Some Preliminary Observations on Truth and Argumentation in the Jewish Legal Tradition*

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A: Methodological Preliminaries

A legal philosophy colloquium in which I recently participated (at the University of Turin, in June 2004) was devoted to "Truth and Argumentation", and was concerned, in particular, to explore the possibilities (despite the prevailing postmodernist climate) of combatting "relativist" theories of argumentation by stressing the relationship of argumentation to truth. Given the interest and contributions of our honoree in both the philosophy of law and comparative legal cultures, I hope that this paper may interest both him and other readers.

In addressing this issue from the perspective of the Jewish religious tradition, I was expected in Turin to avoid at least some of the supposed perils of a relativist approach. But clearly, claims which the Jewish tradition may regard as objective, true, and non-relativist, can only be so *within* the framework of Jewish philosophy and theology. Why, then, should someone not committed to this Jewish framework privilege the epistemological claims which emerge from that particular tradition? Should we not, rather, have recourse to philosophy for a universal analytical framework, one within which we may achieve a non-relativist account of argumentation, based on a non-relativist account of truth?

One only has to put the matter in this way to problematise it. The Western analytical tradition is itself a cultural tradition, no doubt making universal claims, but making them, necessarily, within the framework of its own epistemological assumptions. It stands on no different level to that of any other particular cultural tradition, and we may therefore happily engage in comparison between it and any other particular cultural tradition, such as that of Judaism.

It is not, however, entirely clear what point — beyond that of description — may be served by such a comparative enterprise. For if the object is evaluation or critique, in order to arrive at a *better* account of the relationship between truth and argumentation, we have to have an objective criterion of evaluation or critique, and it is not clear where such a criterion may come from, if not from the universalist claims made within one particular tradition or the other.

In this context, we must distinguish between internal and external questions. Internal questions are those which arise *within* each of these worlds of discourse (using, necessarily, the language and concepts of that tradition: thus, strictly speaking, one can do this for the Jewish legal tradition only through the medium of the Hebrew language). External questions are those which arise in, and are posed from, and by the use of, the language of the other. What is the point of such external comparison? In much of my historical work, I have taken the view that the proper function of comparison is the generation of hypotheses which may then be applied to the other tradition, in order to determine whether they are meaningful at all in the foreign context, and if they are what answers may be discovered using the *internal* resources of the other tradition. Such an approcah

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may also pose questions as to why issues prominent in one tradition (and even claimed there to be universal) are not sufficiently central to another tradition to have been manifest in the latter from internal analysis alone. I stress that this exercise is purely descriptive, not evaluative (unless some evaluative privilege has already been applied to one or other of the traditions being compared).

In what follows, I attempt primarily to describe some claims made from within the Jewish legal tradition. They may or may not prove helpful in posing questions to, or suggesting hypotheses for, Western jurisprudence. Conversely, we may usefully summarise those external questions from Western jurisprudence which both may provide hypotheses for the description of the Jewish legal tradition and at the same time enhance the communication of that tradition to an external audience.

For this purpose, reference may be made to the excellent monograph by Anna Pintore, *Il diritto senza verità* (1996), later published in English translation as *Law without Truth* (2000). After summarising the philosophical debate regarding the nature of truth in general, Pintore poses the question whether the concept of truth can be applied at all to norms. Contrary to those who would radically distinguish the concepts of truth and validity, viewing only the latter as relevant to norms, she argues that "predicating the truth or falsehood of norms" (in a fashion derived from Tarski) "is necessary for constructing a logic of norms". So far, so good — or so bad, if one does not accept the need for, or particular meaning of, the notion of "a logic of norms". Suffice it to say, for present purposes, that Pintore's claim does provide a useful comparative question to pose to Jewish law, as I shall presently argue. But if "predicating the truth or falsehood of norms is necessary for constructing a logic of norms", we then have to come clean on the particular conception of truth we are adopting in making that claim. Pintore examines in turn the rival candidates: truth as correspondence, truth as coherence, truth as consensus and procedural truth. While it is not Pintore's object in this book to draw conclusions for theories of argumentation, it is not difficult to see how adoption of these different conceptions of the truth of norms might generate different approaches to theories of argumentation. I here offer a few observations on this issue in the context of Jewish law.

B: Truth and Argumentation in the Jewish Legal Tradition

1. Truth in Judaism

If we propose to discuss Truth and Argumentation in the Jewish Legal tradition, we cannot avoid Jewish theology. Here, truth (or the nearest we can get to it in Hebrew: normally regarded as the concept *emet*) is not some autonomous concept: it is one of the 13 attributes of God.[1] The Talmud states "The seal of God is truth".[2] Thus God's revelation is by definition true. Does it follow that this is the *exclusive* source of truth, and if so what, and to whom, is the accepted range of divine revelation?[3] Judaism has traditionally been hostile to natural law and natural theology, at least insofar as they claim that there are sources of value independent of divine will and divine creation.[4]

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1 Steven S. Schwarzschild, "Truth", *Encyclopedia Judaica* (Jerusalem: Keter, 1973), XV.1414.

2 *Shabbat* 55a; Jerusalem Talmud, *Sanhedrin* 1:5.

3 An issue which recently got Chief Rabbi Sir Jonathan Sacks into hot water, when he suggested that divine revelation through the Torah was not the exclusive source of truth, and led to his being accused, illogically, of denying the "absolute" nature of Torah truth: see further http://www.mucjs.org/rrs03intro.htm.

4 B.S. Jackson, "Natural Law Questions and the Jewish Tradition", *Vera Lex* VI(2) (1986), 1-2, 6, 10; *idem,* "The Jewish View of Natural Law" (Review of Novak, *Natural Law in Judaism*), *Journal of Jewish Studies* LII/1 (2001), 136-145.

2. Truth and Norms

Kelsen, following Hume, may have thought that failure to recognise the distinction between "is" and "ought", and the modalities appropriate to each (causality and imputation), was characteristic of pre-modern thought.[5] Genesis thus commences with an elementary conceptual mistake: creation of the world by divine command. Many have followed in the view that only propositions can be true; norms can "merely" be valid. Judaism's rejection of this distinction is expressed in a number of ways. If, as already noted, truth is an attribute of God, and if the norms of divine law are the means laid down to achieve *imitatio dei,* then they are of their very nature designed to achieve truth. A philosopher, however, might retort that this is merely their end, not their nature. If so, we may have to resort to a simpler form of argumentation: if "The seal of God is truth", then it follows that norms revealed by God are true, since they have been "sealed" (a metaphor for the conclusion of a covenant).

Steven Schwarzschild writes: "In Judaism truth is primarily an ethical notion: it describes not what is but what ought to be."[6] He cites the association of truth with ethical notions in the Bible[7] and rabbinic literature.[8] Here, too, an analytical philosopher might resist the implication that such associations entail the conclusion that truth itself is an ethical notion. They may not entail it logically (nor do the Jewish sources claim such entailment). Nevertheless, the association is supported by its coherence with a whole raft of beliefs (some already mentioned). And it has survived the Humean attack. As Schwarzschild points out, Hermann Cohen designates the normative unity of cognition and ethics as "the fundamental law of truth".[9] Some have gone further. Martin Buber seeks to identify faith *(emunah)* with truth (*emet*), here conceived as interpersonal trust. Does this sell out any "hard" conception of truth? In the theological context, the believer may very reasonably say: "My belief that X is true is based on my faith in the truthfulness of my source of information (God), which is far more reliable than any attempt I might make at independent confirmation." And even a very moderate secular sceptic of the legal process will readily accept that truth is frequently constructed in the courtroom by *whom* we believe, not *what* we believe.

3. Truth and Language

Access to the truth of norms in the Jewish tradition is mediated through the language of Torah. But what kind of language is this? The tradition itself endorses two seemingly opposite conceptions: on the one hand, the Hebrew of the Torah (if not of the man on the Tel-Aviv omnibus) is *lashon hakodesh,* the holy language, the language of the divinity, which predates human culture[10] and has depths, levels,[11] and forms of signification (such as its numerical connotations, generating exegesis

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5 H. Kelsen, *Pure Theory of Law*, trld. M. Knight (Berkeley: University of California Press, 1967), 76-85 (§§18-20), citing also his *Society and Nature* (Chicago: The University of Chicago Press, 1943), 249ff.

6 *Supra*, n.1.

7 Peace (*Zechariah* 8:16), righteousness (*Malachi* 2:6ff.), grace (*Genesis* 24:27, 49), justice (*Zecheriah* 7:9), and even salvation (*Psalms* 25:4ff.).

8 *Mishnah Avot* 1:18, "The world rests on three things — truth, justice, and peace."

9 *Ethik des reinen Willens* (1904), ch.1.

10 On the role of *Torah* in the creation of the world, see Mishnah Avot 1:4; cf. Philo, *de opif. mundi* 20, 25, 36 (divine *logos,* identified with Torah in *de migrat.* 130): see further W.Z. Harvey, "Torah", *Encyclopedia Judaica* (Jerusalem: Keter, 1973), XV.1236.

11 On the distinction between *peshat and derash*, see R. Loewe, 'The Plain Meaning of Scripture in Early Jewish Exegesis', *Papers of the Institute of Jewish Studies* 1 (1965), 140–85; articles on 'Peshat', and 'Derash' by L.I. Rabinowitz in *Encyclopedia Judaica* (Jerusalem: Keter, 1973) and older literature there cited; S. Kamin, *Rashi's Exegetical*

by *gematria*[12]) which go well beyond human language. Moreover, the drafting of Torah — even without imputing to it any mystical levels of meaning — is held out to be perfect: there are no contradictions and nothing superfluous. Any apparent redundancy is the vehicle of added value meaning, and the coherence of the text is such that analogies may be drawn by linking together the most disparate sources. Its style is never arbitrary, nor is any aspect of its discourse structure: material found in collocation is put there for a purpose, however disparate its subject-matter. The use of analogy to interpret the Torah makes full use of purely literary, and not only substantive, connections.[13]

Yet against this, there is an opposed hermeneutic principle: "The Torah is written in the language of man".[14] This does not mean that it was written by human hands, but rather that it was written in a manner intelligible to human beings, using the conventions of human language. I shall not seek here to resolve the tension between these two opposed conceptions of the nature of the language of Torah. Suffice it to say that each is deployed, on occasion, in support of particular exegetical outcomes: outcomes requiring sophisticated literary exegesis on the one hand, outcomes validated by the "plain sense" (*peshat*) on the other. This may not be the place to discuss further the significance of the co-existence of such opposed approaches. For the moment, suffice it to note the recognition that particular forms of argumentation are premised upon particular conceptions of the nature of the language of the primary text.

4. Truth and Logic

The claim that the language of Torah is divine and therefore significantly different from human language is paralleled in the Talmud by a remarkable passage, which appears to make a similar claim in respect of logic. We read in *Erubin* 13b:

> R. Abba stated in the name of Samuel: For three years there was a dispute between Beth Shammai and Beth Hillel, the former asserting, 'The *halachah* is in agreement with our views' and the latter contending, 'The *halachah* is in agreement with our views'. Then a *bath kol* issued announcing, '[The utterances of] both are the words of the living God, but the *halachah* is in agreement with the rulings of Beth Hillel'. Since, however, 'both are the words of the living God' what was it that entitled Beth Hillel to have the *halachah* fixed in agreement with their rulings? - Because they were kindly and modest, they studied their own rulings and those of Beth Shammai, and were even so [humble] as to mention the action of Beth Shammai before theirs.

The immediate result of this story is a hierarchical rule: in cases of conflict between the views of the Schools of Hillel and Shammai, the former (normally[15]) take precedence. Moreover, a very human (if non-legal) justification is given for this outcome: not only did Beth Hillel take account of the views of their opponents; they also referred to them respectfully. Yet, at the same time, revelation is strongly stressed in the passage. First, it is a "heavenly voice" which reveals this hierarchical rule, despite the fact that such a *bat kol* is excluded as a source of authority for the

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Categorization in respect to the distinction between Peshat and Derash (Jerusalem: Magnes Press, 1986; Hebrew, English summary); D.W. Halivni, *Peshat and Derash* (New York and Oxford: Oxford University Press, 1991), 52-88.

12 Though not generally used for halakhic purposes.

13 See B.S. Jackson, "A Semiotic Perspective on the Comparison of Analogical Reasoning in Secular and Religious Legal Systems", in *Pluralism in Law,* ed. A. Soeteman (Dordrecht: Kluwer Academic Publishers, 2001), 295-325; and earlier: *idem,* "Analogy in Legal Science: Some Comparative Observations", in *Legal Knowledge and Analogy,* ed. P. Nerhot (Dordrecht etc., Kluwer Academic Publishers, 1991), 145-165.

14 The approach of R. Ishmael (as against that of R. Akiba): Babylonian Talmud, *Sanhedrin* 64b, and elsewhere. See M. Elon, *Jewish Law. History, Sources, Principles* (Jerusalem and Philadelphia: Jewish Publication Society, 1994), I.371-374.

15 On the historical development of this rule, and residual exceptions to it, see S. Safrai, "Bet Hillel and Bet Shammai", *Encyclopedia Judaica* (Jerusalem: Keter, 1973), IV.737-41.

resolution of (substantive) halakhic disputes in another famous talmudic passage.[16] Secondly, even the rejected opinion, that of Beth Shammai, is accorded the status of revelation: "both are the words of the living God" (*divre elohim hayyim*). The precise meaning of this has been a matter of considerable scholarly discussion. I myself incline to the view that the *halakhah* as a whole, according to this passage, belongs to the sphere of divine epistemology, in which the law of contradiction may be transcended; a more pragmatic approach, however, is required in practice.[17]

In short, the passage appears to claim that logically contradictory norms may both be true, since both are "the words of the living God", and such words are by definition true. Human beings are not expected to be able to understand how both may simultaneously be true — how, in other words, the law of contradiction may be transcended — but another "true word", that of the divine voice, the *bat kol,* has assured us that this must be the case, and so it must be. It follows that human logic is not a criterion for the evaluation of divine truth. Pintore may still be correct in claiming that "predicating the truth or falsehood of norms is necessary for constructing a logic of norms"; it does not however follow from this (for the Jewish tradition) that "predicating the truth or falsehood of norms is *sufficient* for constructing a logic of norms".

5. Truth and Argumentation

The above remarks about the relations between truth, language and logic in the Jewish legal tradition indicate at the very least forms of pluralism which may make it difficult to conceive of claims to the truth of argumentation in particular cases. Yet in practice, as *Erubin* 13b itself indicates, strategies are adopted in order to mitigate what otherwise might appear to lead to a system devoid of criteria for determining the very truth in which it so passionately believes, and which indeed provide the system with a certain dynamic capacity for change through new argumentation.[18] In seeking to identify these strategies,[19] we may usefully adopt Pintore's

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16 The famous talmudic story of the "oven of Akhnai": Babylonian Talmud, *Baba Mezia* 59b. See E.N. Dorff and A. Rosett, *A Living Tree* (Albany: State University of New York Press, 1988), 189f.; Elon, *supra* n.14, at I.261-63. I have suggested elsewhere that the rejection may be a reaction against the use of the "heavenly voice" (*phone ek tou ouranou*) in the New Testament: "The Prophet and the Law in Early Judaism and the New Testament", in *The Paris Conference Volume*, ed. S.M. Passamaneck and M. Finley (Atlanta: Scholars Press, 1994), 67-112 (Jewish Law Association Studies, VII), at 84. For further discussion, see E. Berkovits, *Not in Heaven: The Nature and Function of Halakha* (New York: Ktav Publishing House, 1983), 47-50; M. Koppel, *Meta-Halakhah. Logic, Intuition and the Unfolding of Jewish Law* (Northvale NJ and London: Jason Aronson, 1997), 79-86 (including the wider controversy regarding the status of disputes, between R. Eliezer and R. Joshua); B.S. Jackson, "Literal Meaning and Rabbinic Hermeneutics: A Response to Claudio Luzzati and Jan Broekman", *International Journal for the Semiotics of Law / Revue Internationale de Sémiotique Juridique* XIV/2 (2001), 129-141, at 134f.

17 B.S. Jackson, "Secular Jurisprudence and the Philosophy of Jewish Law: A Commentary on Some Recent Literature", *The Jewish Law Annual* 6 (1987), 33f.; *aliter,* Hanina Ben Menahem, "Is there always one uniquely correct answer to a legal question in the Talmud?", *The Jewish Law Annual* 6 (1987), 167f. See further, with reference to other rabbinic sources (notably: Babylonian Talmud, *Hagigah* 3b; the R. Yannai tradition in the Jerusalem Talmud, Sanhedin 22a and elsewhere), Berkovits, *supra* n.16, at 50-53; Halivni, *supra* n.11, at 101-125, who develops, on the basis of such sources, a "double-verity theory which dichotomizes between practice and intellect" (at 111).

18 As in the capacity of later authorities to adopt an earlier minority view, using the principle of *hilkheta kebatra'i.* See further Elon, *supra* n.14, at I.267-72. See also I. Ta-Shma, "The Law is in Accord with the Later Authority — *Hilkhata Kebatrai:* Historical Observations on a Legal Rule", in *Authority, Process and Method. Studies in Jewish Law*, ed. H. Ben-Menahem and N.S. Hecht (Amsterdam: Harwood Academic Publishers, 1998), 101-128.

19 I am not referring here to the various formulations of "hermeneutic rules" (*middot*) adopted by the Rabbis for the exegesis of the biblical text, notwithstanding the fact that they include a number comparable to modern rules of statutory interpretation (such as the relationship between general and specific terms, and a version of *eiusdem generis*: see Dorff and Rosett, *supra* n.16, at 198-204; B.S. Jackson, "On the Nature of Analogical Argument in Early Jewish Law", in *The*

classification of different conceptions of truth, and ask to what extent each is applicable within the Jewish legal tradition.

Schwarzschild observes that Jewish philosophers generally accepted the Greek notion of truth as "**correspondence with reality**",[20] even though "such intellectualism, however, is ultimately superseded by biblical ethicism".[21] Such philosophical acceptance, however, relates to the general concept of truth, not the form of truth attributed to the divine word. The conception of *lashon hakodesh,* observed above, implies a conception of truth internal to a particular form of discourse (comparable, I may note, to the Saussurean conception of linguistic meaning). Moreover, it would be problematic to claim that the language of the norms of Torah-law "corresponds with reality" in any conventional sense. In fact, the traditional Jewish approach has more in common with Plato: the ideal world of the norms of Torah, Soloveitchik argues, is no less than a description of the reality of divine creation, and a programme through which that reality may be recreated from the corruptions and distortions which have crept into human, mundane existence.[22] There may, indeed, be an aspiration to create a new correspondence with that ideal reality. But the truth or meaning of that reality is not accessible through some test of correspondence with empirical reality as perceived by human senses.

The conception of truth as **coherence** might appear to have a much stronger claim, in the context of Jewish law. As already noted, the coherence of the biblical text is considered so strong that analogies may be drawn by linking together the most disparate sources. Elsewhere I have compared Ronald Dworkin's account of the methodology of Hercules, who must strive to take account of the political values of the *whole* legal system, in the course of deciding a hard case in any particular area of that legal system. It is hardly surprising that Dworkin attributes the capacity so to do to a judge of "superhuman" abilities.[23] And even then, Dworkin does not claim that the result of the argumentation will be "demonstrable", brooking no counter-argument, but only that it will be the best possible argument. How do we know that it is the best possible argument? Because it comes from Hercules. How do we know who is Hercules? Because his is the best possible argument! To escape from this vicious circle, it appears that we need some external criterion to determine who is Hercules — i.e. who is the "superhuman" judge to whom the divinity has entrusted such charismatic (delegated) authority.

I put the matter in this provocative manner in order to indicate the necessity to incorporate a version of the conception of truth as **consensus**. That notion has two applications in the context of the Jewish legal tradition.[24] First, it indicates the need, in general, to adopt a pragmatic criterion of

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Jewish Law Annual XI (1994), 137-168, at 154-60). Given the many "discretionary" elements within most of these rules, they generally generate possible, rather than necessary interpretations, leaving open a choice between different possibilities which still has to be made on other grounds.

20 Citing Saadiah Gaon, *Book of Beliefs and Opinions*, preface and 3:5; Abraham ibn Daud, *Emunah Ramah*, 2:3.

21 Citing Maimonides, *Guide of the Perplexed*, 3:53, end.

22 See my discussion of J.B. Soloveitchik, *Halakhic Man,* translated Lawrence Kaplan (Philadelphia: The Jewish Publication Society of America, 1983), in "Comparazioni interne ed esterne di ordinamenti giuridici religiosi: la prospettiva del diritto ebraico", *Daimon. Annuario di diritto comparato della religioni* 2 (2002), 257-83, at 275-78. Cf. A. Pintore, *Law without Truth* (Liverpool: Deborah Charles Publications, 2000), 126, quoting M. Detienne, *Les maîtres de vérité dans la Grèce archaïque* (Paris: Maspero, 1967), 42f.: "... in a system of religious thought where the efficacious word triumphs, there is no distinction between "truth" and justice; this type of word is always in conformity with the cosmic order because it creates the cosmic order and is its necessary instrument."

23 A "lawyer of superhuman skill, learning, patience and acumen": *Taking Rights Seriously* (London: Duckworths, 1968), 105.

24 It is even more central within Islamic jurisprudence: see A. Hassan, *The Doctrine of Ijma in Islam* (Islamabad: Islamic Research Institute, 1976); J.R. Wegner, "Islamic and Talmudic Jurisprudence: The Four Roots of Islamic Law and Their Talmudic Counterparts", *American Journal of Legal History* XXVI (1982), 25-71, at 39-44, 55-58; and for the possibility

truth (not what is said but who says it): truth is here defined as emanating from a recognised source of authority, just as we saw in *Erubin* 13b, where, for practical purposes, we follow the views of Bet Hillel rather than Bet Shammai, notwithstanding the fact that, *sub specie aeternitate*, each one may have a hold on the divine truth. Jewish law has a whole series of such pragmatic rules for determining controversies.[25] That brings us to the second sense in which, it may be argued, "consensus" has been adopted in Jewish law as a criterion of truth. Although the *halakhah* traditionally endorsed a majoritarian criterion of decision-making,[26] in recent centuries that has given way to a demand for a "consensus" of halakhic scholars. The demise of the ancient Sanhedrin, within which a majority vote could be ascertained, certainly contributed to this development. But that is hardly a sufficient explanation: consensus appears to have entered Jewish law as a criterion for the acceptance of new argumentation around the 14th century.[27] And the early sources which apply it seem to deploy it not so much as a guarantee of truth but rather as a protection against taking responsibility for the consequences of error in the course of argumentation.[28]

We have still failed to identify a conception of truth, or even a combination of conceptions, capable of generating demonstrable argumentation. Perhaps Pintore's final candidate, **procedural truth**, will prove of greater assistance? A case may, indeed, be made for procedural truth, but only at the cost of severing the link between the truth of a decision and the truth of the argumentation used to justify that decision. For decision-making and argumentation are more radically distinct within the Jewish legal tradition than can be the case in secular systems based on the ideology of the rule of law.[29] How can this be, if truth is identified with the rules of law divinely-revealed in the Torah? The answer is that these divinely-revealed rules were not always conceived as the *exclusive* form of revelation of divine truth. In fact, the original conception of judicial activity was not through argumentation (or consultation of a written text) at all, but rather through the divine guidance of the intuition of the judge as to the right decision in the case before him. As Jehoshaphat charged the judges he appointed: God will be with you in the act of giving judgment: *ve'imahem bidvar mishpat* (*2 Chron*. 19:6). Though this notion of the charismatic judge gave way in time to a more rationalist conception, traces of it remain to this day within the Jewish legal system.[30] Indeed, we may apply to it a Kelsenian theory of "normative alternatives" (the judge is authorised to decide either in accordance with the law or not in accordance with the law) with a far clearer theoretical basis than that which Kelsen provides in the context of secular legal systems.[31] The conclusion, then, is that

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of Islamic influence on Jewish law in this context: S.W. Baron, *A Social and Religious History of the Jews* (Philadelphia: Jewish Publication Society of America and New York: Columbia University Press, 1958, 2nd ed.), VI.100.

25 See H. Ben-Menahem, N. Hecht and S. Wosner, ed., *Controversy and Dialogue in Halakhic Sources* (Boston and Jerusalem: Institute of Jewish Law, Boston University Law School and Israel Diaspora Institute, 1991-93), 2 vols (Hebrew with English synopses).

26 Babylonian Talmud, *Baba Mezia* 59b: see n.16, *supra*.

27 B.S. Jackson, "*Agunah* and the Problem of Authority: Directions for Future Research", *Melilah* 2004/1, pp.1-78 (Publications of the Agunah Research Unit, No.1), and at http://www.mucjs.org/MELILAH/2004/1.pdf., §§4.3.4, 5.1.

28 See further B.S. Jackson, "*Mishpat Ivri, Halakhah* and Legal Philosophy: *Agunah* and the Theory of "Legal Sources"", *JSIJ - Jewish Studies, an Internet Journal* 1 (2002), §4.3.3, at http://www.biu.ac.il/JS/JSIJ/1-2002/Jackson.pdf.

29 B.S. Jackson, "Significato letterale. Semantica e narrativa nel diritto biblico e nella teoria contemporanea del diritto", *Ragion Pratica* 12 (1999), 153-177; English version: "Literal Meaning: Semantics and Narrative in Biblical Law and Modern Jurisprudence", *International Journal for the Semiotics of Law / Revue Internationale de Sémiotique Juridiqu*e 13/4 (2000), 433-457.

30 See further B.S. Jackson, "Judaism as a Religious Legal System", in *Religion, Laws and Tradition. Comparative Studies in Religious Law,* ed. A. Huxley (London: RoutledgeCurzon, 2002), 34-48; Italian version: "L'ebraismo come ordinamento giuridico religioso", *Daimon. Annuario di diritto comparato della religioni* 1 (2001), 165-183.

31 Kelsen, *supra* n.5, at 269, 273, 354; *General Theory of Norms* (Oxford: Clarendon Press. 1991), 248 (ch.58 §xxi); B.S. Jackson, *Making Sense in Jurisprudence* (Liverpool, Deborah Charles Publications, 1996), 115f.

the truth of the legal decision (*psak)* is a function of the procedure of the appointment of the judge and his proper conduct of the proceedings, rather than of the argumentation he has used. There is a story in relatively recent times of an halakhic authority being asked his opinion of the decision of an illustrious colleague. Just tell me the decision, he insisted, not the argumentation; I might disagree with the argumentation, but I would always endorse his decision.[32]

To conclude this brief review of the relationship between truth and argumentation in the Jewish legal tradition. We are not impelled by the foregoing to take a postmodernist approach to Jewish law (though some have been tempted to invoke Jewish law in the postmodernist cause[33]), such that anything goes, any interpretation is as good as any other. For models of good argumentation have been internalised by various communities of *halakhah* (with some internal differences). Within any such community there will be a fair measure of agreement as to what constitutes a good argument and what does not. Of course, this does not exclude controversies on which there will be no demonstrable outcome. Here, pragmatic rules have to be adopted, in the knowledge that "these and these are the words of the living God" (*Erubin* 13b).

C: By Way of Conclusion

What, then, is the outcome of these comparative reflections? I have used an external framework in order to pose questions to the Jewish legal tradition, and I have identified internal resources which may provide partial answers to these questions. But are these partial answers so peculiar, theological, culturally contingent as to lack any value in terms of a potential contribution to these same issues as posed within Western jurisprudence?

An adherent of secularisation theory might answer this question in historical terms: the sovereignty of the law and the majesty of its argumentation derives from the West's adoption or construction of the divine right of kings on the one hand and of holistic theories of interpretation on the other, from the Bible and later Jewish tradition, mediated and fortified through a Christianised Rome.[34] But such historical theories are beyond our present concerns.

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32 See M. Elon, "More about Research into Jewish Law", in *Modern Research in Jewish Law,* ed. B.S. Jackson (Leiden: E.J. Brill, 1980), 89f. n.52: "R. Hayyim of Brisk had a query regarding a practical matter. He decided to turn to the leading authority of these times, R. Isaac Elhanan of Kovno. He wrote: "These are the facts and this is the question; I beg you to reply in a single line – 'fit' or 'unfit,' Guilty' or 'not Guilty', without giving your reasons." When R. Hayyim was asked why he had done so, he replied "The decisions of R. Isaac Elhanan are binding because he is the *Posek* of our generation, and he will let me know his decision. But in scholarship and analysis my ways are different from his and if he gave his reasons I might see a flaw in it and have doubts about his decision. So, it is better if I do not know his reasons."

33 See Suzanne Last Stone, "The Emergence of Jewish Law in Postmodernist Legal Theory", http://www.juedisches-recht.org/miller/harvard/Postmodernist-Legal-Theory.htm, and literature there cited.

34 E.g. P. Goodrich, *Reading the Law* (Oxford: Basil Blackwell, 1986), 4-8. A more radical instance of secularisation is suggested by Goodrich in his *Languages of Law* (London: Weidenfeld and Nicolson, 1990), 53-110 ("The Eucharist and English Law: A Genealogy of Legal Presence in the Common Law Tradition").