

“FOR THE JUDGMENT IS GOD’S”:  
HUMAN JUDGMENT AND DIVINE JUSTICE IN THE  
HEBREW BIBLE AND IN JEWISH TRADITION

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INTRODUCTION

One of the most striking images of God, both in the Bible and in Jewish tradition generally, is that of judge: “The judge of all the earth.”<sup>1</sup> In this sense, one may describe God as He who holds in His hands all legal authority: He is the legislator, He is the judge, and He is the one who executes judgment. Alongside God’s judgment, the Bible recognizes the existence of a human system of judgment, in which human beings act as judges; indeed, it even commands it: “You shall appoint judges and officers in all your gates.”<sup>2</sup> What is the relation between God, the judge of all the earth, and those human beings who fulfill the function of judges? The majority of classical Jewish sources in the Bible and in Rabbinic literature that deal with law and the legal system reflect a certain relationship between human judgment and divine justice. Thus, we find in the Bible the notion that God emanates His authority to the judges who perform this function. In this spirit, Moses commands the judges whom he has appointed: “judge righteously. . . for the judgment is God’s.”<sup>3</sup> The relation assumed here between God and human judgment finds expression in different ways, extending over a considerable spectrum. At one end, one might describe God as the transcendent source of authority of the legal system, whose practical significance is limited. On the other end, one might describe it as a Divine Presence that inspires the judges and even allows them to appeal to God and to involve Him in the legal decision.

The relation between human judgment and Divine justice is not a purely theological matter; it has implications for the nature of the

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1. Gen 18:25 (All Biblical citations are taken from the King James Version or from the new King James Version unless otherwise stated).

2. Deut 16:18.

3. Deut 1:16-17.

judicial process, the perception of the judges' authority, the laws of evidence, the degree of judicial discretion, and other matters. This article argues that a relationship between God and human judgment is one of the basic assumptions underlying the nature of judgment in the Jewish tradition generally. This assumption finds expression on all literary and historical levels of the *halakhic* tradition, from the Bible through the Talmudic literature, and down to medieval and modern literature. Nevertheless, the theoretical meaning and practical implications of this relationship between God and human judgment has changed from time to time. This article will explore the main models of this relationship and will analyze its meanings and legal implications.

Scholars of Jewish law have noted the motif of God's presence in judgment, primarily in the Talmudic context, taking particular note of the influence exerted by this motif on the feeling of "fear of judgment." The latter idea found expression in the reluctance to engage in judgment altogether and to issue decisions regarding difficult questions in particular. The majority of these studies focused on Talmudic sources and paid less attention to extra-Talmudic sources: the Bible on the one hand and post-Talmudic exegesis on the other.<sup>4</sup> Likewise, the full significance of this motif has not been elucidated. As a result, only a partial and fragmented picture has been received. The present article attempts to fill this gap, extending the literary and thematic framework to encompass the Bible and Talmudic and medieval literature, as well as to emphasize the dynamic dimension of the tradition with regard to this issue.

Part I of this article will deal with the Hebrew Bible. In this context, I will consider two primary models of the relation between God and judgment. The first is what I would call "Divine judgment," in which the judicial process is understood as the expression of a Divine decision. In this model God is present in judgment, and one may even

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4. P. Schiffman, *Doubt in Halakhah and in Law*, 1 SHENATON HA-MISHPAT HA-IVRI 336-39 (1974) (Hebrew); A. Radziner, *The Fundamentals of Laws of Penalties in Talmudic Law* 278-81 (2001), (unpublished Ph.D. dissertation, Bar-Ilan University) (on file with author) (Hebrew); B. Lifschitz, *Compromise*, in MISHPETEI ERETZ 137 (Y. Ungar ed., Mishpetei Eretz Inst. 2002) (Hebrew); B. Lifschitz, *Compromise*, in THE JEWISH POLITICAL TRADITION OVER THE GENERATIONS 83 (Bar-Ilan Univ. Press 2010) (Hebrew); I. Gruenwald, *God and Man in Jewish Law: The Philosophical Aspect and its Practical Consequences*, 43 JEWISH STUD. 201 (2005-06) (Hebrew); Yuval Sinai, *The Religious Perspective of the Judge's Role in Talmudic Law*, 25 J.L. & RELIGION 357 (2009-10); Ariel Rosen-Zvi, *'For the Law is God's': On the Force of Law and Its Power in Face of Its Limitations and Boundaries*, 17 TEL AVIV U. L. REV. 5 (1992) (Hebrew). A broader and more theoretical treatment of this topic was presented recently in an article by Bernard Jackson, *Human Law and Divine Justice: Toward the Institutionalisation of Halakhah*, 9 JSIJ 1 (2010).

appeal to Him for a legal ruling. The second model is that of "human judgment," in which the judicial process is understood in human, rational terms. In this model, God is perceived as transcendent; hence, it is impossible to involve Him in the judicial process. The relationship between God and human judgment can hence be described only in terms of delegation: God authorizes the judges to do justice. The bulk of this discussion will be devoted to distinguishing and evaluating the place of these two models in Biblical law.

Part II of this article will be devoted to Talmudic literature. On the one hand, the Talmudic sages rejected the approach of "Divine law" and insisted that judgment be conducted via a rational process. On the other hand, they accepted an approach implying the immanent presence of God in judgment. This hybrid position demands explanation. What is the significance of God's presence in judgment if, in practice, it is impossible to address Him? In this context, I shall focus upon two main points: first, the contribution of this approach to solidifying the authority of the judge; second, the weighty responsibility that it imposes upon the judge. I will devote particular attention to the issue of the relation between the approach of Divine Presence and the issue of judicial discretion. Does the approach of Divine Presence require the judge to adhere rigorously to the law of the Torah, or does it allow him broader discretion and personal judgment?

Part III of this article will be devoted to the theoretical and legal interpretations given to the idea of God's presence in judgment in both the philosophical and in the *halakhic* literature of the Middle Ages. I will begin by comparing the interpretation given this idea in rationalistic philosophy, as represented by Maimonides, writing in Egypt in the twelfth century, with that found in the mystical circles of the Kabbalah, as represented by Moses Nahmanides, writing in Spain in the thirteenth century. I will then turn to the interpretation given to this idea by R. Nissim Gerondi, writing in Spain in the fourteenth century, who represents a Rabbinic approach that did not explicitly adhere to either philosophy or Kabbalah. Particular attention will be paid to the connection between R. Nissim's interpretation of the concept of presence and the political theory that he developed regarding separation between the law of the Torah and the law of the king.

At the end of Part III, I will analyze the legal interpretation given to the concept of presence by R. Moses of Coucy in his *Book of Commandments*, writing in France in the thirteenth century. R. Moses of Coucy perceived the legal process as conducted in accordance with Torah law as a sacred process, requiring great caution. He

recommended that judges refrain from committing themselves to judge according to Torah law and judge instead on the basis of an alternative track, one of compromise or arbitration based upon the agreement of both sides. This recommendation was accepted by the major *halakhic* codes at the end of the Middle Ages (*Tur* and *Shulhan 'Arukh*), and thereby exerted a decisive influence upon the shaping of *halakhic* judicial procedures.

#### I. THE HEBREW BIBLE: DIVINE JUDGMENT AND HUMAN JUDGMENT

God's image in the Bible as supreme Judge is connected with His status as supreme ruler. This activity, however, is not understood merely as an expression of power, but also, and primarily, as one of justice: "With righteousness He shall judge the world, and the peoples with equity."<sup>5</sup> God's judicial activity pertains to both the individual and the public, to Israel and to other nations, to the present time and to the End of Days. God's judgment occupies an important place in prophetic and in historiographic literature, but is also mentioned in the legal sections of the Bible, where it is integrated within the system of punishment, as expressed in the punishment of *karet* ("excision").<sup>6</sup>

But the Bible does not suffice with Divine justice. Biblical law assumes and even requires the existence of a human system of law by which to judge transgressors and to rule in interpersonal disputes. Within this framework, human beings perform the judicial functions; they serve as judges, and they are responsible to execute the sentences. From the Biblical viewpoint, one might say that God is the one who authorizes the judges to judge and to act in His name. Moses' words to the judges, mentioned earlier, emphasize this point: "judge righteously . . . for the judgment is God's."<sup>7</sup> King Jehoshaphat speaks in similar fashion to the judges: "for you do not judge for man but for the Lord who is with you in the judgment."<sup>8</sup>

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5. Ps 98:9.

6. The punishment of *karet* (excision) is mentioned in the Priestly Code alone. Most Biblical commentators assume that it refers to death at the hands of Heaven, but some argue that it means the cutting off of one's seed, whether by death without offspring or through the death of the latter. See D.J. Wold, *The Meaning of the Biblical Penalty of Kareth* (1978) (unpublished Ph.D. dissertation, University of California at Berkeley (on file with author); D.J. Wold, "The Kareth Penalty in P: Rationale and Cases," SBL Seminar Papers 1979, I.1; S. Loewenstamm, s.v. "*Karet*," 4 *ENCYCLOPAEDIA BIBLICA* 330 (Bialik Inst. 1952-82) (Hebrew); B.Y. SCHWARTZ, *THE DOCTRINE OF HOLINESS—STUDIES IN THE PRIESTLY CODE OF THE TORAH* 52 (Hebrew Univ. Magnes Press 1999) (Hebrew).

7. Deut 1:16-17.

8. 2 Chron 19:6.

The relationship between God and judgment implicit in this approach may assume various different forms. For purposes of the following discussion, I wish to draw a distinction between forms of "Divine judgment" and forms of "human judgment." By "Divine judgment" I refer to a judicial process performed by human beings, but which claims to represent the Divine decision. In this model, the judge—usually a priest or prophet—acts in the name of God, and his decision is considered tantamount to God's decision. In difficult cases, the judge may use various special means aimed at uncovering the Divine decision. In particular, judges may make use of lots and ordeal. In contrast, "human judgment" is a judicial process carried out by human beings who do not fulfill any religious function and do not claim to represent the Divine decision. The judge conducts the trial procedure in a rational manner, ruling therein in accordance with the law and with the evidence brought before the tribunal.

These various approaches to judgment are related to different social and religious frameworks. Divine judgment is connected with the priesthood or prophecy, whereas human judgment was connected with other frameworks, such as that of the elders or the monarchy. In what follows, I shall describe various forms of Divine judgment and distinguish their incorporation within the framework of Biblical law. By this concept, I refer primarily to the various collections of laws incorporated within the Torah.<sup>9</sup> This examination draws attention to various approaches relating to the use of Divine judgment and the connection between law, ritual and prophecy.

#### A. Divine Judgment by Means of Lot

One of the main methods of conducting Divine judgment was by means of lot. This technique is well-known from the ancient Near East. It also appears in the Bible as an important tool for determining matters in a variety of contexts: in cultic matters, in political and military questions, and for purposes of legal decision.<sup>10</sup> The lot is perceived in

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9. The main collections of law are: (a) the collection of laws in Exod 20:22-23:33, which is generally referred to as the Book of the Covenant; (b) the laws of the Priestly Code, which are scattered primarily in the books of *Leviticus* and *Numbers*, but some of which also appear in *Exodus*; (c) the laws of the book of *Deuteronomy*, concentrated in Deut 12:1-28.68; (d) within the laws of the Priestly Code, it is customary to distinguish an independent unit, the Holiness Code, concentrated in Lev 17-26. On the various collections, see DAVID NOEL FREEDMAN, *THE ANCHOR BIBLE DICTIONARY* (Doubleday 1992); Raymond Westbrook, *The Laws of Biblical Israel*, in *THE HEBREW BIBLE: NEW INSIGHTS AND SCHOLARSHIP* 99-119 (F.E. Greenspahn ed., N.Y.U. Press 2008).

10. ANN JEFFERS, *MAGIC AND DIVINATION IN ANCIENT PALESTINE AND SYRIA* (E.J. Brill

the Bible as an expression of Divine will: "The lot is cast into the lap, but its every decision is from the Lord."<sup>11</sup> In the judicial context, the lot served primarily to locate and identify the unknown party guilty of certain transgressions. The lot was not used in a formal manner to convict the suspect; for that, his own confession was required.

For example, the lot was used to determine the guilt of Achan son of Carmi, who violated the ban that had been imposed upon Jericho.<sup>12</sup> In this case, Joshua son of Nun came to know by means of prophecy that there had been a violation of the ban, but he did not know who had performed it. He cast lots, by which means the guilty tribe, clan and family were successively "caught," until it pointed toward Achan himself. After identifying Achan in this manner, Joshua addressed him, asking him to admit his sin—and indeed, Achan confessed: "I have sinned to the Lord God of Israel, and this is what I have done."<sup>13</sup> In light of this confession, Achan was sentenced to execution by stoning. Thus, the lot was used to locate the guilty party, but his judgment was not concluded until he himself had admitted the deed.

Similar use was made of lot in the case of Jonathan son of Saul, who tasted of the honeycomb contrary to the orders of his father, the king.<sup>14</sup> In this case, not only was it not known who had sinned, but the exact nature of the sin was unknown. Because God refused to answer Saul regarding the question he presented to the priest ("Shall I go down after the Philistines? Will You deliver them into the hand of Israel? But He did not answer him that day."),<sup>15</sup> the inevitable conclusion was that some sin had been performed in Israel. To clarify the nature of this sin and the identity of the sinner, a lot was cast. After Jonathan was "caught," Saul addressed him to determine what he had done, and Jonathan answered, "I only tasted a little honey with the end of the rod that was in my hand. So now I must die!"<sup>16</sup> In wake of this confession, Jonathan was sentenced to death. But in the end, under pressure from the people, the sentence was commuted, and Jonathan was redeemed in exchange for redemption money.<sup>17</sup> Here, too, the lot served to locate the guilty party, whose sentence was only decided following his confession.

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1996); H. Gevaryahu & S. Loewenstamm, s.v. "Goral," 2 ENCYCLOPAEDIA BIBLICA 459 (Bialik Inst. 1952-82) (Hebrew).

11. Prov 16:33.

12. Josh 7:10-26.

13. Josh 7:20.

14. 1 Sam 14:37-45.

15. 1 Sam 14:37.

16. 1 Sam 14:43.

17. 1 Sam 14:45.

Yet another example of the casting of lots appears in the book of Jonah.<sup>18</sup> During the great storm at sea in which the ship was caught up, the sailors agreed to cast lots in order to determine “for whose cause this trouble has come upon us.”<sup>19</sup> The lot fell on Jonah, and in this case as well he was required to admit his deeds before being thrown into the sea.<sup>20</sup>

The first two cases, which represent official and “professional” use of the lot, are distinguishable from the case of Jonah, which involved a folk use of the same technique. In the latter case, the sailors made use of a technique usually reserved for people who were expert therein. In the case of Jonathan son of Saul, the lot was cast by a priest with the help of the Urim and Tummim.<sup>21</sup> The case of Achan does not explicitly state who cast the lot, but based on the similarity between the two cases, the traditional commentators assumed that it was performed by a priest in a similar manner.<sup>22</sup> In yet another case, the prophet Samuel used the lot in connection with the appointment of Saul as king.<sup>23</sup> In all these cases, the execution of the lot is described using a standard terminology, centered around the terms *QRB* (“to draw close”) and *LKD* (“caught”).<sup>24</sup> The one performing the lot “brings close” those who stand for the lot before the Lord, and thereafter one of them is “caught” in the lot. This description thus speaks of a series of binary decisions; at each decision stage, the question must be answered either “yes” or “no” until, through a gradual process, the ruling of the lot is received.<sup>25</sup>

Does the lot perform a function within the framework of the judicial process in the laws of the Torah? Notably, by way of introduction, the lot is explicitly mentioned in the Torah only in the collection of laws of the Priestly Code, which sees it as an explicitly

18. Jonah 1:1-16.

19. Jonah 1:7.

20. Jonah 1: 9-10.

21. The Masoretic text is somewhat unclear on this point. The version reflected in the Septuagint, according to which Saul sought out the Urim and Tummim, is more explicit. On this point, see the modern commentaries on the book of *Samuel*; e.g. P. KYLE MCCARTER JR., I SAMUEL 243, 247 n. 41 (Doubleday 1980).

22. See commentaries of Rashi, Radak and Ralbag in THE RABBINIC BIBLE; cf. Pirkei de-Rabbi Eliezer ch. 38, at 90.

23. 1 Sam 10:17-24.

24. Joshua 7: 14-18; 1 Sam 14: 36, 41-42; 1 Sam 10: 20-21.

25. In other contexts, another type of language is used, in which the lot “ascends” or “comes up” (עלה) from some storehouse. It is thus that the lot cast for the division of the land among the tribes is portrayed (Num 26:55-56; 33:54; Josh 18:5-6), as well as the lot used to choose the goat to be sent into the wilderness (Lev 16:8-10; *m. Yoma* 4.1). These passages seem to speak of two different techniques of casting lots, which were used for different purposes. See the studies on “lot” cited above, *supra* note 4.

priestly institution. The priest is the one authorized to conduct the lot, and the principal—and evidently the only—tool for its execution is the Urim and Tummim. The Urim and Tummim are part of the priestly vestments, and are placed upon the “breastplate of judgment” (*hoshen ha-mishpat*).<sup>26</sup> This fact may allude to the relation between the Urim and Tummim and judgment. However, the only “judgment” performed by the Urim and Tummim mentioned in the Torah are instructions pertaining to the military or political realm. Hence it is stated in connection with the appointment of Joshua: “and he shall stand before Eleazar the priest, who shall ask counsel for him after the judgment of Urim before the Lord.”<sup>27</sup>

Elsewhere the Torah mentions the use of a lot performed by other means. Thus, in the Temple ritual of the Day of Atonement, lots were cast to determine which of the two goats would be sent to Azazel.<sup>28</sup> It likewise serves as a central tool in the division of the land among the tribes.<sup>29</sup> The significant point for our purposes is that none of these instances used the lot to clarify or decide a legal question. It therefore becomes clear that the laws of the Priestly Code, which make use of the lot in various contexts, do not adopt it within the framework of the judicial process.

#### B. The Law of Bailees:

“The cause of both parties shall come before God”

This section examines whether the collection of laws in the Book of the Covenant makes use of the method of casting the lot. In the book of *Exodus*, the Book of the Covenant does mention a process of Divine judgment. For instance, in *Exodus* 22:6-8 a law appears concerning a person charged with caring for another’s property who claims that the object in question had been stolen from his home:

The master of the house shall be brought to God (*Elohim*) to see whether he has put his hand into his neighbor’s goods. For any

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26. Exod 28:30. See the survey by JEFFERS, *supra* note 10, at, 197-215; and I WILLEM VANGEMEREN, *NEW INTERNATIONAL DICTIONARY OF OLD TESTAMENT THEOLOGY AND EXEGESIS* 329 (Zondervan Pub. House 1997).

27. Num 27:21.

28. Lev 16:8-10.

29. Num 26:55-56; Num 33:54; and *cf.* Josh 18:5-6. Within these contexts, the sources mention the fact that the lot “ascends.” This term alludes to a different technique. According to the Talmudic Sages, in these cases speak of the drawing of slips of paper from a box (*see* Rashi’s comment on these verses). Some commentators think that the use of the lot in this context reflects an accepted practice of the use of lots for purposes of dividing property, such as at the time of inheritance. However, this practice is not explicitly mentioned in Biblical law.

kind of trespass . . . which another claims to be his, the cause of both parties shall come before God; and whomever God condemn shall pay double to his neighbor.<sup>30</sup>

The wording of this verse suggests that it speaks of a Divine judgment, although the meaning of this passage is disputed, and there are different interpretations of it. According to the interpretation widely accepted in the Jewish tradition, the word *Elohim* as used in this context does not necessarily refer to God, but rather to the judges,<sup>31</sup> an approach followed by a number of modern commentators as well.<sup>32</sup> However, this interpretation does not fit the plain meaning of the text. In the Bible, the name *Elohim* indicates God, and it is difficult to assume that "God" may easily be exchanged for "judge."<sup>33</sup> Further, the particular phrase, "and the owner of the house shall *come near (ve-nigrav)* to God" serves as a technical term to indicate the clarification of an oracular question before God. It is clear, therefore, that in this context the word *Elohim* must be interpreted in its literal sense, a view accepted by most modern Biblical commentators.<sup>34</sup> Namely, the passage speaks of a "Divine judgment"—that is, of a decision made before a priest or prophet who acts in the name of God.

30. I deviated here from the classical translation and stuck to the Hebrew source that uses the word *Elohim* (God). King James Version as many other translated version render the word *Elohim*: judges. Compare Exod 21:6 regarding the matter of the Hebrew slave: "then his master shall bring him to the judges," and Exod 22:28, "You shall not revile God, nor curse a ruler of your people." See also the tannaitic dispute concerning the subject, where Rabbi Akiba interprets the word "God" in this verse as referring to the Divine while R. Eliezer interprets it as referring to the judges. Mekhilta de-Rabbi Yishma'el, Kaspā, ¶ 19, at 317 (Horowitz-Rabin ed., and parallels).

31. Mekhilta de-Rabbi Yishma'el, Nezikin, 252 (Horowitz-Rabin ed.): "Then his master shall bring him to God"—before the judges"; and *cf. id.* at 15, p. 300, and Targum Onkelos. These texts were interpreted in similar manner by the medieval exegetes. See, e.g., commentaries of Rashi, Rashbam, Ibn Ezra, Ramban and others in RABBINIC BIBLE.

32. For example, see S.R. DRIVER, THE BOOK OF EXODUS 211 (Cambridge Univ. Press 1953) and compare M.D. CASSUTTO, A COMMENTARY ON THE BOOK OF EXODUS 186 (Varda Books 2005, 1982) (Hebrew): According to Cassutto, this passage speaks of an archaic, pre-Biblical linguistic expression, which originally referred to pagan gods, but once assimilated within the framework of the Torah is to be understood as referring to the court.

33. FRANCIS BROWN, EDWARD ROBINSON, S.R. DRIVER, CHARLES A. BRIGGS, THE NEW BROWN-DRIVER-BRIGGS-GESENIUS, HEBREW AND ENGLISH LEXICON: WITH AN APPENDIX CONTAINING THE BIBLICAL ARAMAIC (Hendrickson 1979); DAVID NOEL FREEDMAN, I THE ANCHOR BIBLE DICTIONARY 1006 (Doubleday 1992).

34. MARTIN NOTH, EXODUS: A COMMENTARY 184 (S.C.M. Press 1962); BREVARD S. CHILDS, EXODUS: A COMMENTARY 468-69, 475 (S.C.M. Press 1974); WILLIAM HENRY PROPP, EXODUS 19-40 (Doubleday 2006); NAHUM M. SARNA, EXODUS: THE TRADITIONAL HEBREW TEXT WITH THE NEW JPS TRANSLATION 120 (Jewish Pub. Soc'y 1991); BERNARD S. JACKSON, THEFT IN EARLY JEWISH LAW 237 n.1 (Clarendon Press 1972); BERNARD S. JACKSON, WISDOM-LAWS: A STUDY OF THE MISHPATIM OF EXODUS 21:1-22:16, at 337-44 (Oxford Univ. Press 2006).

The precise method of clarification is not explicated in our case, and therefore the meaning of the passage cannot be determined with certainty. Scholars disagree as to whether the procedure here is an oracle, perhaps by means of lot, or an oath taken before God. The phrase, “and the master of the house shall be brought (*ve-nigrav*) to God” alludes to the use of an oracle or a lot.<sup>35</sup> However, comparison with the subsequent law suggests the passage deals specifically with an oath. The adjacent law, regarding shepherding, likewise speaks of damage caused while caring for the other’s property, stating explicitly that “an oath of the Lord shall be between them both, that he has not put his hand into his neighbor’s goods; and the owner of it shall accept that, and he shall not make it good.”<sup>36</sup> The similar context and the identical language in both places support the view that the former case also speaks of an oath.<sup>37</sup> Notably, an oath was also understood within the framework of a “Divine judgment,” as it assumes the involvement of God in the event that the person swears falsely. Nevertheless the passage speaks of a decision based upon the confession of the person and not upon a lot.

To sum up, the law of bailees is an explicit example of a kind of “Divine Judgment.” However, the exact nature of this judgment is not entirely clear, and it is difficult to state with certainty whether this law involves the use of an oracle, probably by means of lot, or of an oath.

### C. Divine Judgment by Means of Ordeal

An ordeal is a physical test intended to determine the guilt of a person suspected of a crime and to pass sentence on him. The ordeal is

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35. In addition to the cases mentioned in the previous section, *see also* the case of the daughters of Zelophehad in Num 27:1-5, “And Moses brought (*vayakrev*) their case before the Lord.” The Rabbis raised the possibility that the case spoke here of a decision made with the help of the Urim and Tummim, but rejected it. *See* Mekhilta de-Rabbi Yishma’el, Nezikin (Mishpatim) 15, at 300.

36. Exod 22:9-12. The former case deals with guarding money or goods (according to rabbinic interpretation: *shomer hinam*: “an unpaid keeper”), whereas the latter refers to guarding an animal (*shomer skakhar*: “a paid keeper”). In the former case, the keeper claims that the object was stolen and, if his claim proves correct, he is exempt from payment. In the latter case, the keeper is responsible for theft, but is exempt in the event of *force majeure*. In such a case, he claims that an act of force has taken place. In either case, it is necessary to verify the claim of the keeper. The Rabbis interpreted both cases as speaking of an oath. *See, e.g.*, Mekhilta de-Rabbi Yishma’el, Nezikin (Mishpatim) ¶ 15, at 300; Mishnah (m.) Bava Metzi’a ch. 3; m. Shevu’ot, ch. 5.

37. This conclusion depends on the reliability of the extant text. Scholars debate the unitary and originality of each of these two laws. Specifically, some argue that the phrase “If he has not put his hand to his neighbor’s goods” (*im lo shalah yado be-melekhet re’ehu*) in the law of deposit is not original, thereby undermining the comparison between the two laws. For a detailed discussion, *see* JACKSON, *supra* note 34.

considered as a Divine test expressing God's decision. If the person passes the ordeal he is found innocent, and if he fails he is held guilty. Unlike the lot, intended to locate a suspect whose identity is unknown, the ordeal is implemented when a given person is suspected of having committed a particular act, but there is no testimony to support holding him or her accountable by law. The ordeal thus serves as a decisive proof, deciding the verdict of the accused.

The cultures of the ancient Near East, and later cultures as well, imposed various tests or ordeals.<sup>38</sup> For instance, the Laws of Hammurabi mention a test in which the accused was thrown into the waters of the river. Such a test was imposed upon an individual suspected of sorcery, as well as on a woman accused of adultery, but concerning whom there was no clear proof. If the waters overcame the accused, this proved guilt, but if the accused survived, this indicated innocence.<sup>39</sup> In this test, the punishment of the accused came about as a direct result of failure in the test.

In other cases, the punishment was separated from the ordeal and was imposed upon the accused by the judges. Such was the case, for example, in the trials by water and fire conducted in medieval Europe. In the test by water, the suspect was placed in water; if he sank, this proved his innocence, while if he floated, this indicated his guilt (as the pure waters refused to accept him). In the trial by fire, the person was seared and the burn was examined; if it healed within three days, he was innocent, and if not, he was guilty.<sup>40</sup>

Biblical law does allow for an ordeal of this type, but only rarely. The most striking and evidently the only case is the ceremony of the *sotah*, in which a woman accused by her husband of adultery underwent

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38. Tikva Simone Frymer-Kemsky, *Judicial Ordeal in Ancient Near-East* (1977) (unpublished Ph.D. dissertation, Yale University) (on file with author); Julian Morgenstern, *Trial by Ordeal Among the Semites in Ancient Israel*, HUCA JUBILEE VOLUME, 1875-1925, at 113 (Hebrew Union College 1925); H. GOITEIN, *PRIMITIVE ORDEAL AND MODERN LAW* (Allen & Unwin 1923); and compare the survey of D. Friedman, *Shall You Kill and also Inherit?*, in *LAW, ETHICS AND SOCIETY IN BIBLICAL NARRATIVE* 21 (Dvir Publ'g House 2000) (Hebrew).

39. Code of Hammurabi § 2, 132. Regarding a woman, the law distinguishes between an accusation brought by the husband, which imposes upon the woman the obligation of taking an oath, and one brought by some other party, which requires the test of the river. See GODFREY ROLLES DRIVER & JOHN C. MILES, *THE BABYLONIAN LAWS* 1-2 (Clarendon Press 1952-55). See also *supra* note 38 and accompanying text.

40. ROBERT BARTLETT, *TRIAL BY FIRE AND WATER: THE MEDIEVAL JUDICIAL ORDEAL* (Clarendon Press 1986); and see JAMES Q. WHITMAN, *THE ORIGINS OF REASONABLE DOUBT: THEOLOGICAL ROOTS OF CRIMINAL TRIAL* ch. 3 (Yale Univ. Press 2008). Jews made every effort not to undergo trials based upon these methods, and in a number of verdicts of innocence it is explicitly stated that Jews were exempt from the tests of fire and water. See Shlomo Eidelberg, *TRIAL BY ORDEAL IN MEDIEVAL JEWISH HISTORY: LAW, CUSTOMS AND ATTITUDES*, 46-47 *PAAJR* 105 (1979-80).

a trial by ordeal.<sup>41</sup> In this ceremony conducted by the priest, the woman was made to drink “bitter waters.” If she was guilty as accused, she was punished (“her belly will swell, her thigh will rot”)<sup>42</sup> and if not, she was found innocent (“she shall be free and may conceive children”).<sup>43</sup> The ceremony bears a priestly ritual character and not a legal character. It is performed by a priest in the Temple, not by a judge or by “the congregation,” the judicial body in the Priestly Code. It likewise does not result in punishment of the woman by human beings, but leaves that to the hands of Heaven.<sup>44</sup> The ceremony of the *sotah* may therefore serve as an example of “Divine judgment,” although its unusual character and ritualistic nature specifically indicate that, generally speaking, Biblical law does not allow the use of ordeal to reach legal decisions.

#### D. The Chapter of Jethro: From Divine Judgment to Human Judgment

The previous sections examined the place of “Divine judgment” in the Biblical law. This section will compare the normative texts discussed above to a narrative text, which describes the establishment of a judicial system by Moses.<sup>45</sup> This narrative portrays a transition from a primitive system of law, in which Moses judges the people by himself from morning till evening, to an organized system, presided over by a series of judges of various ranks and levels: officers of thousands, of hundreds, of fifties, and of tens. As we shall see, this story reflects a process of institutionalization and a move from divine judgment to human judgment.

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41. Num 5:11-31.

42. *Id.* at 5:27.

43. M. Fishbane, *Accusations of Adultery: A Study of Law and Scribal Practice in Numbers 5: 11-31*, 45 HUCA 25 (1974); Tikva Simone Frymer-Kansky, *The Strange Case of Suspected Sotah*, 34 VT 11 (1984); J. Licht, *The Examination of the Sotah as an Ordeal*, in *STUDIES IN THE BIBLE* 173 (M.D. Cassutto FS, Dvir Publ'g House 1987) (Hebrew).

44. According to its description, the ceremony seems to belong to that type of trial in which the punishment comes about as a direct result of the test itself. On the other hand, there is a clear distinction between this ceremony and the test of the river. Whereas in the test of the river the observers witnessed the immediate punishment of the woman, it is difficult to imagine that such was the case in the event of the *sotah*. It therefore seems more accurate to classify it as a punishment that comes from Heaven. See in this connection the description in the Mishnah, m. Sotah ch. 3, art. 4-5: “She does not suffice to finish drinking, until her face turns pale and her eyes bulge out and she is filled with sinews, and they say, ‘Take her out! Take her out! So that she will not render the Temple courtyards impure,’” and the subsequent discussion as to whether, if she has some merit, this may suspend her punishment. On the entire subject, see the discussion of Y. ROSEN-ZVI, *THE CEREMONY THAT NEVER WAS* 103-31 (Hebrew Univ. Magnes Press 2008) (Hebrew).

45. Exod 18:13-27.

In the original more primitive system described here, Moses acts as a judge-prophet, whose function was to decide various disputes according to the word of God. "Because the people come to me to inquire of God; when they have a difficulty, they come to me, and I judge between one and another."<sup>46</sup> The phrase "to inquire of God" is characteristic of appeal to God by means of a prophet or priest for oracular purposes,<sup>47</sup> in this context, addressing the prophet to resolve a legal matter. Thus, under this system, the prophet serves as a judge who implements "the Divine judgment."

In the narrative, however, Jethro was opposed to this method of operation due to its inefficiency or ineffectiveness, in that Moses was unable to fulfill the role of judge for the entire people by himself. Jethro instead proposes establishing a judicial system in which the judges are not prophets, but honest individuals from among the people: "able men, such as fear God, men of truth, hating covetousness."<sup>48</sup> These judges do not act by virtue of a prophet's supernatural powers, but on account of their own intellectual and moral qualities.<sup>49</sup>

Nevertheless, the prophet is not removed from the picture. Under the new system, the prophets engage in revealing the law: "Stand before God for the people, so that you may bring the difficulties to God. And you shall teach them the statutes and the laws, and show them the way in which they must walk and the work they must do."<sup>50</sup> As against that, the judges will deal with judgment: "and let them judge the people at all times."<sup>51</sup> The distinction drawn between the function of the prophet and that of the judge is similar to that drawn between legislation and judgment. The prophet deals with legislation, while the judges engage in judgment.

This background illuminates the distinction between "the small matter," which is given over to the judges, and the "great matter" or "difficult matter," which must be brought to Moses. It would appear that the "small matter" is something that is well-known, a case that falls

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46. *Id.* at 18:15.

47. Medieval exegetes debate whether the phrase "to seek out God" here indicates judgment or some other function of Moses. See commentary of Rashi, Rashbam, Ibn Ezra and Ramban in THE RABBINIC BIBLE. Modern commentators tend to see it in the context of judgment. See CHILDS, *supra* note 34, at 329-32. JACKSON, WISDOM-LAWS, *supra* note 34.

48. Exod 18:21.

49. See JACKSON, WISDOM-LAWS, *supra* note 34, at 422-25. Jackson emphasizes that Jethro rejected the old system on a practical basis and not in principle. However, as in many other reforms the declared reason does not always reflect the real one. The deeds are more important than the words.

50. Exod 18:19-20.

51. *Id.* at v. 22.

within the rubric of a known rule that had already been taught by Moses. As against that, the “great matter” is one that is not known, a case that poses a new question.<sup>52</sup> In other words, the judges are allowed to apply the law in a case in which there is a known rule, but are not permitted to make new law. In the event that the law is unknown, they must refer the matter to Moses, who will in turn bring it before God and teach the people “the statutes and the teachings” that he received from Him.<sup>53</sup> This division of labor assures that all the laws will be the word of God and that judgment will be performed in accordance with them.

The narratives of the Torah concerning the desert period reflect this model. When a new case not previously known arises, the matter is brought before Moses and he brings the matter before God; the answer he receives is then brought to the people. This pattern was applied both in matters of a religious or ritual nature and in matters of a civil nature. Examples include laws concerning persons who cursed God’s name,<sup>54</sup> persons who gathered sticks on the Sabbath day,<sup>55</sup> the inheritance of the daughters of Zelophehad,<sup>56</sup> and the offering of the Paschal sacrifice by impure persons.<sup>57</sup>

The story of Jethro thus establishes a “secular” judicial system, in which the judges are neither prophets nor priests, but ordinary decent individuals who come from the ranks of the people. The judge’s decision is a human one, which does not claim to represent the decision

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52. It was explained thus by Ibn Ezra (long commentary on v. 22), as likewise follows from Rashbam’s words in THE RABBINIC BIBLE. Some modern commentators also interpreted it in a similar fashion. *See, e.g.*, JOHN I. DURHAM, EXODUS 246-53 (Thomas Nelson 1987).

53. Exod 18:20. For a slightly different analysis of this story, *see* Baruch J. Schwartz, *The Visit of Jethro: A Case of Chronological Displacement? The Source-Critical Solution*, in MISHNEH TODAH: STUDIES IN DEUTERONOMY AND ITS CULTURAL ENVIRONMENT IN HONOR OF JEFFEREY H. TIGAY 29 (Nili Sachaer Fox, David Glatt-Gilad & Michael Williams eds., Eisenbrauns 2009). Schwartz emphasizes that “the statutes and laws” (*hukim ve-torot*) here do not refer to a system of commandments that Moses received from God, but rather to specific instructions for the cases brought before him. Thus, in his opinion “the statutes and laws” are specific rulings needed in cases that are difficult from the factual viewpoint (that is to say, where there is no conclusive evidence). However, I find the use of the term “statutes and laws” in this context problematic. As against that, according to my suggestion, these cases are difficult from the legal viewpoint—that is, where the law itself is not known. In such cases, the specific rulings create general laws; hence, the term “statutes and teachings” is appropriate. This matter is well exemplified in the fourth case mentioned above, in which Moses brought questions before God (the fact that from a critical viewpoint this belongs to a different source than the chapter of Jethro is not decisive in this respect). This reading also fits better, in my opinion, the logic of the story, as according to my suggested interpretation, in the final analysis, all disputes (and not only “the great thing”) are resolved according to the word of God, thereby providing a more complete response to the people’s request to “seek God.”

54. Lev 24.

55. Num 15.

56. Num 27:1-11.

57. Num 9:6-12.

of God. Nevertheless, this model does not reflect a completely autonomous human legal system. The system of law described here continues to rely upon an ongoing connection with the prophet, who provides it with new solutions. Without the prophet, the system could not address new cases or new questions.

#### E. The Book of Deuteronomy: Human Judgment

The book of *Deuteronomy* presents a detailed judicial system including both local courts “in all your towns” and a central court that sits in the Temple “in the place which the Lord your God chooses.”<sup>58</sup> It also contains many rules related to the operation of this judicial system. Scholars debate how to describe the relations between this human system and Divine justice. Some scholars see the Deuteronomistic legal system as a manifestation of Divine judgment.<sup>59</sup> This interpretation emphasizes Moses’ words to the judges—“for the judgment is God’s”<sup>60</sup> as an expression of “charismatic Divine justice” in which the judges are inspired by God. They also note the location of the central court in the Temple as a site that inspires the judges and even enables them to engage in oracular inquiry. But following the interpretation of Moshe Weinfeld, *Deuteronomy* can be seen as a reflection of a human judgment.<sup>61</sup> I believe that a close reading of the relevant passages demonstrates this interpretation.

*Deuteronomy’s* unique approach finds expression at the beginning of the book, where it describes the appointment of judges.<sup>62</sup> In this story, Moses repeats his instruction to the judges to bring every difficult matter to him. But, unlike the process described in *Exodus*, he does not bring them before the Lord, but decides them by himself: “The case that is too hard for you, bring to me, and I will hear it.”<sup>63</sup> As Moshe Weinfeld has noted, this distinction expresses a fundamental change in the nature of the legal system. According to *Deuteronomy*, the legal system is no longer connected with prophecy, but is an autonomous

58. Deut 17:8.

59. BERNARD M. LEVINSON, *DEUTERONOMY AND THE HERMENEUTICS OF LEGAL INNOVATION* 127-33 (Oxford Univ. Press 1997); JACKSON, *supra* note 34, at 411-22; Jackson, *supra* note 4.

60. Deut 1:17.

61. MOSHE WEINFELD, *DEUTERONOMY AND DEUTERONOMIC SCHOOL* (Clarendon Press 1972). For specific references, *see infra*.

62. Deut 1:9-18.

63. *Id.* at 1:17. The Rabbis of the Midrash distinguished this and said that for this reason, Moses was punished and forced to bring the case of the daughters of Zelophehad before God. Sifre on Deuteronomy ¶ 17, at 29 (L. Finkelstein ed., JTS 1969) and parallels.

system that has the power to resolve every problem, even the difficult ones, even if there is no precedent for it.<sup>64</sup>

Simultaneously, in his words to the judges, Moses maintains the connection between human law and the Divine: “judge righteously between a man and his brother or the stranger who is with him. You shall not show partiality in judgment; you shall hear the small as well as the great; you shall not be afraid in any man’s presence, *for the judgment is God’s.*”<sup>65</sup> As Moses creates an autonomous system unrelated to prophecy, these words must be understood in terms of delegation: the judges fulfill the function of God and therefore are responsible towards Him. Rather than a direct, prophetic relationship, *Deuteronomy* introduces a more abstract relationship, understood in terms of delegation.<sup>66</sup> Such a relationship is fitting to the transcendent conception of God characteristic of the book of *Deuteronomy*.<sup>67</sup>

The independence of the judicial system finds expression in the structure of the system later in the book. The local judges are not prophets or priests, but judges who come from among the people.<sup>68</sup> When a legal question arises for which the local judges find no answer,

64. WEINFELD, *supra* note 61, at 233-34. There are further differences between these two stories, the most striking of which is the absence of any mention of Jethro in the book of *Deuteronomy*. Another difference relates to the qualities of the judges. Unlike *Exodus*, which emphasizes the integrity of the judges, *Deuteronomy* emphasizes their wisdom: “wise and discerning men, who are known to your tribes.” Deut 1:15. This case is used by Weinfeld, along with other cases, to show the connection between *Deuteronomy* and the Wisdom literature. *Id.* at 244-81.

65. Deut 1:16-17.

66. In the terms of Bernard Jackson: the words of Moses do not reflect the “charismatic model” but “the delegated model.” Jackson, *supra* note 4, at 223-24. For a similar interpretation, see Nahmanides, Commentary on the Torah, Deut 1:6. Some scholars point to the law of the Prophet that promises to send the people of Israel “a prophet like Moses.” Deut 18. They assert that this prophet may give new laws, and thus reflect another version of the connection between human law and divine justice. For literature and discussion, see Bernard Jackson, *The Prophet and the Law in Early Judaism and the New Testament*, in *ESSAYS ON HALAKHA IN THE NEW TESTAMENT* (Brill 2008). I wish to emphasize that this law is not connected in any way to the judicial process. The bodies that deal with judgment are mentioned in *Deuteronomy* 17, and are the local courts and the high court. The prophet is mentioned against and contra to other divine personalities (such as an augur, soothsayer, and sorcerer), and not in any connection with judgment. One may even question the association of the prophet (in this context) with a new revelation of new laws, but in any case it is clear that he is not connected to judgment.

67. WEINFELD, *supra* note 61.

68. Deut 16:18. From other laws in the book, it would appear that this function is fulfilled, generally speaking, by the elders of the city. See Deut 19:12; 21:2-4; 21:19-20; 22:16-18; 25:7-9. Nevertheless, the conjecture has been raised that the commandment to appoint judges and officers came to introduce a command to appoint other judges who were not the elders of the city. See S. Loewenstamm, s.v. “*Mishpat, Mishpat ha-Mikra*,” *ENCYCLOPAEDIA BIBLICA* V.329 (Hebrew); cf. Jacob Milgrom, *The Ideological and Historical Importance of the Office of Judge in Deuteronomy*, in *ISAAC LEO SEELIGMAN VOLUME: ESSAYS ON THE BIBLE AND THE ANCIENT WORLD* 129 (Alexander Rofe & Yair Zakovitch eds., E. Rubinstein 1983).

it needs to be brought to the high court that sits in the Temple precincts:

If a matter arises which is too hard for you to judge . . . then you shall arise and go up to the place which the Lord your God chooses. And you shall come to the priests, the Levites, and to the judge there in those days, and inquire of them; they shall pronounce upon you the sentence of judgment.<sup>69</sup>

On the face of it, the fact that the High Court sits in the Temple indicates a connection between law and cult. And as mentioned above, some scholars think that the appeal to the priests and the Levites is of an oracular nature.<sup>70</sup> However, this interpretation does not seem necessary. The Temple is also the place of the holy books and of the priests and scribes who are expert in the law. During the Biblical period, knowledge of the law was the provenance of the priests; hence, it ought not to be surprising that they serve as judges. And, in fact, they are not the only judges; also mentioned is “the judge who is in office in those days,” who was evidently not a priest.<sup>71</sup> Most important, the decision of the court is not based upon prophecy, nor does it come about by virtue of the cult, but is based upon the decision of the judge.<sup>72</sup>

*Deuteronomy* also provides a clear example of the human nature of the legal process in the section addressing the subject of the “conspiring witness.”<sup>73</sup> The Torah states that, in the event of a claim of false

69. Deut 17:8-13 (ESV-English Standard Version.).

70. LEVINSON, *supra* note 60. JACKSON, *supra* note 34. Such interpretation was already given in Second Temple period by the Dead Sea sect. A text from Qumran describes how the High Priest, during the Day of Atonement ritual, clarified by cultic means those laws that were hidden from the congregation: “[And he shall approach t]o the ark of testimony and expound [all the commandments] of the Lord, of all [the hidden thi]ngs from you, and [he] went out before a[ll the head patriarchs] of the congregation” (4Q375). On this text, see Aharon Shemesh, *Halakhah and Prophecy: False Prophet and Rebellious Elder*, in RENEWED/MODERN JEWISH COMMITMENT 935 (A. Sagi & Z. Zohar eds., 2001) (Hebrew).

71. Deut 17:9. This matter emerges more clearly from 2 Chron 19. This chapter, which describes the establishment of a legal system by King Jehoshaphat of Judah, was influenced by the law in *Deuteronomy* and may reflect its ancient exegesis. The composition of Jehoshaphat’s court includes “Levites and priests and heads of families of Israel”—that is, elders alongside the priests. 2 Chron 19:8 (ESV). This composition reflects an internal division of authority between “the word of the Lord,” for which the “chief priest” is responsible, and the “word of the king,” with which the “governor of the house of Judah” is charged. On the historical issues related to this chapter, see W.F. Albright, *The Judicial Reform of Jehoshaphat*, in ALEXANDER MARX JUBILEE VOLUME: ON THE OCCASION OF HIS SEVENTIETH BIRTHDAY 61 (Jewish Theological Soc’y Am. 1950); S. YAFETH, THE IDEOLOGY OF THE BOOK OF CHRONICLES 361-74 (Mossad Bialik 1977) (Hebrew); Bernard S. Jackson, *Law in the Ninth Century: Jehoshaphat’s Judicial Reform*, in 143 PROCEEDINGS OF THE BRITISH ACADEMY 369 (Oxford Univ. Press 2007); Bernard S. Jackson, *Law in the Ninth Century: Jehoshaphat’s Judicial Reform*, in UNDERSTANDING THE HISTORY OF ANCIENT ISRAEL 369 (H.G.W. Williamson ed., Oxford Univ. Press 2007).

72. See WEINFELD, *supra* note 61; JEFFERY TIGAY, THE JPS TORAH COMMENTARY: DEUTERONOMY 163-64 (Jewish Publ’n Soc’y 1996).

73. Deut 19:15-21.

testimony, the litigants must come and stand “before the Lord, before the priests and the judges who serve in those days.”<sup>74</sup> The clarification “before the Lord” is reminiscent of the standing “before God” in *Exodus* 22:7. Nevertheless, the difference between the two laws is striking. First, the law in *Deuteronomy* emphasizes that the litigants are in practice judged before other human beings, “the priests and the judges,” and not “before God.” Second, while the decision in *Exodus* is described as a kind of Divine judgment, *Deuteronomy* emphasizes that judgment results from an investigation performed by the judges: “And the judges shall make careful inquiry.”<sup>75</sup> This sort of requirement is striking in other laws in the book of *Deuteronomy* as well. For instance, the judges are called upon to seek out and to examine well whether “it is indeed true and certain.”<sup>76</sup> This requirement seems to say that the decision in the case must always be the result of examination and clarification by the judges, and not a decision taken through supernatural means.

#### F. Summary

The two basic models examined here, “Divine judgment” and “human judgment,” reflect two different relationships between God and

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74. *Id.* at 19:17. According to the literal sense of the Bible, it would appear that “both parties to the dispute” are the witness and the accused. *Id.* (ESV) It is explained thus by the majority of modern commentators. See, e.g., S.R. DRIVER, A CRITICAL AND EXEGETICAL COMMENTARY ON DEUTERONOMY 235-36 (ICC 1985). As against that, according to the Rabbis, who speak here of a contradiction between two conflicting testimonies, the “two people” are two groups of witnesses: “both parties shall appear.” Further, Scripture speaks here of “witnesses,” Midrash Tannaim 116 (ed., Hoffman); BABYLONIAN TALMUD (b.) Shevu’ot 30a. However, it would seem that, according to this approach of the Sages, the litigants were also present in the procedure. *Id.*; cf. Sifre on Deuteronomy ¶ 190, at 230.

75. Deut 19:18. The commentators deliberated the interpretation of “before the Lord” in *Deuteronomy*. This expression usually indicates standing before God in the Sanctuary or in the Temple. The book of *Deuteronomy* assumes the existence of a single central Temple “in the place of which the Lord shall choose,” from which it follows that the case of a conspiring witness must be clarified in the High Court located in the Temple. The question is: Why does a routine problem of contradictory testimonies need to be clarified specifically in the High Court? The midrashic Sages rejected this possibility, and interpreted the expression “before the Lord” as indicating that standing before any court is tantamount to standing before the Lord. Sifre Deuteronomy 190. Modern commentators have suggested various solutions. Some explained this case as falling under the rubric of an “extraordinary thing” which needs to be brought up to “the place which He shall choose”; for example, Driver. Deut 17:8. See DRIVER, *supra* note 74. Others rejected this possibility and suggested that it refers to local courts, located in sacred places where there was not any sacrificial service. Yet another interpretation suggests a direction similar to that of the Rabbis, namely, that standing before the judges is “standing before the Lord,” as they act at His charge. See, e.g., DUANE L. CHRISTENSEN, WORD BIBLICAL COMMENTARY: DEUTERONOMY 430 (Thomas Nelson 2002); TIGAY, *supra* note 72, at 184.

76. Deut 13:15; 17:4.

judgment. Divine judgment is intended to express God's decision and assumes God's immanent presence in the judicial process. The decision of the judge, generally speaking a priest or prophet, is in effect the decision of God. In a case where the judge finds it difficult to decide, he makes use of various methods—such as casting a lot, a Divine test or ordeal, or prophecy—whose purpose is to reveal God's decision.<sup>77</sup>

In contrast to Divine judgment, human judgment is not intended to express the Divine decision, but rather the law. Under this model, the trial is typically conducted by a judge who is neither a priest nor a prophet. He may be one of the elders of the congregation or a person who was chosen for this function because of his integrity or wisdom. The judge conducts the trial in a rational manner based upon law, in light of the testimonies and evidence that are before him. Further, God is not present in the judgment and certainly is not involved therein. The relationship between God and law is described here in terms of delegation and carries a predominantly normative character. The judges fulfill the function of God and therefore bear responsibility for it.

As illustrated above, several Biblical narratives reflect the notion that Divine judgment was common in the early stages of the Israelite legal system. Nevertheless, in the legal collections of the Pentateuch, only limited use is made of Divine judgment. In practice, it is mentioned in two cases: in the law of bailees in *Exodus* (the Book of Covenant), and in the law of the *Sota*, the unfaithful wife, in *Numbers* (the Priestly Code). In the book of *Deuteronomy* there is no clear expression of Divine law. On the contrary, it seems that the developed Deuteronomistic legal system reflects a model of human law. Presumably, these literary data reflect an historic process of institutionalization of the ancient Israelite legal system.

## II. TALMUDIC LITERATURE: GOD'S PRESENCE IN JUDGMENT

This section of the article examines the unique understanding of the relation between God and judgment developed in the Talmudic literature. On the one hand, the rabbis accepted the Biblical view as expressed in the book of *Deuteronomy*, and even elaborated upon it. They saw judgment as an independent process separate from both cult and prophecy, based upon rational judgment. On the other hand, they fashioned a unique approach, emphasizing God's immanent presence

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77. On the reality of judgment by the prophet, see, e.g., Judg 4:4-5; 1 Sam 7:15-17. The Bible does not explain the manner of judgment of the prophet, either by means of lots and ordeal or other means of prophecy.

within judgment. The first part of this section will describe the manner in which the Sages continued the Biblical tendency and rejected the use of Divine judgment *per se*. The second part will describe the theoretical approach relating to God's presence in judgment. The third part will discuss the implications of this approach for the authority of the judge and the extent of judicial discretion. Finally, the fourth part will deal with its influence on the psychological attitude of the judge towards judgment and towards the issue of "fear of judgment."

#### A. Rejection of the Use of Divine Judgment

The Talmudic Sages, Tannaim and Amoraim, adopted the basic approach that had taken shape in the Bible. According to this approach, the judicial process is conducted by human judges in accordance with the law and on the basis of the testimony and evidence brought before them. They expanded upon and grounded this approach, taking care to remove by means of reinterpretation any manifestation of Divine judgment. This may be seen in their interpretation of the two cases of Divine judgment mentioned in the Torah: the law of bailiffs and the law of the *sotah*, the wanton woman. The possibility that the law of bailiffs refers to a kind of Divine judgment was firmly rejected by the Rabbis: "And the master of the house will be brought to God.' I might infer from this that one ought to inquire of the Urim and Tummim. Scripture says: 'he whom God [*Elohim*] shall condemn.' This only speaks of *Elohim* [the judges] who finds them culpable."<sup>78</sup> This would also seem to be the reason for the unequivocal rejection of the reading of the noun *Elohim* in its literal sense, as "God." Such an interpretation would lead one to perceive judgment as a process of Divine judgment and hence was rejected.<sup>79</sup>

Likewise, the Rabbis fashioned the chapter of the *sotah*, the woman suspected of adultery, in a manner that softened the dimension of examination by ordeal, and possibly uproots it completely. One striking

78. Mekhilta de-Rabbi Yishma'el, Nezikin, ¶ 15, at 300 (Horowitz-Rabin ed.).

79. This interpretation creates further difficulties. "And he shall draw near to God" or "the master of the house will draw near to God" in Deut 19:17 express a kind of closeness or accessibility characteristic of concrete representatives of God (compare the more distant expression, "before the Lord"). However, one could interpret this as saying that it refers to turning towards the Temple. But this interpretation raises difficulties of a different kind: which Temple is referred to? From the perspective of the Sages, one may assume that it refers to the central Temple. If so, then why must the law of guardians be clarified in the Temple? According to modern Bible commentators, the book of Exodus does not assume the centralization of the cult, and it must allude to a local Temple. The reading of *elohim* as judges resolves these difficulties as well.

aspect of the Rabbinic interpretation of *sotah* is the addition of certain formal demands and the requirement for *a priori* evidence. The Rabbis stated that it was not enough that the husband bring a private complaint against his wife; there must also be a formal process of “jealousy” (*kinui*), in which the husband warns his wife, in the presence of witnesses: “Do not seclude yourself with such-and-such a person.”<sup>80</sup> The husband must also produce witnesses who will testify that the woman had in fact been alone with the man in question in a secluded place for a period of time “sufficient to become impure.”<sup>81</sup> These requirements increase the area of certainty and greatly reduce the realm of doubt, as opposed to the inherent logic of the process of the ordeal, which was usually carried out when there were no witnesses to the act. In light of this, Yishai Rosen-Zvi has recently claimed that the process described in the *Mishnah* is not one of examination, but is rather fashioned as a process of punishment.<sup>82</sup> Whether one is speaking of complete abolition of the process of examination or only of its blurring and softening, the Rabbis clearly did not view complete reliance on such examination alone with favor.

The Rabbis’ reservations regarding prophecy as a legal factor are well known. The predominant view among the Rabbis negated the status of prophecy as a factor in legislation: “These are the commandments which the Lord commanded Moses for the [children] of Israel on Mount Sinai”<sup>83</sup>—from hereon in, a prophet is not allowed to innovate anything.”<sup>84</sup> The prophets are included in the *Mishnah* among those who form part of the chain of tradition of the Oral Torah,<sup>85</sup> and in the Talmud their words are referred to as “words that have been received” (*divrei kabbalah*)<sup>86</sup>—as if to say, their words are to be seen in

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80. m. Sotah 1.1; Jerusalem Talmud (y.) Sotah 1.2 (16c); b. Sotah 5b. The requirement of warning in front of witnesses is subject in the *Mishnah* to a dispute between R. Eliezer and R. Joshua, but in y. Sotah 1.1 another tradition is brought in the name of R. Eliezer, who admits that such warning is required. See M. HALBERTAL, *INTERPRETATIVE REVOLUTIONS IN THE MAKING* 94-104 (Hebrew Univ. Magnes Press 1997) (Hebrew).

81. m. Sotah 1.1; y. Sotah 1.2 (16c); b. Sotah 5b.

82. ISHAY ROSEN-ZVI, *THE CEREMONY THAT NEVER WAS* 152-80 (Hebrew Univ. Magnes Press 2008) (Hebrew). As Rosen-Zvi comments, the Sages were not exposed to the use of the ordeal, not even in their surrounding milieu, as this procedure was not accepted in Roman law or culture.

83. Lev 27:34.

84. Sifra, Behukotai, 8.13, 7. But according to the Rabbis the prophet can make a temporary order (*lefi sha'a*) that contradicts Biblical commandment. The classical precedent for such authority is Elijah, who ordered the sacrifice on Mount Carmel. See the rabbinic interpretation on *Deuteronomy* 18 in Sifrei *Deuteronomy* 175.

85. m. Avot 1.1.

86. b. Rosh Hashana 7a, 19a, Taanit 17b, Hulin 137 a, and see the following note.

the legal area as tradition rather than as prophecy. On the basis of this position, the *Babylonian Talmud* negated the *halakhic* authority of the books of prophecy, and declared that “words of Torah are not inferred from words of tradition.”<sup>87</sup>

As shown by Professor E.E. Urbach, this position was not accepted by all, and many Talmudic sources relied upon the prophetic books much as they rely upon verses from the Torah.<sup>88</sup> However, in the realm of actual legislation and interpretation of the Torah most of the Rabbis agree that one ought not to use prophecy or a heavenly voice for purposes of determining the *halakhah*. The dominant view on this point in the Rabbinic school was that of Rabbi Joshua: “It is not in the Heaven.”<sup>89</sup> The opposing view, attributed to R. Eliezer, which recognized the validity of miracles and heavenly voices, was marginal, and insofar as it was ever practiced, did not characterize the manner of learning of the Rabbis. Thus, the attribution of this position specifically to R. Eliezer was apparently intended to express their rejection thereof.<sup>90</sup>

The rejection of prophecy as a legal factor stands out even more clearly in the realm of judicial decision, regarding which we have found no expressions of a dissenting view. Hence, it would appear that everyone agrees that prophecy or other supernatural means may not be used to arrive at legal decisions. The Rabbis thus adopted the Biblical tendency to see the judicial process as an autonomous one, unconnected in any way to prophecy, to the cult or to other supernatural factors. The judicial process is conducted in a rational manner and is decided by the judges in accordance with the law and in light of the evidence before them.

### B. God’s Presence in Judgment

On the other hand, the Rabbis developed an imminent understanding of God’s presence radically different from the transcendent approach expressed in the book of *Deuteronomy*.

87. b. Hagiga 10b, Bava Kama 2b, Nida 23a.

88. On this entire subject, see E.E. Urbach, *Halakhah and Prophecy*, 18 *TARBITZ* 1 (1947) (Hebrew); MENACHEM ELON, *JEWISH LAW: HISTORY, SOURCES, PRINCIPLES* 214-35 (Jewish Pub. Soc’y 1988).

89. b. Bava Metzi’a 59b; y. Mo’ed Qatan 3.1 (10b).

90. Since R. Eliezer is always considered as a dissenting opinion. Compare m. ‘Eduyot 1.6: “If so, why are the words of the individual mentioned together with those of the many? To refute them, so that if a person should say, ‘Thus have I received,’ one may say to him, ‘From the words of so-and-so you heard it’”; and Tosefta (t.) Eduyot 1.4: “They say to him: According to the words of R. Eliezer you have heard.” Urbach discusses a few examples where the Sages rely on Divine revelations and the like. But these examples do not alter the overall picture, and demonstrate, specifically, the marginality of this phenomenon.

According to this view, God is present in judgment together with the judges: "From whence do we know that three [people] who sit in judgment, the Divine Presence (*Shekhinah*) is with them? As is said, 'in the midst of the judges He holds judgment.'"<sup>91</sup> Unlike the Biblical model of agency, based upon a clear distinction between God, the principal, and the judge, the agent, the Talmudic model of presence blurs this distinction and reduces the distance between them. In this model, God is present in judgment and is represented by the judge. He is a central participant in the legal process and is in practice the true judge. This approach is widespread in the tannaitic and amoraic sources, both from the Land of Israel and those from Babylonia, and evidently enjoyed widespread support among the Sages.<sup>92</sup>

This perception of the judicial process is represented in detail in the following tannaitic passage:

The judges should know whom they are judging, and before whom they are judging, and who is judging with them. And the witnesses should know of whom they are testifying, and before whom they are testifying, and with whom they are testifying, and who is testifying with them. As is said: "Then both parties to the dispute shall appear before the Lord" (*Deuteronomy* 19:17); and it says: "God has taken his place in the Divine council, in the midst of Gods He holds judgment," (*Psalms* 82:1) and it says regarding Jehoshaphat: "And he said to the judges: Consider what you do, for you judge not for man but for God" (*2 Chronicles* 19:6). And lest the judge should say, "What have I to do with this trouble?" has it not already been said, "He is with you in giving judgment" (*id.*)—You have naught but what your eyes see.<sup>93</sup>

The first part of this passage contains a series of statements addressed to the judges and the witnesses, enumerating the various aspects of God's presence in judgment. These statements take the form of a rhetorical question, whose answer is "He who spoke and the world came into being."<sup>94</sup> The purpose of these statements is to make the

91. Ps 82:1; b. Berakhot 6a. The Talmudic text is a revision of m. Avot 3.6, which discusses three people who engage in Torah. And compare the *gemara* there: "Should you say, law is dominant in the world and the Presence does not come? As we have taught, that judgment is also Torah."

92. The tendency to emphasize God's immanence is not unique to this subject, but reflects a broad tendency in Rabbinic thought after the Destruction, and possibly as a result thereof. See E.E. URBACH, *THE SAGES: THEIR CONCEPTS AND BELIEFS* 29-59 (Hebrew Univ. Press 1969) (Hebrew); Y. LORBERBAUM, *THE IMAGE OF GOD: HALAKHAH AND AGGADAH* 89-101 (Schocken Publ'g House 2004) (Hebrew).

93. t. Sanhedrin 1.9, at 416 (Zuckerman edition); y. Sanhedrin 1.1 (18b); b. Sanhedrin 6a. The text cited is based upon the Erfurt MS. of the Tosefta.

94. y. Sanhedrin 1.1 (18b) adds these words.

players acting in the judicial scene aware that there is an additional, decisive factor present, even if it is not visible. The three statements addressed to the judges represent three different functions fulfilled by God in judgment; hence one receives a multifaceted and even paradoxical picture of the judicial process. Apart from God's (anticipated) function as the One "before whom" judgment is conducted—that is, with his sponsorship and supervision—He also serves as a judge, and even as the one who is judged.

This last function is the most surprising and requires some explanation. Thus, they asked in the Jerusalem Talmud: "May a human being judge his Creator?" And the answer: "Rather, the Holy One blessed be He said: 'I am the one who said that Reuben should receive one hundred *dinar* and Shimon nothing, and you took it from the one and give it to the other unlawfully; I must pay him and take it away from the same man.'<sup>95</sup> According to this passage, then, upsetting the just order of things obligates God to restore things as they ought to be; the Almighty must correct that which the judges have upset. Hence, if a judge rules improperly, he forces God to correct the wrong which he has done. But there seems to be an additional implication here as well, beyond the concrete fact of the improper legal ruling.<sup>96</sup> As God participates in the decision of the law, He shares responsibility for its consequences. If the judges err in judgment, whoever judges with them is also held accountable, while if they judge properly, the merit accrues to whoever judges with them. According to this, God is quite literally judged by the judges, whether favorably, as a true judge, or otherwise, as a judge who distorts the law.

In the second part of the above passage, three verses are cited anchoring the concept of God's presence in judgment in the Bible itself. This part specifically exemplifies the change that took place during the transition from the Bible to the rabbinic teaching. The Biblical version of the first verse, "Then both men in the controversy shall stand before the Lord, before the priests and the judges who serve in those days," speaks on the literal level of standing in the Temple, as is the usual

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95. y. Sanhedrin 1.1(18a), and in the Bavli as an independent idea: "R. Hamma son of Hanina said: The Holy One blessed be He said. It is not enough for the wicked that they take money from this one and give it to that one unlawfully, but that they trouble Me to return money to its [rightful] owners." b. Sanhedrin 8a.

96. In practice, the explanation of the Yerushalmi is not unique to the idea of God's Presence and is equally fitting to the idea of agency. It is enough that we assume that the judges fulfill the role of God, who oversees them, to arrive at the idea that the judge obligates God in the sense that He is required to correct that which is crooked.

meaning of the phrase "before the Lord,"<sup>97</sup> But the tannaitic passage implies that any appearance before the Court is essentially before the Lord. The Biblical version of the second verse, "God stands in the congregation of the mighty; He judges among the gods" describes, in its literal sense, the judgment conducted within the heavenly entourage.<sup>98</sup> However, according to the Rabbis, it describes God's presence in the lower, earthly court.<sup>99</sup> The third verse, "for you do not judge for man, but for the Lord," indicates that the judges bear responsibility before God, similar to the idea implied in the words of Moses, "for the judgment is God's."<sup>100</sup> However, it is interpreted here as if the judgment is performed "before the Lord" and in His presence.<sup>101</sup>

In the third part of the passage, the text deals with the possible fear and reluctance the judge may feel in light of the heavy responsibility imposed on him: "Lest the judge say, Why do I need this trouble?" and thereby refrain from sitting in judgment. Hence he is told, "Has it not already been said, 'He is with you in giving judgment.' You have naught but what your eyes see."

This part of the passage comes to counterbalance the responsibility imposed upon the judges in the first part. Notably, the self-same idea, that God is present in judgment, serves both in the context of the responsibility and care that must be exercised by the judge and in that of his confidence. God's presence in judgment imposes a heavy responsibility upon judges, leading them to be careful and precise in judgment, and that same presence supports them and guides them in the true path.

This understanding of God's presence is expressed in an incident related in the Jerusalem Talmud concerning Rabbi Akiva:

When a person came and wished to be judged before Rabbi Akiva,  
[the latter] would say to him: "You should know before whom you

97. Deut 19:17. See, e.g., Exod 28:12, 29, 30; Lev 1:3, 11; 4: 4, 6, 15, 17, 18, 24; Deut 14:23, 26; 15, 20; and many others.

98. Ps 82:1. See, e.g., the commentary of R. Abraham Ibn Ezra in THE RABBINIC BIBLE.

99. According to this interpretation, Elohim is used in the same verse in a double sense: the first time in the sacred sense [i.e., as a name of God], the second time in a mundane sense. Thus it is stated in tractate Soferim 4.6: "'Elohim stands in the congregation of El, among Elohim He shall judge'—this serves as both sacred and mundane." Tractate Soferim 4, 21, at p. 144 (Michael Higger ed., Masekhet Soferim 1937) (Hebrew).

100. 2 Chron 19:6 and Deut 1:17.

101. It may be that the source relates also to the sequel of the verse "who is with you in the judgment." 2 Chron 19:6. Here too one may discern the transition from the literal meaning, where "with you" is understood in the metaphoric sense, as an expression of support. Compare Gen 28:15, "Behold I am with you and will guard you [or: keep you] wherever you go," and many similar passages. Here it is understood in the literal sense, as an expression of presence in judgment.

are standing, before He who spoke and the world was created, as is said 'And both parties to the dispute shall appear before the Lord'—and not before Akiva son of Joseph."<sup>102</sup>

As one can see, there is a close relationship between the incident involving Rabbi Akiva and the above-quoted passage from the Tosefta. The words placed in R. Akiva's mouth using the identical language as that used by the Tosefta.<sup>103</sup> But there is also a difference between them. Whereas the Tosefta turns its reading "inwards" toward the court, R. Akiva's reading is directed "outwards" toward the litigants. Of course, there is no contradiction in this, as the two sources may be seen as complementing one another. The *beraita* uses the concept of presence to impose a sense of obligation upon the judges, whereas R. Akiva uses it to impress upon the litigants the need to conduct an honest and fair discussion.

In addition, the words are also intended to bolster the authority of the court. Following the destruction of the Second Temple, the Sages faced a lack of obligatory judicial authority. The judicial system of the Sages was not backed by any system of enforcement, as power was in the hands of the Roman government, forcing the Sages to rely primarily upon community and social norms and pressures.<sup>104</sup> The idea that the judge is the representative of God played an important role in this context. If the judge is the representative of God, then his decision must be accepted as a ruling from Heaven.

The use of this idea to establish the authority of the court is expressed in a story in the Babylonian Talmud regarding King Jannaeus's (Yannai) trial before the Sanhedrin:

King Yannai's servant killed someone. Shimon ben Shetah said to the Sages: Place your eyes upon him and let us judge him. They sent to him [the king]: Your servant has killed a man. He sent him [the man] to them. They sent to him: You must also come. It says in the Torah: "And his owners were warned"—let the owner of the ox come and stand with his ox. He came and sat down. Shimon

102. y. Sanhedrin 1.1 (18a); Midrash Tannaim to Deut 19:17, at 116 (Hoffman ed.).

103. It would be tempting to see R. Akiva as the author of this saying and the creator of this approach. However, it would seem that the language of the Yerushalmi is secondary and draws upon the Tosefta. Note that the incident involving Rabbi Akiba speaks of "a person" (*bar nash*) in the singular, whereas Rabbi Akiva's words, "you [plural] should know" is couched in the plural.

104. S.J.D. Cohen, *The Rabbi in Second Century Jewish Society*, in III CAMBRIDGE HISTORY OF JUDAISM 922 (Cambridge 1999); SETH SCHWARTZ, IMPERIALISM AND JEWISH SOCIETY 103-28 (Princeton Univ. Press 2001); Z. Safrai, 'For There is a Higher Above the High [One], And Yet Higher Ones Over Them' [Eccles 5:7]: Sages and Legal Systems in the Age of the Mishnah and Talmud, in JUDAISM WITHIN AND WITHOUT 219 (A. Sagi et. al eds., Hebrew Univ. Magnes Press 2000) (Hebrew).

ben Shetah said to him: King Yannai, stand on your feet, and let them give testimony about you. For it is not before us that you stand; rather, you stand before He who spoke and the world was created, as is said: "And both parties to the dispute shall appear before the Lord." He said to him: Not as you say, but as your colleagues say. He turned to his right, and they cast their eyes to the ground; he turned to his left, and they cast their eyes to the ground. Shimon ben Shetah said to them: You are masters of thought; let the Master of Thoughts come and take retribution of you. Immediately [the angel] Gabriel came and pushed them down to the ground.<sup>105</sup>

This story depicts a confrontation between Hasmonean King Jannaeus and Shimon ben Shetah, who was the Head of the Sanhedrin.<sup>106</sup> The words placed by the story's author in the mouth of Shimon ben Shetah are similar to those uttered by Rabbi Akiva in the Jerusalem Talmud, representing the same intellectual conception.<sup>107</sup> Nevertheless, his words play a different function in this context than we have seen thus far. The words speak not of an obligation to behave with honesty and integrity, but rather of accepting the authority of the court. The dispute between Jannaeus and Shimon ben Shetah concerns whether the king is subject to the law and judgment of the Sanhedrin. In Jannaeus' eyes, the court is a branch of the kingdom; therefore the king, who stands at its head, is not subjugated to it.<sup>108</sup> But Shimon ben

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105. b. Sanhedrin 19a-b. The text is brought below according to the Vilna edition. The differences among the textual witnesses are minimal and not significant for our purposes.

106. There is a parallel to this story in JOSEPHUS, *JEWISH ANTIQUITIES* bk. 14, verses 128-38 (Loeb Classical Lib. Harv. Univ. Press 1966), which evidently served as inspiration for the Talmudic story. Josephus's version speaks of the trial of King Herod, who killed Jewish rebels in the Galilee without a trial. The parallel between the two incidents has already been noted by the Maharsh"ā, in his *Hiddushei Aggadot* on Sanhedrin 19a (albeit he refers there to the [medieval] *Sefer Yosifon*). The matter was subsequently discussed by historians of the period and Talmudic scholars. See, e.g., H. MANTEL, *STUDIES IN THE HISTORY OF THE SANHEDRIN* 72-73 (Harv. Univ. Press 1961). (The Hebrew version of Mantel's book, published in 1969, contains a full discussion at pp. 357-65); Y. EFRON, *HIKREI HA-TEKUFAN HA-HASHMONAIT* 131-94 (Hakibbutz Hameuchad 1980) (Hebrew); see also the recent discussion by Y. LORBERBAUM, *DISEMPOWERED KING: MONARCHY IN CLASSICAL JEWISH LITERATURE* 98-102 (Continuum Int'l Pub. Group 2011). From a methodological viewpoint, the comparison to Josephus suggests that, even if this story has a historical basis, the present text is literary and is not a report of historical facts, and therefore must be judged from that perspective. Concerning the status of Shimon ben Shetah, according to m. Hagiggaḥ 2.2, Shimon ben Shetah was the Head of the Court, whereas in t. Hagiggaḥ 2.8, he was the Nasi. See also m. Ta'anit 3.8, Sanhedrin 6.4; t. Sanhedrin 6.6.

107. There is a resemblance between the *aggadah* in the Bavli and the Palestinian sources discussed above (Tosefta, Yerushalmi), which suggests the Palestinian origin of the story. The same conclusion was reached, for other reasons, by M. KISTER, *STUDIES IN AVOT DE-RABBI NATHAN: TEXT, EDITING AND INTERPRETATION* 149 n.158 (Yad Ben-Zvi 1998) (Hebrew).

108. Yannai's approach represents the Hellenistic Roman view of monarchy. See, e.g., the Greek sentence that appears in the Jerusalem Talmud: "Para basileus ho nomos agraphos"—i.e.,

Shetah's words are opposed to this approach: "It is not before us that you stand; rather, you stand before He who spoke and the world was created." Thus, the judges are not the representatives of the ruler, but rather of God, before whom the king is also subject.

The view that "judgment belongs to God" thus serves here as a source for the authority of the court and supports the principle of the rule of law. This approach also carries a certain psychological weight. Shimon ben Shetah's belief that the king is judged before God enables him to stand up to him. The other Sages of the Sanhedrin are filled with fear and are unable to look the king in the eye. If they too had known "before Whom they are judging and Who judges with them," they would have had the strength to overcome this fear and to stand up to King Jannaeus (Yannai).<sup>109</sup>

It follows from this analysis that the Talmudic idea of God's presence in judgment, like the Biblical idea that "judgment is God's," has two sides. On the one hand, it gives power and authority to the judge. The litigants must accept the authority of the judge and conduct the judicial procedure in an honest and fair manner. On the other hand, that same idea imposes an obligation upon the judge to judge with righteousness and to conduct an honest and fair proceeding, all the more so that he may not abuse his function in an arrogant way, take bribery, or commit iniquity in judgment. It is therefore possible that this idea is in principle balanced: authority against responsibility, power against the obligation of caution.<sup>110</sup>

Finally, one of the explicit expressions of Divine Presence—namely, the use of the term *elohim* for judges—also illustrates this concept of God's presence in judgment. As mentioned, the *midrashic* Sages interpreted the term *elohim* as it appears in the law of the guardians<sup>111</sup> as referring to judges. It then goes on to cite the number of times the word *elohim* appears in this section in order to determine the number of judges required in civil cases (or in order to anchor existing practice in Scripture): "The owner of the house shall come near to

"The law is not written regarding the king." y. Rosh Hashanah 1.3 [57b]; Lev. Rab. 35.

109. The lesson that emerges from this story is that one ought to impose the yoke of law upon the king. The Talmud, as is known, arrives at a different conclusion from this story; namely, it sees this incident as the background for the law of the Mishnah that "The king does not judge and is not judged." b. Sanhedrin 19b. This realpolitik conclusion expresses doubt as to whether faith and determination are sufficient to impose authority over rulers.

110. See also Mekhilta de-Rabbi Yishma'el, Shirah, § 1, at 120: ("I will sing unto the Lord' that He is judge, as is said, 'for the judgment is God's' (Deut 1:17), and it says, 'God sits in the council of the judges [gods]' (Ps 82:1), and it says 'The Rock, his work is perfect [for all his ways are just]' (Deut 32:4).").

111. Exod 22:7-8.

elohim [‘the judges’ or ‘God’]—one. “The case of both parties shall come before elohim”—two. “He whom elohim shall condemn”—three.<sup>112</sup> Thus, according to the words of Rabbi Hoshaayah, these passages imply that civil matters are judged by three.

At first sight, this interpretation, in which elohim is identified with the judges, comes to secularize the name of God. Accordingly, the word *elohim* should not be read in this context as sacred, but rather as mundane. However, in the eyes of the Sages this may have had the opposite meaning. By referring to the judges with the term *elohim*, the Sages express the view that the judge represents God within the judicial process. This interpretation was noted clearly by Nahmanides, a major thirteenth-century Biblical commentator: “And in my opinion, Scripture says, ‘and his masters shall bring him before elohim,’ and ‘until elohim the word of the two of them shall go,’ to hint that God will be with them in the matter of judgment; He will find innocent and He will find guilty.”<sup>113</sup>

### C. Judicial Discretion

As explored above, the approach according to which the Divine is present in judgment entails recognition that God is the source of the judge’s authority. This idea is meant to give the judges a sense of confidence and of independence. They do not represent the rulers, but God; hence, they are not subject to the rulers, but to God alone. What is the significance of this subjugation? To what extent is the act of judgment subject to Divine law, that is, to the law of the Torah? What degree of judicial discretion do judges enjoy?

Theoretically, an approach emphasizing God’s presence in judgment might pull in two opposite directions. On the one hand, the idea of Divine Presence would restrict judicial discretion, requiring that the judge rule precisely according to the law of Torah. The logic behind this concept is simple: as the judge represents God and acts in His name, he must rule precisely according to His laws, without deviating from them. Moreover, according to this approach one might say that God’s presence is embodied in His laws. If the judge implements God’s laws, God is present in the act of judgment; if he does not do so, but acts according to his own judgment or to some other law, God is not present in judgment.

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112. Mekhilta de-Rabbi Yishma’el, Nezikin, 15 (p. 302) and parallels: y. Sanhedrin 1.1 (18a); b. Sanhedrin 3b, and further on in the midrash two additional approaches (R. Jonathan and Rabbi), who learn this in slightly different ways.

113. Nahmanides, Commentary on the Torah, Exodus 21:6.

But the idea of the Divine Presence in judgment might also act in the opposite direction, according to which the judge enjoys extensive discretion and is even permitted to deviate from the law of Torah. This direction also has its own logic. Because the judge enjoys special status as the representative of God, he is not subject to the law and is not limited thereby. All of his decisions are considered God's decision. According to this view, God's presence is embodied not in the law, but in the judge himself. Thus, God's presence does not depend upon the application of the law of Torah, because even if the judge deviates from the law of Torah, he remains God's representative.<sup>114</sup> To determine which direction was taken by the Sages, this section examines the attitude of the Talmudic sources to the law of Torah. Is the judge required to judge according to Torah law or is he permitted to depart from it? And if and when the judge acts at his own discretion, rather than according to Torah law, is he still considered to be acting in the name of God?

Talmudic law recognizes the existence of a voluntary judicial framework in which the litigants agree among themselves as to the procedure to be followed, including the identity of the judges who will judge them and the law by which they will be judged. Further, the *Mishnah* allows the litigants to select judges who are not expert in Torah law, even "three cattle herders."<sup>115</sup> This choice of judges is significant because it means the proceeding will not be conducted according to Torah law. Even if the judges are expert in Torah law, the *halakhah* allows the litigants to agree among themselves that the judge is not limited to ruling according to Torah law, but may rule according to his own discretion and understanding. In such a case, they may say to him: "We have naught but your opinion."<sup>116</sup>

In this context, the Jerusalem Talmud distinguishes between a judgment based on "law of Torah" and one based on "judicial discretion"—that is, a ruling based upon the judge's own understanding.<sup>117</sup> The Babylonian Talmud likewise raises the possibility

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114. See Hanina ben-Menachem, *Postscript: The Judicial Process and the Nature of Jewish Law*, in *AN INTRODUCTION TO THE HISTORY AND SOURCES OF JEWISH LAW* ch. 16 (N. Hecht et. al eds., Oxford Univ. Press 1996) (postscript), supporting the second option.

115. m. Sanhedrin 3.1-2. It speaks there of judges who are chosen in a manner of "This one chooses one, and that one chooses one, and the two of them choose themselves another one."

116. t. Sanhedrin 5.1., at 422. (Zuckerman edition).

117. y. Sanhedrin 1.1 (18a): "R. Ba in the same name of R. Abahu said: If they said to him: 'You are acceptable to us like three [judges], on condition that you judge according to the law of Torah,' and he erred, and judged them according to his own understanding [shikul ha-da'at] . . . ." This usage of the term is somewhat different from its meaning in the Bavli, at b. Sanhedrin 6a and 33b, in which *shikul ha-da'at* indicates a decision when there is no clear rule but only a custom.

that the litigants may accept whatever the judges may say, in such a manner as to allow them to depart from the law.<sup>118</sup> This reality creates two tracks of law: Torah law and law based upon judicial discretion.

Against this background, one might well ask: Is God's presence in judgment connected specifically with the law of Torah, or does it even apply to a judgment not conducted according to Torah law? Or, to ask a related question: is preference given in this respect to Torah law over and above law based upon judicial discretion? The Jerusalem Talmud discusses this subject at the beginning of tractate Sanhedrin, where the following incident is invoked:

Two people came before Rabbi Yossi bar Halafta so as to be judged. They said to him: On condition that you judge us according to the law of Torah. He said to them: I do not know the law of Torah, but He who knows the thoughts [of man] will take recompense against those people. Accept upon yourselves whatever I say.<sup>119</sup>

In this passage, the litigants wished to condition their consent to being judged by R. Yossi bar Halafta upon his judging by the law of Torah. But he insisted that they accept upon themselves whatever ruling he might make, without necessarily being committed *a priori* specifically to Torah law. While the litigants' request is understandable, the incident does not offer any explanation for R. Yossi's position.<sup>120</sup>

Notably, this passage speaks of voluntary judgment, based upon the agreement of both sides to accepting the authority of this particular judge. This framework implies a negotiation between the parties as to the conditions of the procedure, the identity of the judges, and the laws according to which they will be judged. As noted earlier, Talmudic law allows the litigants considerable leeway regarding these questions and

In this context *shikul ha-da'at* indicates a decision that is taken within Torah law and not an alternative track. Nevertheless, in both contexts, in the Bavli and in the Yerushalmi, the core meaning of *shikul ha-da'at* is similar. It refers to a decision made on a basis of personal judgment and not on a basis of conventional rule. y. Ketubot 9.2 (33 a).

118. b. Sanhedrin 5a, in the words of R. Yosef and those of R. Hiyya, "If they accepted you upon themselves, you are not required to pay [in event of error]." However, in the Bavli there is no explicit legitimation for an alternative form of judicial procedure, but only for the possibility of departure from the law, which falls under the rubric of "error." But in practice the result is quite similar, as the judge is not initially limited to precisely following the law of the Torah. See Rashi, Sanhedrin 5a, s.v. "ee kablukh aleihu."

119. Y. Sanhedrin 1.1 (18a).

120. Some medieval *halakhic* sages interpreted the incident of R. Yossi as deriving from reasons of fear of judgment. See Sefer Mitzvot ha-Gadol (Semag) 'Aseh 107, and Tur, Hoshen Mishpat 12, and in their wake many others. See B. Lifschitz, *supra* n. 4. In my opinion, this interpretation does not suit this passage. I do not see R. Yossi's words as an expression of fear or repudiation but, to the contrary, as an expression of power.

barely limits their choice. The negotiation concerning the conditions of judgment involves not only the litigants, but also the judge himself. Within this framework, the litigants may ask the judge “on condition that you judge us according to the law of Torah” or, alternatively, to say “We have naught but your opinion”—that is, to allow him to judge at his own discretion.<sup>121</sup>

The framework set for the discussion is of great importance, not only for the litigants, but also for the judge. According to the *Mishnah*, a judge who failed to rule in accordance with the law is subject to lawsuit in the event of error. An “expert judge” is exempt from such suit, but even one not considered an expert may protect himself from monetary culpability, if he receives the *a priori* agreement of both parties to judge in accordance with his own understanding. In such a case, the parties cannot come to him later with the claim that he did not rule in accordance with the law.<sup>122</sup> The judge thus had an explicit interest in the litigants accepting whatever ruling he might make, as this exempted him from a claim of negligence.

This background illuminates the dispute between R. Yossi and the litigants regarding this subject. The litigants asked R. Yossi to judge them according to Torah law so that they might sue him in the event of error, whereas he, for the same reason, asked them to accept upon themselves whatever ruling he might make, without being limited to the law of Torah. His severe language—“He who knows thoughts will take recompense against those people”—indicates that he well understood the litigants’ hidden intention, and therefore insisted that they accept whatever he might decide. Such an agreement would protect him from suit in the event of error. This explanation also clarifies an additional point—namely, why both sides demanded that R. Yossi judge them according to Torah law. As a rule, there is no identity of interests between litigants: a decision suitable to one side is not usually so to his

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121. This passage is not speaking here of a settlement or compromise between the two parties, but of a judicial decision that is not limited to Torah law, something similar to the decision of an arbitrator. This judicial decision can also be one-sided, as in a process of arbitration. As against that, compromise must be based upon agreement of the litigants and must lead to an intermediate result. See on this A. Lifschitz, *Compromise in Jewish Law* 123–43 (2004) (unpublished Ph.D. dissertation, Bar-Ilan University) (Hebrew) (on file with author); Haim Shapira, *The Debate over Compromise in the Goals of Judicial Process*, 26 *DINEI ISRAEL* 183 (2010).

122. m. Bekhorot 4.4; y. Sanhedrin 1.1 (18a); b. Sanhedrin 6a, 33a, and 5a in the words of R. Yosef. The question as to who is considered a *mumheh* (expert) requires a separate discussion. In any event, one ought not to assume that R. Yossi was considered an expert judge, as not everyone who was ordained and received the title of “Rav” necessarily enjoyed the status of “expert” in judicial matters. See, e.g., the ordination of Rav described in y. Hagigah 1.8 (76c); y. Nedarim 10.10 (42b) and b. Sanhedrin 5a. On the entire matter, see N. Aminah, *Experts in the Halakhic Tradition*, 8 *DINEI YISRAEL* 141 (1977) (Hebrew).

opponent. However, in light of the proposed explanation, litigants in this matter clearly had a common interest vis-à-vis the judge.<sup>123</sup>

Thus, R. Yossi b. Halaftha's principled position is that the judge is not restricted to the law of Torah, but is allowed to judge even on the basis of his own understanding. The next question then is whether R. Yossi's position is consistent with the view of Divine Presence in judgment. The language he uses, "He who knows thoughts shall take recompense against those people," indicates his recognition of God's presence in judgment. The same language is used in the words of Shimon b. Shetah in expressing his own understanding of the notion of Divine Presence.<sup>124</sup> This correspondence likewise follows from the context of the Talmudic discussion. The incident involving R. Yossi is cited in connection with the verse, "Now these are the judgments which you shall set before them,"<sup>125</sup> together with the Talmud's gloss, "as explained in accordance with R. Yossi b. Halaftha."<sup>126</sup> That is to say, this verse, or the *midrash* implied therein, is consistent with the approach of R. Yossi—namely, that the judge has the authority to judge even in accordance with his own understanding.<sup>127</sup>

Immediately after this incident, the previously mentioned incident involving Rabbi Akiva is cited, which relates that R. Akiva used to say to those who came before him to be judged: "You should know before whom you are standing: before He who spoke and the world came into being . . . and not before Akiva son of Joseph."<sup>128</sup> The context thus suggests that the story of Akiva is likewise brought to support the approach of R. Yossi.<sup>129</sup> Under R. Yossi's approach, the judge is

123. Compare the explanation of 2 G. Alon, in MEHKARIM BE-TOLDOT YISRAEL 30-31 (Hakibbutz Hameuchad 1976) (Hebrew). Alon made the dispute dependent upon the possibility of reopening the verdict in the event of error. It seems to me that, in light of the Talmudic sources brought within the body of this article, matters are more consistent as protection against lawsuit.

124. b. Sanhedrin 19a.

125. Exod 21:1.

126. y. Sanhedrin 1:1 (18a).

127. The connection is not clear. It would appear that, according to this, the word *lifneihem* ("before them") is interpreted as meaning "before the judges," meaning that they are given full discretion in matters of judgment. According to the commentary of P'nei Moshe, there is implied here a certain homily: "'Before them'—the judge has naught but what his eyes see." This is according to R. Yossi, who judges according to his own judgment. In other places as well, the phrase "before them" is interpreted as "before the judges." E.g., b. Gittin 88b: "Before them and not before Gentiles." A similar homily is implied in the words of R. Eliezer b. Azariah in Mekhilta de-Rabbi Yishma'el, Nezikin, ¶ 1, p. 246, and in Mekhilta de-Rashbi: "'Before them'—to the outstanding 'faces' among them; from this one infers that one does not teach matters of civil law before the ignorant." Parshat Bo, ¶ 1, p. 162.

128. y. Sanhedrin 1:1 (18a).

129. There is no sign to indicate that the incident involving R. Akiva disagrees with that of R. Yossi. Furthermore, from the flow of the *sugya* it seems that the second case (r. Akiva) was cited to support the first one (r. Yossi). Compare Lifshchitz, *supra* note 120, who thinks that these two

allowed to rule on the basis of his own understanding, whereas the incident involving R. Akiva provides this approach with an ideological basis: the judge is given extensive latitude precisely because he is a representative of God. The approach of Divine Presence does not restrict the judge's judicial discretion, but rather expands it, allowing him to rule according to his own understanding. Therefore, according to the Jerusalem Talmud, God's presence does not depend upon the type of law implemented—that is, whether or not it is Torah law—but rather upon the judicial function *per se*.

#### D. Fear of Judgment

One of the main functions of the Biblical idea that “judgment is God's” is to elicit a sense of caution and trepidation in relation to that judgment. This is the case regarding those words of Moses which serve as the basis for the judges' obligation to judge with righteousness, “for the judgment is God's.”<sup>130</sup> Likewise in the words of Jehoshaphat to the judges: “Take heed to what you are doing, for you do not judge for man but for the Lord. . . . Now, therefore, let the fear of the Lord be upon you.”<sup>131</sup> The idea of Divine Presence as developed by the Sages continued this idea and even strengthened this tendency. As discussed earlier, the Sages used this idea to imbue the judges with an awareness of the magnitude of the responsibility imposed upon them: “The judges should know whom they are judging and before whom they are judging, and with whom they are testifying, and who is judging with them.”<sup>132</sup>

In *Sifre* on Deuteronomy, commenting on Moses' words, “I am not able to bear you alone”<sup>133</sup> the *midrash* asks:

Is it conceivable that Moses was unable to judge Israel? That a person who took them out of Egypt, and split the sea, and brought down the manna, and gathered the quail, and made for them miracles and mighty deeds, was unable to judge them? Rather, thus did he say to them: “The Lord your God has made you great [literally: multiplied you]” (*Deuteronomy* 1:10)—greater than your judges. And thus did Solomon say: “give your servant an understanding heart, to judge Your people” (*1 Kings* 3:8). Is it possible that Solomon was unable to judge Israel? . . . Rather, thus did he say to them: I am not like the other judges. A king of

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incidents disagree and represent different approaches.

130. Deut 1:17.

131. 2 Chron 19:6-7.

132. t. Sanhedrin 1:9, at 416 (Zuckerman edition) discussed above, *supra* note 92.

133. Deut 1:9.

flesh and blood sits upon the bench and judges [people] for execution, strangulation, burning and stoning, and it is as if naught. And if he is required to take one sela [unit of coin] he takes two; two, he takes three; a dinar, he takes a maneh (100 dinars). But I am not thus: rather, if I required capital punishment, I am held accountable. And it also says,<sup>134</sup> "Do not rob the poor because he is poor, nor oppress the afflicted at the gate; for the Lord will plead their cause, and plunder the soul of those who plunder him"<sup>135</sup>

According to the *midrash*, Moses and Solomon found it difficult to judge Israel, for God had "increased" them—that is, made Israel superior over their judges. The judges of the other nations can judge arbitrarily "and it is as if naught [nothing had happened]." But the Israelite judge bears a grave responsibility, such that if he requires someone to pay money unlawfully, he is held accountable as if for a capital matter. If Moses, the master of the prophets, and Solomon, the wisest of all men, were hesitant to judge, all the more so any other judge.

The idea of God's presence is not explicitly stated in this *midrash*, and offhand one could interpret the passage without relating to this subject. But without this component it is difficult to explain the gravity of the sin of perverting justice. Why a judge who made an error in a monetary matter is held culpable of his very life, as the *Sifrei* asserts? If the judge unlawfully required someone to pay money, then let him be required to pay money. But apparently the judge's sin is greater: his sin derives from the fact that he represents God, so to speak, so that if he took money unlawfully, it is as if God Himself is held accountable for taking money unlawfully. Notably, the focus of this *midrash* is not on deviation from the letter of the law, but rather the harm done to the weak, as indicated by the following verse: "Do not rob the poor because he is poor, nor oppress the afflicted at the gate; for the Lord will plead their cause, and plunder the soul of those who plunder him."<sup>136</sup> The gate refers, of course, to the court, and the warning is directed to the judge not to oppress the poor man nor to steal from the misfortunate.

The Babylonian Talmud at *Sanhedrin* 7a explicitly points out the connection between this homily and the belief in Divine Presence. This passage includes a series of three sayings given by R. Shmuel bar

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134. Prov 22:22-23.

135. *Sifrei* on Deuteronomy § 9, at 17 (Finkelsein ed.); compare Deut Rab. ¶ 15, at 13-14 (Lieberman ed.). This *midrash* is discussed by B. Lifschitz, *On Judges in Israel and the Art of the Homily*, 94 SINAI 71 (1984) (Hebrew).

136. Prov 22:22-23.

Nahmani in the name of R. Yonatan:

1. Every judge who judges a true judgment causes the Divine Presence to rest in Israel, as is said "God has taken His place in the Divine council, in the midst of the judges [or: gods] He shall judge" (Ps 82:1). And every judge who does not judge a true judgment causes the Divine Presence to depart from Israel, as is said: "From the despoiling of the poor, from the groan of the needy, I will now arise, says the Lord." (Ps 12:6)
2. Every judge who takes [money] from one and gives it to the other unlawfully, the Holy One bless be He takes his very soul [i.e., life], as is said "Do not rob the poor, because he is poor, or crush the afflicted at the gate; For the Lord will plead their cause and despoil those who despoil them." (Prov 22:22-23)
3. The judge should always see himself as if a sword were poised between his thighs, and Gehinnom is opened up below him,<sup>137</sup> as is said: "Behold the couch of Solomon, about it are sixty mighty men, of the mighty men of Israel; Each one is girt with a sword, expert in war, each with his sword at his thigh, against fears at night" (Songs 3:7-8)—because of the fear of Gehinnom, that is similar to night.<sup>138</sup>

These three sayings are intertwined with one another; together, they paint a picture expressing the approach of Divine Presence on the one hand and the fear of judgment on the other. The first saying clearly expresses the view of the presence of God in judgment. The second one, which appeared in the *tannaitic midrash* cited earlier, expresses the judge's absolute responsibility and his capital culpability. The proximity of these two subjects emphasizes the connection between the theological idea of God's presence and the grave responsibility borne by the judge. Nevertheless, there is an important distinction between the two. The opening statement presents a new formulation of the understanding of presence. It does not assume God's presence in every legal proceeding, but makes it provisional upon the nature of the judgment. A judge who judges a true judgment brings about the indwelling of the Presence, whereas one who does not do so causes the

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137. The phrases within square brackets are corrections based upon the Munich manuscript. The last section is brought in a more delicate formulation in the Yemenite manuscript of Yad Harav Herzog: "And the judge should see it as if a sword is resting on his neck." Compare Maimonides' wording in *Hilkhhot Sanhedrin* 23.8.

138. R. Shmuel b. Nahman and R. Yonatan are Palestinian *amoraim*, but greater weight should be given to the fact that the material is found in the Babylonian Talmud, as we do not know the exact formulation of things in the Palestinian source. Hence the matters must be examined in the context of the *sugya* in the Bavli.

departure of the Divine Presence.<sup>139</sup> According to this view, God's presence does not depend upon the judicial function *per se*, but rather upon its result, specifically its being "a true judgment."

What is "a true judgment"? The *Mishnah* at *Peah* 8.9 mentions "a judge who judges a true judgment" as opposed to "a judge who takes bribes and slants the judgment."<sup>140</sup> That is to say, "a true judgment" is a righteous one, in which there is no deliberate slanting or imbalance in the verdict.<sup>141</sup> However, in the *Bavli* it would appear that the emphasis is not on the "justness" of the judgment, but rather upon its "truth." It is not sufficient for the judge to judge matters fairly and evenhandedly, but he must also rule precisely according to the Attribute of Justice.

This idea finds expression in sayings two and three as well. The second saying, regarding the absolute responsibility of the judge, as mentioned earlier in the *Sifre*, has undergone a slight reworking. The emphasis is no longer upon the damage done to the poor man or the weak one, but rather to the damage done to the law *per se* by the fact that the judge "takes from one and gives it to the other unlawfully." The very departure from the law—even if done in all innocence—imposes

139. Compare Mekhilta de-Rabbi Yishmael, Amalek, Yitro § 2, at 196:

Whoever brings about a truly true judgment (*emet la-amito*) is considered by Scripture as if he were a partner of the Holy One blessed be He in the acts of Creation. It is written here "[Moses sat to judge the people] from morning till evening" [Exod 18:13], and in the in acts of Creation it is written "and it was evening and it was morning"

[Gen 1:5]; see also b. Shabbat 10a.

140. This passage does not appear in the Kaufmann manuscript (except in the margin), nor is it mentioned in other manuscripts of the *Mishnah*. Evidently, it is not part of the *Mishnah* but rather a *beraita* that was added to it. See the notes of Shishah Sidrei *Mishnah*, *Zera'im*, 352 (H. Albeck ed.), and Y.N. EPSTEIN, INTRODUCTION TO THE TEXT OF THE MISHNAH 975 (Hebrew Univ. Press 2000) (Hebrew).

141. On this idiom, see C. Hayes, *Legal Truth, Right Answers and the Best Answers: Dworkin and the Rabbis*, DINEI ISRAEL 25 (2008) (Hebrew) (in English Section at 73-121). Hayes rightly emphasizes that one is speaking of the propriety and fairness of the procedure and not of the objective "truth" of the ruling. However, as I argue here, in the Babylonian Talmud "a true judgment" has a different meaning. Here a certain concept of truth in judgment is already assumed. Another interpretation is proposed by Tosafot, which said in a number of places that this refers to a true judgment as opposed to "false judgment." b. Shabbat 10a, Megillah 15b, Bava Batra 8b; and compare Hiddushei ha-Ritba to Bava Batra 8b. "False judgment" (*din merumeh*) refers to a ruling based on the testimony given, but in which the judge knows—on the basis of information that is not acceptable within the framework of the procedure—that one is dealing with false testimony. In such a case an obligation is imposed upon the judge to judge "a truly true judgment"—i.e., on the basis of his own truth—and not to suffice with a formalistic decision based upon the laws of evidence. See Maimonides, *Hilkhot Sanhedrin* 24.1-3. An additional interpretation of this matter has been proposed by R. Yehoshua Falk Katz, author of the *Derishah* on the *Tur*: "That he judges according to the place and time in the matter saw that it will be true, to teach us that he does not always rule literally according to the law of Torah, for at times the judge must rule beyond the letter of the law, depending upon the time and the subject matter." *Tur*, *Hoshen Mishpat*, 1, in *Derishah* § 2. According to this interpretation, a judgment that is "truly true" indicates specifically a deviation from normative law.

upon him the responsibility to exercise great care. The third saying expresses matters in a sharper and more colorful manner. The judge must see himself as if a sword were resting between his thighs or, in a more delicate image, upon his throat. If he departs from the truth even slightly, he will bring upon himself the blow of the sword.

From these three sayings, a new formulation of the concept of presence emerges: God's presence is not related to the judicial procedure *per se*, but rather depends upon the nature of the judgment, upon it truly being a "true judgment." This approach thus assumes the existence of a certain "truth," and not only the formal correctness of the procedure.

This being so, it is not sufficient that judges are careful about deliberate slanting of the judgment, such as taking bribes, favoring one side, and the like. Even an innocent slanting of the judgment stemming from lack of knowledge of the facts or of the law may cause removal of the Presence. Clearly, this approach increases the judge's responsibility and strengthens the sense of "fear" of judgment.

This tendency is recognizable in the continuation of the discussion in the Babylonian Talmud. Here, a series of sayings emphasize the judge's obligation to rule on the basis of clear knowledge of the facts and of the law:

Rabbi Yoshiya, and some say R. Nahman, expounded:<sup>142</sup> What is [the meaning of] the Scripture: "O house of David! Thus says the Lord: judge justly in the morning" (Jer 21:12). And does one judge in the morning? Does not one judge the entire day? Rather, if the matter is as clear to you as the morning, say it; and if not, do not say it. R. Hiyya bar Abba said in the name of R. Yohanan from this: "Say to wisdom, you are my sister" (Prov 7:4) If the matter is as clear to you as your sister, who is forbidden to you, say it; and if not, do not say it.<sup>143</sup>

Another saying of R. Joshua b. Levi emphasizes the personal responsibility of each judge who participates in the judicial process: "Ten who sit in judgment, a yoke hangs over the necks of all of them."<sup>144</sup> The image of the yoke upon the neck of a prisoner, evidently

142. In the Yemenite manuscript (Yad Harav Herzog): R. Shemuel bar Nahmani.

143. b. Sanhedrin 7b, according to Munich manuscript (with deciphering of abbreviations).

144. b. Sanhedrin 7b. The mention of ten judges is deserving of attention. In the Mishnah and in other Talmudic sources, we do not know of a bench with ten judges, but this number does appear in Biblical sources. Boaz gathers ten elders in order to redeem Ruth (Ruth 4:2); Ecclesiastes mentions "ten rulers who were in the city" (Eccles 7: 19); and also Damascus Document mentions ten judges (CD P. 10). The language of R. Yehoshua b. Levi, "ten who sit in judgment," alludes to the fact that this practice still existed during the period of the amoraim. See L. GINSBERG, AN UNKNOWN JEWISH SECT 47-48 (Jewish Theological Seminary Am. 1976); LAWRENCE SCHIFFMAN, HALAKAH, PRACTICE AND MESSIANISM IN THE JUDAEAN DESERT SECT

one condemned to death, is reminiscent of the image of the sword resting over the throat. If they slant the judgment, all of them are subject to death.

A clear sense of the fear of judgment likewise emerges from other sayings related to this issue. However, it is difficult to determine to what extent the Sages related seriously to these warnings, and whether the warnings caused the Sages to refrain from participating in judgment. There appear to be no explicit calls on the part of the Sages to refrain from judgment in general, or from judgment based on Torah, in particular. In fact, in some sayings, warnings about fear of judgment even seem bear a certain sarcastic note. For instance, later in this discussion the following incident is cited: "When a judgment was brought before Rav Huna he would take ten sages from the Study House and say: So they might get some of the sawdust from the beam."<sup>145</sup> Offhand, it would seem as if Rav Huna assembled these sages to deflect some of the liability for the judgment from himself: "so that if we err, the punishment will be divided among all of us."<sup>146</sup> However, the fact that he gathered ten people suggests that his main purpose was to conduct the judgment in the presence of this specific number of people. The same follows from the saying of Rabbi Joshua ben Levi cited earlier. This being so, the consideration of easing the burden of judgment occupies a secondary place, and ought to be understood in a softer manner or even as intended sarcastically.<sup>147</sup>

The story about Rav Ashi should be read in a similar spirit: "When Rav Ashi would go to judgment, he would say: It is His will to hold me accountable of death: I did not do the needs of my house, and I leave my house empty. Would that my coming home be like my going out."<sup>148</sup> These words of self-mockery express a feeling of fear of judgment, but they are also related to other matters that determine the worthwhileness of labor, like unpaid work. But these impediments do not cause Rav Ashi to refrain from going to the court house even on the next day and to

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136-43 (Mrekaz Zalman Shazar 1993).

145. b. Sanhedrin 7b.

146. Rashi, Sanhedrin 7b s.v. "denimtayan."

147. In practice, there is a contradiction between the words of R. Joshua b. Levi that "a yoke hangs over the neck of them all" and those of Rav Huna, that this comes to make matters easier for those sitting in judgment. See Lieberman's comment: "We have not seen the teachers when they preached their disciples. Was it said in seriousness and sobriety, or was it perhaps with a wink." S. Lieberman, *'It Was Thus and It Was Thus': Palestinian Jewry and World Jewry During the period of the Mishnah and the Talmud*, in MEHKARIM BE-TORAT ERETZ YISRAEL 331 (Hebrew Univ. Magnes Press 1991) (Hebrew).

148. b. Sanhedrin 7b, based on Munich Manuscript. According to the printed version, the incident involved Rav.

continue to judge.<sup>149</sup>

In short, this discussion in the *Bavli* expresses a feeling of fear of judgment. The sense of God's presence in judgment is understood as a factor that requires the judge to be very careful in judgment and to direct himself towards its truth. The judge who fails to do so causes the Divine Presence to depart and is held culpable of his very life.

From this viewpoint, there is a difference between the Babylonian Talmud as against the tannaitic tradition and the other Palestinian sources. The tannaitic tradition took care to calm the judge: "Lest the judge say, 'What have I to do with this trouble? And is it not already said, 'for He is with you in the matter of judgment'—You have naught but what your eyes see."<sup>150</sup> By contrast, the *Bavli* emphasizes the judge's responsibility in a manner that is liable to frighten him from sitting in judgment. In fact, the interesting question is whether the latter approach had any practical influence. Some commentators assert that this approach had an impact upon the legal policy of the Talmudic Sages. For instance, the Babylonian Sages stated that monetary penalties or fines (*kenasot*) are not to be imposed in Babylonia.<sup>151</sup> This ruling included refraining from certain kinds of damage that required the court to make a valuation and which were thus considered analogous to laws of penalties.

This unique phenomenon, in which the court foregoes one of its prerogatives and powers, requires a certain explanation. Some scholars have explained that the judicial policy of the Babylonian Sages derived from fear of judgment.<sup>152</sup> If this was so, they spoke not only of a rhetorical fear of judgment, but of a factor that had direct influence upon judicial policy. However, significantly, in the *Bavli* there is no call or recommendation to the judges to refrain from sitting in judgment or to refrain from judging by Torah law. Such a recommendation will only emerge in the medieval literature, as discussed below.

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149. It is worth comparing these words of Rav Ashi with those of R. Yishamel b. R. Yossi in the Mishnah: "One who withholds himself from judgment removes himself from enmity, theft and false oaths. m. Avot 4.7. The same R. Yishmael b. R. Yossi was an expert judge in Zippori. BUCHLER, *STUDIES IN THE PERIOD OF THE MISHNAH AND THE TALMUD* (Hebrew) (Mossad Karav Kook 1968). It would seem that these words express his life experience, but there is no indication that they caused him to refrain from judgment.

150. t. Sanhedrin 1.9.

151. See, e.g., b. Sanhedrin 31b.

152. A. Radziner, *The Fundamentals of Laws of Penalties in Talmudic Law* 278-819 (2001) (unpublished Ph.D. dissertation, Bar-Ilan University) (Hebrew) (on file with author). On the nature of the laws of penalties, see *id.* at 136-94, and A. Radziner's article, '*Penalties*' in *Payment for Damages in Tannaitic Literature*, 24 *SHENATON HA-MISHPAT HA-IVRI* 287 (2006-07) (Hebrew).

### III. THE IDEA OF DIVINE PRESENCE IN THE MIDDLE AGES: THEORETICAL INTERPRETATION AND LEGAL IMPLICATIONS

The concept of Divine Presence in the judicial process became a fundamental concept, a defining myth, of *halakhic* juridical theory. The texts describing God's presence in judgment are repeated in post-Talmudic *halakhic* literature, so much so that there seems to be hardly a single *halakhic* text that did not copy them and base its approach upon them.<sup>153</sup> However, the sophisticated conceptual approaches developed in the Middle Ages did not accept the literal sense of the Talmudic texts, but offered new interpretations thereof. Alongside the new theoretical interpretations, there were also developments in the legal and practical realm.

This section of the article will examine both the theoretical interpretations offered for the concept of Divine Presence and its legal implications. The first part will discuss two primary exegetical directions given to the approach of Divine Presence: that of Maimonides, who in this context represents rationalistic philosophy, and that of R. Moses Nahmanides, who represents the Kabbalah. The second part will discuss the approach of R. Nissim Gerondi, who represents a third tradition, different both from philosophy and Kabbalah. However, R. Nissim is discussed not only for his theoretical approach to the issue of God's presence, but also its connection to the unique political theory that he developed regarding the distinction between "the law of Torah" and "the law of the king." The third part will discuss the juridical interpretation propounded by R. Moses of Coucy, author of the *Book of Commandments* (known as *Sefer ha-Mitzvot ha-Gadol*). Unlike the other Sages mentioned, R. Moses of Coucy did not develop a theoretical approach to the Divine Presence, but rather developed an unusual *halakhic* position regarding the status of Torah law that left its impression upon the development of *halakhic* judicial proceedings.

#### A. Maimonides and Nahmanides—Divine Presence in the Courtroom: Between Philosophy and Kabbalah

Maimonides utilizes both the Biblical idea of "the judgment is God's" and the Talmudic approach of Divine Presence in judgment. First, the idea that "the judgment is God's" is used by Maimonides to

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153. See R. Yitzhak Alfasi (Rif), *Sanhedrin* 1-2; Maimonides, *Laws of Sanhedrin* 23.8; R. Ya'akov b. Asher, *Tur*, *Hoshen Mishpat* 8; Levush, 'Ir Shoshan, *Hilkhot Dayanim* 8.2.

express different ideas. Thus, in his *Introduction to the Mishnah* he uses this phrase to emphasize the authority of the law. Since “the judgment is God’s,” one should not cast any doubt on any particular judgment or decision of a specific judge, because the judgment is not a personal decision, but rather an expression of a true tradition that ultimately reflects God’s judgment.<sup>154</sup> Second, in *The Laws of Sanhedrin*, Chapter 24.3, Maimonides uses the idea to express the truth of the law and to emphasize the judge’s obligation to pursue the truth. He discusses there the manner in which the judge ought to behave in the event of a “deceitful ruling”—that is, a situation in which the judge is confronted with testimony that he personally knows to be false, but which he is unable to confute in an accepted procedural manner. In such a case, Maimonides proposes that the judge examine the witnesses closely, in an effort to get the truth out of them. If he does not succeed in doing so, and is still convinced that the proceeding is false, he ought to recuse himself from the case and not rule. He concludes this *halakhah* as follows: “for such matters are given to the heart, and Scripture says ‘for judgment is God’s.’”<sup>155</sup> That is, the factual rulings of the judge ought to be based upon the inner conviction of their truth; following the formal rules of evidence is not sufficient. This approach is unique to Maimonides, and is based upon the idea that “the judgment is God’s,” and thus the judge is obligated to the truth alone.<sup>156</sup>

Maimonides also uses the Talmudic idea of Divine Presence in judgment to emphasize the responsibility imposed upon the judge and the gravity with which he must regard his task. In *The Laws of Sanhedrin* Chapter 3.7, he uses this idea to describe the atmosphere which ought to prevail in the courtroom:

In every court of Israel which is honest, the Divine Presence (shekhinah) resides. Therefore the judges must sit with fear and awe and enwrapped and with serious demeanor. And it is forbidden for them to be light-hearted or to jest or to converse idly in the courtroom, but only [to speak] words of Torah and wisdom.

Further, at the end of Chapter 23, Maimonides discusses the judges’ duty to behave in an upright manner, utilizing this same idea to emphasize the judge’s obligation to perform a true judgment. In this context he weaves together a number of different Talmudic sayings:

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154. MAIMONIDES, INTRODUCTION TO THE MISHNAH 47-48 (Shilat ed., Ma’ale Adumim 1996) (Hebrew).

155. Maimonides, *Laws of the Sanhedrin* ch. 24.3.

156. G.J. Blidstein, *The Judge’s Own ‘Truth’ as Judicial Instrument: Maimonides’ Laws of Sanhedrin 24:1-3*, in 24 DINEI ISRAEL 119 (2007) (Hebrew).

(8) The judge should always see himself as if a sword is resting upon his neck and Gehinnom is open beneath his feet. And he must know whom he is judging, and before Whom he is judging, and Who shall take recompense from him in the future if he deviates from the truth, as is said, "God stands in the council of the judges [gods]" (Ps 82:1), and it says, "Consider what you do, for you judge not for man but for God" (2 Chron 19: 6).

(9) Every judge who fails to judge a true judgment causes the Divine Presence (*shekhinah*) to depart from Israel. And every judge who takes from this one and gives to that one unjustly, the Holy One blessed be He removes his soul, as is said "I will despoil the very soul of those who despoil him" (Prov 22:23). And every judge who judges a true judgment, even for a brief hour, is as if he had corrected the entire world and caused the Divine Presence to reside in Israel, as is said "God stands in the council of the judges." And lest the judge say to himself: what do I have to do with this trouble? Scripture says, "and he is with you in the matter of judgment"—the judge has naught but that which his eyes see.<sup>157</sup>

These words are cited according to their language in the Babylonian Talmud, without any interpretation by Maimonides. At first blush, these ideas appear inconsistent with Maimonides' philosophical approach. His conception of God is abstract, and he cannot accept the concept of Presence in any literal sense, for instance, that is, as the presence of an autonomous Divine entity, which at times resides in the world and at others removes itself. Some scholars thought that Maimonides' words in the *Code* were intended for the masses, as distinct from his philosophical approach. But the other view, and today the more widely accepted one seems preferable: that his words in the *Code* are consistent with his philosophical approach and reflect their essence.<sup>158</sup>

Following this approach, I suggest a philosophical interpretation of these ideas, in light of Maimonides' own words in the *Guide for the Perplexed*. The central concept demanding such an explanation is that of the Divine Presence (*shekhinah*). Maimonides discusses this concept in the *Guide*, where it is identified with "the Glory of the Lord

157. Maimonides, *Laws of the Sanhedrin* ch. 23. The relevant statements are primarily from b. Sanhedrin 7a and 6b (t. Sanhedrin 1.9; y. Sanhedrin 1.1 [18 b]). It would appear that the expression, "as if he corrected the entire world" is based upon b. Shabbat 10a, cf. m. Avot 1.18.

158. See ISADORE TWERSKY, *INTRODUCTION TO THE CODE OF MAIMONIDES (MISHNEH TORAH)* 356 ff. (Yale Univ. Press 1982); Y. LEVINGER, *MAIMONIDES' WAYS OF HALAKHIC THOUGHT* ch. 4 (Hebrew Univ. Magnes Press 1965) (Hebrew); Y. LEVINGER, *MAIMONIDES AS PHILOSOPHER AND AS POSEK* 100-11 (Mossad Bialik 1990) (Hebrew); DAVID HARTMAN, *MAIMONIDES: TORAH AND PHILOSOPHIC QUEST* (Jewish Publ'n Soc'y Am. 1978).

(*Kavod*).<sup>159</sup> Maimonides devotes a separate discussion to the concept of the Divine Glory, for which he offers a philosophical interpretation.<sup>160</sup> According to this interpretation, “the Glory of the Lord” is not a quality or attribute of God, nor an independent entity created by Him; rather, it is the attitude human beings hold towards God. The source of this relationship is in philosophical recognition: “For the true greatness is in perception of His greatness.”<sup>161</sup> Accordingly, the revelation of the “Glory of God” or of His “Presence” is simply a colorful formulation for the intellectual cognition of the greatness of God. This being the case, the statement that the Divine Presence dwells upon an upright court means that that court has arrived at a high intellectual level.<sup>162</sup> The saying that a judge who judges a true judgment “causes the Divine Presence to reside in Israel”<sup>163</sup> means that the judge brings about the recognition of the greatness of God and His knowledge.

The concept of Gehinnom (Purgatory or Hell), as it appears in the words of Maimonides, ought to be interpreted in a similar manner. The image of Gehinnom as being open at the feet of the judge symbolizes the danger of human beings becoming cut off from wisdom and from the eternal life involved therein.<sup>164</sup> Thus, according to Maimonides’ view, the ideal judge is a philosopher who has arrived at a high philosophical level and is able to translate his perceptions into proper judgments within practical life.<sup>165</sup>

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159. Maimonides, *Guide for the Perplexed* Pt. 1.18-19.

160. *Id.* at ch. 1.64. The concept of the Divine Glory occupies an important place in pre-Maimonidean philosophy. Rabbi Saadya Gaon and others made use of the doctrine of Glory to explain the concrete descriptions of revelation described in the Bible. According to this doctrine, one is not speaking of a revelation of God himself, but rather of His Glory, an entity created by God specifically for this purpose. R. Saadya Gaon, *Emunot ve-De’ot*, Part 2. The idea developed in parallel among Karaite thinkers, as well as among other thinkers such as R. Abraham Ibn Ezra. See J. DAN, *THE ESOTERIC DOCTRINE OF ASHKENAZIC HASIDISM* 104-16 (Mossad Bialik 1968) (Hebrew). In wake of this, Maimonides draws a distinction among three meanings of Glory: the one intended by his predecessors; the second as a term for God himself; the third the philosophical meaning which he proposes.

161. Maimonides, *Guide for the Perplexed* Pt. 1.64.

162. This subject is connected to Maimonides’ understanding of the Divine image of man. See in this context Y. Lorberbaum, *Maimonides on the Image of God: Philosophy and Halakhah—The Sin of Murder, Criminal Law, and the Death Penalty*, 68 *TARBITZ* 533 (1999) (Hebrew).

163. Maimonides, *Laws of the Sanhedrin*, ch. 23. 9.

164. “Gehinnom” signifies the opposite of “the World to Come.” See Maimonides, *Foundations of the Torah* ch. 5.4. The World to Come signifies the eternal spiritual life assured to those who have attained complete philosophical apprehension. See Maimonides, *Laws of Repentance* ch. 8.2. For discussion, see M. HALBERTAL, *MAIMONIDES* 122-26 (Merkaz Zalman Shazar 2009) (Hebrew).

165. In this context it is worth referring as well to the concluding chapter of *The Guide for the Perplexed*, Pt. 3.54, in which Maimonides draws a connection between the intellectual perfection of the philosopher and the performance of “loving kindness, justice and righteousness in the land.”

In contrast, Rabbi Moses Nahmanides (Spain, 1194-1270), who adhered to the Kabbalistic world-view, identified more easily with the concept of God's immanent presence. But he gave this idea a systematic interpretation integrated with his general thought. Nahmanides' principled approach, which adopts the idea of Presence, is expressed in his *Commentary on the Torah*, in which he discusses the term whereby judges are referred to as *Elohim* (*Exodus* 21:6). He first brings the interpretation of R. Abraham Ibn-Ezra: "The judges are called *Elohim* [God] because they sustain God's judgment in the world."<sup>166</sup> According to this interpretation, the judges serve as agents of God and therefore are called by His name. But Nahmanides disagrees with this view:

In my opinion, when Scripture says, "And his master shall bring him before God (*Elohim*)" or "The case of both parties shall come before God (*Elohim*)," this is to hint that God will be with them (the judges) in the judicial proceeding; He will find guilty and He will find innocent. And this is what is meant by saying, 'He whom God declare guilty. . . .'<sup>167</sup>

Thus clear cut controversy emerges regarding the concept of Divine Presence. Ibn Ezra interprets the verse in a rational manner, utilizing the concept of agency, while Nahmanides interprets the same verse in the spirit of the idea of Presence, as found in the Talmudic sources. The judges are called *Elohim* because God is present in the judicial process and, in practice, He is the real judge: "He will find guilty and He will find innocent."

Thus, Nahmanides understood the idea of God's presence in judgment in a concrete, immanent sense. He suggests even an explanation for the "mechanics" of such presence. In his *Commentary on the Torah*, Nahmanides explains the indwelling of the Presence upon the seventy elders, as described in *Numbers* 11.<sup>168</sup> According to his interpretation there, the indwelling of the Divine Presence came about as the result of a formal, isomorphic correspondence between earthly objects and supernal powers. This correspondence creates an "attraction" of the supernal forces, drawing them down into the world. Such correspondence exists between the Sanctuary, the Ark of the Covenant, and the *kaporet* with the "image of those who serve on high," facilitating the indwelling of the Presence within the Tabernacle. A

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166. R. Abraham Ibn-Ezra, Long Commentary to Exod 21:6. In his Short Commentary to the same verse he simply writes "because they are the officials of God in the land."

167. Nahmanides, Commentary on the Torah, Exod 21:6.

168. Nahmanides, Commentary on the Torah, Num 11:16. On the entire subject, see M. HALBERTAL, IN THE WAY OF TRUTH 72-76 (Shalom Hartman Inst. 2006) (Hebrew).

similar correspondence exists between the seventy elders appointed by Moses and the heavenly princes, thereby causing the indwelling of the Presence upon them. Using the same principle, Nahmanides explains the Indwelling of the Divine Presence in the Great Court (*Sanhedrin*) in which there were also seventy judges: "And Scripture alludes to this when it says that 'God stands in the council of the judges, in the midst of the judges he holds judgment,' for the *Shekhinah* is with them, to uphold them."<sup>169</sup> The indwelling of the Presence within the Court assists it in its decisions and prevents it from making errors. As he comments in his remarks in *Deuteronomy*: "For the spirit of the Lord is upon those who serve in His holy place, and he will not abandon his pious ones, for ever they shall be protected from error and from stumbling."<sup>170</sup>

But this explanation is only valid for the indwelling of the Presence in the Great Court. How are we to explain God's Presence in an ordinary court? It would seem that this may be explained by means of Nachmanides' doctrine of prophecy. According to Nahmanides, the Sages also enjoy a certain degree of prophecy, but its level is lower than that of the prophets. He notes the distinction between the two kinds of prophecy in his interpretation of the Talmudic saying, "After the Temple was destroyed, prophecy was taken from the prophets and given to the Sages."<sup>171</sup> He comments on this: "Even though the prophecy of the prophets—which was seeing and vision—was abolished, the prophecy of the Sages, which is via the path of wisdom, was not taken away, but they know the truth through the Holy Spirit that is within them."<sup>172</sup> Thus, the prophecy of the Sages that comes through wisdom—rather than that of the prophets, which is characterized by sight—still exists. The source of the Sages' prophecy is their attachment to God; therefore, "the Holy Spirit is in their midst." According to this approach, God's presence is connected to the concept of *devekut*, cleaving to God. If the judge who sits in judgment is attached to God, he merits the Holy Spirit and one may say that the Holy One blessed be He is present with him in judgment.

This background highlights an interesting parallel between Maimonides and Nahmanides. According to Maimonides, the ideal judge is a philosopher, whose rulings reflect his intellectual cognition of

169. Nachmanides, Commentary on the Torah, Num 11:16.

170. Commentary to Deut 17:11. This mystical interpretation is brought alongside another, rationalistic interpretation. Rather than being based on the infallibility of the Divine Presence, it is based upon the conveying of the Torah's authority upon the Great Court, "for it was with their consent [to this] that He gave the Torah."

171. b. Bava Batra 12a.

172. Hiddushei ha-Ramban, Bava Batra 12a; HALBERTAL, *supra* note 165, at 203-04.

God's greatness. In comparison, according to Nahmanides, the ideal judge is a prophet, who expresses in his ruling the Holy Spirit. According to both of these interpretations, the Divine Presence (*Shekhinah*) is not a separate entity that dwells "by itself" in the Court, but rather a result of the special characteristics and qualities of the judge.

B. Torah Judgment as Focus for Divine Presence:  
Rabbenu Nissim Gerundi

Rabbenu Nissim b. Reuven Gerondi (1320-76; Gerona, Catalonia; known also as *Ran*) was part of the school of Talmudic scholarship founded by Nahmanides, but on the theoretical level his attitude towards Nahmanides' system was more complex. He was influenced by Nahmanides' teachings, but had reservations regarding his Kabbalistic approach.<sup>173</sup> This complex attitude is expressed with regard to the present subject.

In the wake of Nahmanides, R. Nissim assumed that the sage has prophetic powers, "a power that transcends the intellect."<sup>174</sup> Moreover, he stressed the sage's superiority over the prophet in the spirit of the Talmudic, saying, "The sage is preferable to the prophet."<sup>175</sup> While the prophet is graced with a clearer power of prophecy than the sage, the sage's *halakhic* authority is superior to that of the prophet. Further, the sage is authorized to rule on *halakhic* matters, whereas the prophet is not allowed to do so. In practice, R. Nissim emphasized, the validity of the prophet's prophecy itself depends upon the sage, as it is he who determines whether the prophet is in fact to be considered authentic. The sage's superiority to the prophet in the *halakhic* area and the unique status of the Court cannot be based upon prophecy, but upon other factors. According to this approach, the Divine Presence in the Court does not derive from the special qualities of the judge, but rather from a certain quality of the law. A Torah judgment is "a true and righteous

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173. R. Nissim's reservations regarding Nahmanides in the area of Kabbalah are testified to by his disciple, R. Yitzhak b. Sheshet: "And I have made known to you that which was told me privately by my master, R. Nissim of blessed memory, that the Ramban z'l immersed himself far more than necessary to believe in these matters of Kabbalah." *Teshuvot ha-Ribash* 157. On his status and system in the realm of Talmudic exegesis, see I. TA-SHMA, *THE EXEGETICAL LITERATURE OF THE TALMUD* 85-89 (Hebrew Univ. Press 2000) (Hebrew). On his theoretical approach, see M. LORBERBAUM, *POLITICS AND THE LIMITS OF LAW: SECULARIZING THE POLITICS IN MEDIEVAL JEWISH THOUGHT* 124-28 (Stan. Univ. Press 2001), and the bibliography mentioned there. On R. Nissim's legal doctrine and his relation to Nahmanides, see Z.W. Harvey, *On R. Nissim's Philosophy of Halakhah*, in *NEW STUDIES IN THE PHILOSOPHY OF THE HALAKHAH* 171-80 (A. Ravitzky & A. Rosenak eds., Van-Leer Inst. 2008) (Hebrew).

174. R. Nissim, *Derashot ha-Ran*, 214 (Machon Shalem 1977) (Hebrew).

175. *Id.* at 215.

judgment in itself, from which the Divine element is drawn down and attaches to us.”<sup>176</sup>

Against the background of this statement, R. Nissim quotes the Talmudic saying, “Every judge who judges a true judgment is deserving that the Divine Presence rest with him, as is said, ‘God has taken His place among the judges, in their midst He holds judgment.’”<sup>177</sup> In this respect, as against both Maimonides and Nahmanides, who made the Divine Presence dependent upon the personality and characteristics of the judge, R. Nissim makes the Divine Presence dependent upon the nature of the law implemented by the judges. Thus, a Torah judgment brings about the indwelling of the Divine Presence, whereas one based upon something else does not bring this about.

This approach underlies R. Nissim’s political theory, in which a distinction is drawn between “the law of the Torah” and “the law of the king.”<sup>178</sup> R. Nissim noted that the Torah’s legal system has a dual purpose: on the one hand, to impose obedience to the laws of the Torah, whose main purpose is religious, to bring down the “Divine influx.” On the other hand, its purpose is social, to implement the “correction (or maintenance) of the social order.”<sup>179</sup> There is a certain tension between these two goals. The policy desirable in the religious realm is likely to undermine the social goals, and vice versa.

This tension finds particular expression in the realm of criminal law. According to Torah law, criminals may only be punished on the basis of proper testimony and advance warning, specifically, the testimony of two reliable people (criminals or transgressors are unfit for testimony) who not only witnessed the act in question, but warned the criminal prior to the performance of the act. This strict requirement is intended to assure the reliability of the testimony and to ascertain that the transgressor performed the act deliberately and is hence deserving of the severe punishment entailed. However, insistence upon this requirement makes it very difficult to convict criminals and harms the social goal of the war against crime. R. Nissim formulated matters thusly: “If transgressors are not punished except in this manner [i.e.,

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176. *Id.* at 191.

177. b. Sanhedrin 7a.

178. R. Nissim, *Derashot ha-Ran*, *supra* note 170, at Eleventh Sermon, 189 ff. This subject has been discussed extensively in the research literature. See A. Ravitzky, *On Kings and Laws in Medieval Jewish Thought*, in *CULTURE AND SOCIETY IN JEWISH HISTORY IN THE MIDDLE AGES* 469-92 (R. Bonfil et al. eds., Merkaz Zalman Shazar 1989) (Hebrew); A. Ravitzky, *Religion and State: Competing Models in Jewish Thought*, in *FREEDOM INSCRIBED* 49-89 (Am Oved 1999) (Hebrew); M. LORBERBAUM, *supra* note 169, at 124-52.

179. R. Nissim, *Derashot ha-Ran*, *supra* note 170, at 190.

with witnesses and warning], the political order will lose out completely, for the number of those who shed blood and without fear of punishment will increase."<sup>180</sup>

R. Nissim's solution to this problem is rooted in the distinction he draws between "the law of Torah" and "the law of the king." Unlike Torah law, whose purpose is religious—namely, attachment to "the Divine matter" and making God present—the Torah authorized the king to implement a legal system whose only purpose is "correction of the political order." Within the framework of the "law of the king," the king is also allowed to legislate and define other transgressions, in addition to those stated by the Torah, as well as to establish more lenient procedures for testimony than those demanded by Torah law. The law of the king is thus intended to serve as a more efficient tool for preserving the social order. In the ideal situation, Torah law would serve both ends—i.e., both the religious aim of "bringing down the Divine influx" and the social goal of "correcting the political order." However, in concrete reality, it is preferable at times to forego the religious goal and to focus upon attaining the social goal by means of the law of the king.

### C. Judgment by Torah: From Practical Law to Sacred Law

Within the framework of Franco-German Jewish culture, a unique approach developed towards Torah law—an approach expressed, not in theoretical formulations regarding the status or purpose of Torah law, but in *halakhic* formulations relating to the caution demanded regarding it. This approach first appeared in the book of commandments, *Laws of the Sanhedrin (Sefer Mitzvot ha-Gadol)* composed by R. Moses of Coucy, who was active in France during the thirteenth century.<sup>181</sup> At the end of his *Laws of the Sanhedrin*, he includes the following statement: "The judges must take care to avoid with all their strength, as far as possible, taking upon themselves to judge by Torah law, for the hearts have diminished."<sup>182</sup> This surprising instruction is justified by the statement that "the hearts have diminished," so that the judges are no longer able to direct themselves towards the truth of the law, making it quite plausible that they will commit errors in judgment. There seems little doubt that the background of this instruction is rooted in the

180. *Id.* at 190.

181. On R. Moses of Coucy and his book, see E.E. URBACH, *THE TOSAPHISTS* 465-79 (Hebrew Univ. Press 1976) (Hebrew); Y. Galinsky, 'Come and Make a Torah Scroll of Two Parts': On R. Moses of Coucy's Intention in Writing the *Semag*, 35 HA-MA'AYAN 23-31 ff (1995) (Hebrew).

182. *Sefer Mitzvot ha-Gadol* (the *Semag*), 'ASEH 107 (Venice ed.).

Talmudic tradition regarding God's presence in judgment, the grave responsibility imposed upon the judges for that reason, and the fear of punishment should they err and slant the law incorrectly.<sup>183</sup>

R. Moses of Coucy's words are quoted in subsequent *halakhic* works, initially in other Franco-German (*Ashkenazic*) works and thereafter among works from the Spanish (*Sephardic*) world as well.<sup>184</sup> R. Jacob b. Asher quoted him by name in *Tur*, *Hoshen Mishpat* 12, and from there his words found their way into R. Yosef Karo's *Shulhan Arukh* and became fixed *halakhah*: "The judges must distance themselves with all their strength not to take upon themselves to judge according to Torah law."<sup>185</sup> At the basis of this *halakhah* lay the assumption that the judge bears serious responsibility only when he judges according to Torah law, but that when he does not do so he is exempt from that same responsibility. From a theoretical viewpoint, this approach is based upon the idea that the Divine Presence in judgment is connected specifically with judgment based on Torah law. In this respect, his view would seem similar to that of R. Nissim, but different from the views of Maimonides and Nahmanides, who made this dependent upon the personality of the judge *per se*.

From a legal viewpoint, R. Moses of Coucy's approach paved the way for an alternative juridical path to that of Torah law. He does not explicitly state the alternative law according to which the judges ought to judge. But the Talmudic sources seem to indicate the judges will judge on the basis of their own discretion once the litigants accept this upon themselves. However, the authorities who followed in his wake understood that he spoke of a proceeding based upon compromise (*peshara*). Consequently, authorities accepted the opinion that the judges must receive the agreement of the litigants to judge them by way of compromise.<sup>186</sup> In any event, according to this approach Torah law

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183. Matters were interpreted thus by all the commentators who came in his wake. See the interpretation of Isaac Stein's Commentary on Sefer Mitzvot ha-Gadol (the Semag) 61 (Venice ed.); Bayit Hadash on the Tur, Hoshen Mishpat 12.

184. He is first quoted in the Sema"k (Sefer Mitzvot Katan), Mitzvah 227 ("keep far away from a false word"); Hagahot Maimoniot to Hilkhot Sanhedrin 24.2; and Orhot Hayyim 2; Hilkhot Dayanim 516 (Berlin 1899). Thereafter he is quoted in the Italian Recanati; and in the 14th century his words are already mentioned in Spain, as in Derashot R.Y. Ibn Shueib (Parshat Mishpatim), and in Tur, Hoshen Mishpat 12. Notably, in the 13th and 14th centuries the *Semag* was among the most popular *halakhic* works. See URBACH, *supra* note 177, at 476, and the Introduction by I. Ta-Shma to Avraham b. Efraim's *Kitzur Sefer Mitzvot Gadol* 13-21 (Y. Horowitz ed., Mossad Bialik 2005).

185. Hoshen Mishpat 12.20.

186. The Semag's words are cited in the Tur and the Shulhan Arukh in the framework of the section dealing with compromise. The Semag himself did not cite the words in this framework; it therefore seems that he intended that the judges would judge on the basis of their own

became a law which one was afraid to practice and from which judges needed to distance themselves "with all their strength."

R. Moses of Coucy's instruction is unprecedented, both in the Talmud and in the words of the Geonim and the early medieval authorities who preceded him. As discussed above, neither the Talmudan words nor the post-Talmudic authorities include a general rule or even a suggestion that the judges ought to refrain from ruling according to Torah law. Thus, R. Moses of Coucy's words seem to imply that he was speaking of a new ruling, for he justifies his words by saying that "the hearts have diminished." In the introduction to his book, he uses this formula to describe the decline that had taken place in knowledge and understanding of the Torah during the period that followed the closing of the Talmud and at the end of the Geonic period, due to the dispersion of the people and the troubles that befell them during the period of their exile.<sup>187</sup> The use of the term "exile" demonstrates that he spoke of a new ruling deriving from the situation of Israel in Exile.

At the same time, in order to provide a basis for his words, R. Moses cites a proof from the Jerusalem Talmud:

And we also read in the Yerushalmi, in the first chapter of Sanhedrin, and it is also cited in Sefer Hefetz: In the time of Rabbi Shimon b. Yohai they abolished [adjudicating matters of] civil [i.e., monetary] law. R. Shimon b. Yohai said: Blessed is the Compassionate One, that there is no sage [suitable] to judge. Two people came before Rabbi Yossi b. Halafta for adjudication. They said to him: on condition that you judge us according to the law of Torah. He said to them: I do not know how to judge you by the law of Torah.<sup>188</sup>

R. Moses cites two precedents in which the Sages refrained from judging according to Torah law, based upon the concern that they may not know the law properly. The first precedent involves the abolition of the practice of civil law in the time of R. Shimon b. Yohai. The Jerusalem Talmud testifies to this fact, and immediately thereafter cites his words that "There is no sage [suitable] to judge." R. Moses

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understanding and not necessarily within the framework of compromise.

187. His description of this matter was influenced by that of Maimonides in his Introduction to the Mishneh Torah.

188. Semag, citing y. Sanhedrin 1.1 (18a), and in the version brought in the Tur: "And we read in the Yerushalmi in the first chapter of Sanhedrin: In the days of R. Shimon ben Yohai they abolished the [adjudication of] monetary law. R. Shimon ben Yohai said: There is no sage able to judge." Hoshen Mishpat 12. The Semag notes that these things are also cited in Sefer Hefetz, a book mentioned by a number of other *rishonim* but which is not extant. See B.M. LEVIN, SEFER METIVOT 30 ff. (Jerusalem 1934) (Hebrew), where he quotes the words from the Semag at p. 131.

understands R. Shimon's words as explaining the reason for the abolition of the practice of civil law in his day, as if to say that the Sages abolished the adjudication of civil law because there was no one capable of serving as judge.<sup>189</sup> The second precedent is the above-mentioned incident involving R. Yossi b. Halafta. According to R. Moses' understanding thereof, R. Yossi refrained from judging according to Torah law because he did not know how to do so. These two precedents indicate that, when the sages did not know the law, they refrained from judging on the basis of Torah law. Therefore, today, "as the hearts have diminished," and we are not expert in Torah law, everyone needs to refrain from judging according to Torah law.

Both of these precedents raise questions. The first precedent brought by R. Moses does not correspond to the extant wording of the Jerusalem Talmud. According to the extant version of the text, the abolition of adjudication of civil law in the days of Rabbi Shimon b. Yohai did not derive from the fact that there were no sages capable of judging, but was rather the result of the edict by the Roman rulers: "They taught: Forty years before the Destruction of the Temple capital law was removed from Israel,<sup>190</sup> In the days of Rabbi Shimon b. Yohai<sup>191</sup> civil law was removed from Israel. Rabbi Shimon b. Yohai said: Blessed is the Compassionate One that I am not a sage who judges."<sup>192</sup>

Further, the tannaitic *halakhah* just cited at the previous paragraph mentions the abolition of capital law by the Romans before the Destruction, as well as the abolition of civil law following the Bar Kokhba rebellion ("in the days of Rabbi Shimon b. Yohai"—i.e., at the time of the Hadrianic persecutions).<sup>193</sup> Thus, it speaks not of a decision by the Sages to cease to engage in judging capital cases, but rather of an edict imposed by the Romans. The saying of R. Shimon brought thereafter—"Blessed is the Compassionate One that I am not a sage who

189. As matters were interpreted by Bayit Hadash on the Tur, Hoshen Mishpat 12.6: "And according to what was copied by our teacher, there is no sage for judgment; R. Shimon b. Yohai interpreted its reason as said, as to why they abolished adjudication of civil law in his day, and he said that it was because there is no complete sage who is able to judge according to the law of Torah." Compare R. Isaac Stein's commentary on the Semag, *supra* note 179.

190. The reading, "from Israel" appears twice in the language of the *beraita* and is repeated again in y. Sanhedrin 7.2 (24b). This reading is preferable.

191. The text of the *beraita* here (18a) is: "In the days of R. Shimon b. Shetah they abolished the [adjudication of] civil law." But it should read "In the days of R. Shimon ben Yohai," as in the text of the *beraita* in ch. 7, and as cited by the Semag, *supra* note 180.

192. y. Sanhedrin 1, 1, 18a.

193. For the historical background of these edicts, see M.D. Herr, *The Edicts of Apostasy and Martyrdom in the Days of Hadrian*, in HOLY WARS AND MARTYRDOM 73-92 (Israeli Hist. Soc'y 1968) (Hebrew).

judges"—stands in its own right and is not cited as a reason for abolishing civil law. These words may indicate a personal reservation about judging cases of civil law, but they are unrelated to the abolition of civil law. Hence, R. Moses of Coucy's words must be based upon a different and less reliable version than the extant text of the *Yerushalmi*.<sup>194</sup>

Likewise the second precedent, involving R. Yossi ben Halafta, raises various questions. As discussed above, R. Yossi's reluctance to judge did not necessarily derive from fear of judgment. To the contrary, he appears to have acted with confidence, while emphasizing the broad latitude allowed for judicial discretion. He is not required to judge according to Torah law, and the litigants must accept whatever he rules. In essence then, R. Moses of Coucy's ruling is a marked innovation, unprecedented either in the words of the Jerusalem and the Babylonian Talmud or in those of the Geonim or the early medieval authorities.

In light of this, the question of this ruling's source arouses curiosity. Rabbi Moses of Coucy's work and writing is not innovative, generally speaking, and it is therefore difficult to assume that he would invent such a ruling by himself. Thus, he may well have derived the rulings from one of his sources.<sup>195</sup> But in the absence of an explicit source, nothing definite may be concluded and conjecture must suffice. In this context, R. Moses of Coucy's relation to Franco-German Pietism (*Hasidei Ashkenaz*) is significant. Specifically, the pietistic nature of this *halakhah* suggests that it derived from those circles.<sup>196</sup>

But whatever its source, R. Moses of Coucy's instruction was adopted by the *halakhic* authorities who followed him, bringing about a significant change in the order of *halakhic* judicial proceedings. From that time onward, the judges were called upon not to judge according to the law of Torah, but rather to judge by way of compromise.

194. Instead of "civil law was removed (*nithu*)," he had before him the text "civil law was abolished" (*batlu*), which enabled him to assume that they were abolished by the Sages. In the matter of R. Shimon ben Yohai he read: *de-leika hakim ba-din* ("that there is no sage in judgment")—that is, there is no sage fit to judge. But the extant version is: *de-leina hakim ba-din*—"that I am not [qualified to act as] a sage in judgment." That is, R. Shimon states that he is not qualified to judge.

195. He relied extensively on Maimonides, whose book *Mishneh Torah* served him as a model for imitation. But he also added to it the innovations or novellea of the sages of Germany and France. See URBACH, *supra* note 177; cf. Galinsky, *supra* note 177.

196. On the Semag's closeness to the circle of Ashkenazic Hasidism, see URBACH, *supra* note 177, at 469-70; Y. Galinsky, 'To be a Faithful Servant Before You all the Days': A Chapter in the Religious Thought of Moses of Coucy, 42 DA'AT 13-31 (1999) (Hebrew). Unfortunately, I was unable to find any explicit source for this in the writings of Ashkenazic Hasidism, but Sefer Hasidim greatly stresses the presence of God in judgment and the great care to be taken when engaged in judgment. See SEFER CHASSIDIM §§ 1307-23, at 323-27 (Mekitzei Nirdamim 1891).

Compromise, which was usually accomplished through arbitration, now became a routine legal procedure by which the judges were asked to judge.<sup>197</sup>

This juncture highlights an important move in the concept of compromise. If, according to Talmudic law, compromise was the exclusive provenance of the litigants (“if they wished to compromise, they make a compromise between themselves”),<sup>198</sup> from this point on it also became the concern of the judges, as they were called upon “to avoid with all their strength not to accept upon themselves to judge according to the law of Torah.”<sup>199</sup> In light of this, compromise became a systemic substitute for ruling based upon law.<sup>200</sup>

The result of this move is fascinating and even astonishing. The Biblical idea that “the judgment is God’s” was originally intended to assure that the judges would decide according to law, with righteousness and honesty. The tannaitic approach regarding God’s presence in the juridical process was intended for the same purpose. This approach emphasized that the judges must be conscious of God’s presence in judgment so they would be careful about how they judged, according to the law and in an upright manner. Yet these strict warnings led to a fear of judgment, which paradoxically led people to avoid judging by Torah law. The Law became so holy and frightening that judges were afraid to judge according to it, lest they fail to arrive at the truth of the law. The most extreme example of this demand is the instruction found in the *Shulhan Arukh* that the judges must refrain insofar as possible from judging according to Torah law. The law of the Torah thus became an ideal law which was to be feared, rather than a practical law meant to be implemented in practice.

#### SUMMARY

The Hebrew Bible and the entire Jewish legal tradition assume a certain connection between Divine justice and human judgment. Indeed,

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197. On the various forms of compromise in Jewish law, see Haim Shapira, *The Debate Over Compromise and the Goals of Judicial Process* 26-27 DINEI YISRAEL—STUDIES IN HALAKHA AND JEWISH LAW 183 (2009-10) (Hebrew).

198. Maimonides, *Laws of the Sanhedrin* 22.4.

199. A. Hafuta, *Limits of Law and Compromise*, 17 NO’AM (1934) (Hebrew); M.Z. Neriah, *The Law of Compromise*, in RABBI J.B. SOLOVEITCHIK, JUBILEE VOLUME 358 (Jerusalem & N.Y. 1984) (Hebrew).

200. A. SCHOCHETMAN, *SEDER HA-DIN* 208-16 (Jerusalem 1988) (Hebrew); A. Dichovski, *The Rabbinic Court as Arbitrator*, 16-17 SHENATON HA-MISHPAT HA-’IVRI 530 (1990-91) (Hebrew); A.A. Lifschitz, *Compromise in Jewish Law*, 142-89 (2004) (unpublished Ph.D. dissertation, Bar-Ilan University) (Hebrew) (on file with author).

this connection is one of the basic principles of the theory of adjudication in the Jewish tradition. The discussion in this article focused upon two principal aspects: the theoretical-theological one, dealing with the conceptualization of the relationship between God and human judgment, and the legal-practical aspect, concerned with its legal implications.

The various conceptions of the relationships between God and human judgment are standing on a continuum between immanence and transcendence perceptions of God. The Biblical "Divine judgment" model represents an immanent presence of God in which a judge may approach God and get help from him. The "human judgment" model represents a transcendent perception of God that is beyond human reaching; therefore, a judge cannot involve the Divine in human judgment. The Talmudic model of judgment assumes Divine presence in the judicial process, and thus reflects an immanent perception. However, on the other hand it rejects any divine involvement in judicial process; thus, Divine presence ultimately functions as source of authority and responsibility.

Another aspect of the theoretical speculation concerns with the meaning of the attribution "Divine" to judgment. When and in what sense can judgment be regarded as Divine? The sources offer several answers to this question; each of them has legal or practical implications. The first answer is that divinity lies in the judicial function itself. Judgment is divine because the action of judging is divine and because God emanates his judicial authority to human judges. This perception is reflected in some Biblical texts such as Moses' declaration in *Deuteronomy* "for the judgment is God's." This is the main attitude of the tannaitic sources and of the Jerusalem Talmud as well. The implication of this approach is that every judgment that is decided by legitimate judge is divine regardless its content. Even judgment that is not according to Torah law but is a result of the judge's own discretion can be considered as divine.

The second answer is that divinity lies in the judge's own merits. Judgment is divine if and when the judge exercises divine qualities. This perception was shared by both Maimonides and Nahmanides, although their conception of what is divine quality is different. While Maimonides saw rationality and philosophy as divine qualities Nahmanides saw the attachment to God and prophecy as divine qualities.

The third answer is that divinity of judgment depends on its source. Judgment is divine if it is based on a law that comes from divine

revelation. The implication of this answer is that only Torah law can be divine. A law that is not in accordance with Torah law cannot be considered as divine. This perception has roots in the Babylonian Talmud. In contrast to tannaitic sources and the Jerusalem Talmud that conceived the act of judging as divine, the Babylonian Talmud conceived only “true judgment” as divine. Thus, Judgment’s divinity depends on its content and on its truthfulness.

R. Nissim Gerundi and R. Moses of Coucy separately embraced and developed this perception. According to their view, only judgment that is based on Torah law can be considered as divine. A judgment that is based on any other source, would be the judge’s own discretion or the state law, and will not be considered divine. In a paradoxical way this approach that praised the Torah law as divine gave a way to legitimize secular law. R. Nissim, by his dualistic model, recognized secular courts that implement the “law of the king” alongside religious courts that implement Torah law. R. Moses of Coucy, who recommended the judges not to bind themselves by Torah law, but judge according to their own discretion, recognized the legitimacy of judgment that is not according to Torah law. Thus, the idea that “Judgment is God’s” is not just a rhetoric and not only a theoretical and theological concept but is a defining principle that shaped the nature of judicial process in many ways.