aspects of purity and aspects of impurity, and when they asked him how long they should continue to debate he said to them follow the many but both are the words of the living God". Tosfot Shantz Eduyot 1,5. For another medieval author who precribes to the same model see R. Jacob of Marvege, **Shelot u-Tshubot min ha-Sahmim** R. Margalioth ed. (Jerusalem: Mosad ha-Rav Kook) 3. The same idea is expressed in kabbalistic terminology for example Meir ibn Gabai, **Avodat ha-Kodesh** (Cracow, 1576) Helek ha-Tachlit ch. 23. Shlomo Lurya, **Yam shel Shlomoh** (Bnei Brak, 1959-60) introduction to tractate Hulin and in R. Shmuel be-Rabi Izhac, **Midrash Shmuel** (Cracow, 1593) Avot 5, 19. R. Shlomoh Ephraim of Lunzeiz, a sixteenth century figure made a bold analogy between the revelation at Sinai and the structure of the Mishnah. Like the Mishnah the revelation was handed to Moses with counter arguments with the intention that future generation can rely upon those overrule the existing law according to the need of the hour, the Torah itself was revealed as a flexible canon see **Amudei Shesh** (Prague, 1607) ch. 20.

13. It is important to note that the different accounts of the history of halakhah and controversy which we analyze stem from tensions within the Talmudic

material itself - as for example the difference between controversy as a result of decline or controversy as inherent to revelation. This point will need further explication.

14. Unlike Ritba and Ran, the author of Sefer ha-Chinuch an adherent of Nachmanides, uses Nachmanides terminology in a nonconstitutive fashion. According to Sefer ha-Chinukh, "the intention of the Torah was handed to the sages of isrel". But such a privilege is merely procedural and not consitutive. The sages have to be obeyed even if they are mistaken since a legal system cannot allow anarchy: 'it is better to endure one mistke, and everybody will be obedient to their opinion which is usualy correct, and not that each will follow his poinion which will result in the destruction of the law and the division of he heart of the people and the complete loss of the nation. Because of such considerations the intention of the Torah was handed to the sages of Israel' Mitzvah 508.

15. The same ontological outlook of halakhah is manifested in Yehudah ha-Levi's Kuzari. Ha-Levi who uses the medical metaphor as well attempts to minimize the human innovation in halkhah and relies heavily on the concept of recieved tradition, since he is an adherent of the ontological outlook. See **Kuzari** 3; 39.

16. See above note 12, for such formulations which many of them are cast in kabbalistic language.

17. For a very helpfull phenomenological analysis of different notions of the Oral Law, and their relations to problems of authority and innovation, see Y. Silman, "Torah Elohit sh"Lo ba-Sahmaim - Beirur Tipologi" **Sefer Bar Ilan**, Jerusalem 1988, pp. 261-286.