

# **ELU VA-ELU DIVRE ELOKIM HAYYIM: HALAKHIC PLURALISM AND THEORIES OF CONTROVERSY**

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## I.

The theme of Pluralism, as it relates to the value of controversy and to the legitimacy and precise status of conflicting opinions, is fundamental to law and obviously constitutes a crucial conceptual and pragmatic challenge for any legal system. With respect to halakha, however, there are additional elements and dimensions to consider which further complicate an already elaborate issue. Halakha is, after all, a uniquely divine system of law predicated on the interaction of two superficially dissonant motifs -- an ontologically independent *devar haShem*, on the one hand, and the almost autonomous human capacity and obligation to interpret that *devar haShem*, accompanied by the responsibility that this measure of autonomy entails, on the other. Thus, the topic of halakhic controversy and pluralism assumes even greater prominence than one might have anticipated in reflecting the essential character of Halakha as an effective legal system.

From one perspective, an analysis of this topic is important because it enables us to formulate the halakhic attitude and policy toward the issue of dissent and the dissenting, even rejected, minority view. It affords us the opportunity to evaluate its role, and to assess the dimension it contributes to the overall system, as well as to define the necessary parameters which limit its centrality, without which halakha as a unifying and authoritative legal system would be jeopardized.

There is, however, an additional contemporary dimension to this issue which increases the urgency for its proper investigation. We live in an era in which extravagant claims march under the banner of religious pluralism. In part, this is due to the present connotation of the term which conjures the image of standards watered down by unrestricted and uncritical flexibility. Primarily, however, this phenomenon can be traced to the bold assertions of the Conservative and Reform movements, whose justification of halakhic deviation on the basis of a pluralistic perspective constitutes the perversion of a concept that in its authentic form accents the depth and intensity of a maximally demanding Halakha as the embodiment of *devar haShem*.

The enterprise of investigating this topic is plagued by both methodological and substantive difficulties. There is no clear *locus classicus* in terms of the central issues. Even the Talmudic passages in *Hagiga* (3b) and *Eruvin* (13b), which we shall demonstrate to be the most significant texts, are ambiguous in terms of their real implication. At the same time, the broad issues that are central to this theme pervade the philosophy of halakha and therefore encompass many subtopics. Issues such as *lo bashamayim hi* (the Torah is not in heaven), the independence of a *posek* from previous authority and perhaps even from divine authority, and complex questions of procedure

and methodology of *pesak* vis-à-vis the pursuit of halakhic truth border and sometimes overlap our theme and thus complicate the picture considerably.

The philosophical and epistemological difficulties suggested by the very concept of multiple truths—an apparent oxymoron—constitutes another dimension of the problem. This can be illustrated by what I believe to be a fundamental misconception—the association of our concept of *elu-va-elu divre Elokim hayyim* (both positions of a debate represent the word of the living God) with the so-called medieval Double Truth Doctrine of the Averroist school with respect to conflicts of Faith and Reason. Firstly, it should be noted that there is considerable doubt that such a theory ever existed. Etienne Gilson and others have pointed out that such an attribution first appears in 1277 in the introduction to a church document authored by Bishop Etienne Tempier of Paris which condemned heterodox ideologies. It is likely that rather than representing a true and justifiable doctrine, this view was attributed to the Averroists by their religious critics who suspected them of covering up their heresy by cynically and insincerely clinging to Belief while truly being committed to Reason. In fact, Averroists merely asserted that despite their authentic belief in the teachings of Faith, they could not but acknowledge that Reason revealed a different set of conclusions, and they were unwilling to brand logical philosophical analysis a waste of time in spite of this dilemma<sup>1</sup>. Be it as it may, this theory of Double Truths fundamentally acknowledges the absolute dichotomy between two distinct spheres—Religion and Reason. This approach cannot serve as a model for the concept of *eilu va-eilu* which refers to multiple truths all of which are legitimate expressions of the Divine Spiritual domain<sup>2</sup>.

Moreover, in attempting to evaluate the overall topic of halakhic pluralism, confusion is likely to stem from a lack of clear differentiation between different phases of the issue—each characterized by its own dynamics and range of options. These include: a) biblical exegesis and Jewish philosophy; b) the process of *Talmud Torah* and the theoretical status of *hefzah shel Torah* (an essence of Torah); c) *pesak halakha* and the relationship between procedure and its de facto conclusions, and the pursuit of objective halakhic truth.

I shall endeavor to outline some of the possible approaches and parameters of this problem without making any attempt to achieve the kind of comprehensive treatment that would demand much more extensive elaboration on issues of authority, procedure and methodology of *pesak* than the scope of this paper permits.

## II.

In the realm of biblical exegesis (*parshanut*) and Jewish thought (*hashkafa*), diversity of opinion and interpretation is pervasive and the perception of its legitimacy is widely acknowledged. Pluralism in these contexts poses no real difficulty inasmuch as the fundamental guidelines which regulate these disciplines and provide their religious sanction are quite clear. Several additional factors contribute to this as well.

The primary focus of pluralism in these contexts is not contradictory views, but multiple layers of meaning since generally no absolute mutually exclusive values or determinations are at stake. It is not only possible but even compellingly logical that events, institutions and *mizvot* which are perceived to be Divinely inspired and spiritually invested should have the capacity to accomplish many functions and to

symbolically represent more than one single theme. Moreover, inasmuch as the primary sources of these enterprises are usually biblical-divine texts rather than human rabbinic texts, multiple meanings consequent on a divine text are possible. Even when relevant, rabbinic texts do not exert the same measure of binding authority in areas of *parshanut* and *hashkafa* as they do in halakhic discussions. The *midrash* and *aggadot* of the Talmud are open to allegorical interpretation and according to some halakhists even to rejection.<sup>3</sup> While one must seriously consider the message of *aggadot*, they certainly do not have the force and normative weight of halakha.

On the social-communal level, too, there is not the same kind of urgency for uniformity in the sphere of *hashkafa* as there is in halakha, where concrete performances, mutual obligations and objective procedures are central. With respect to the notion of a subjective inner life of the spirit, a pluralistic ideology addressing itself to individual inclinations and intuitions potentially constitutes a more valuable and effective approach to religious life.

And yet, the broad parameters of even this pluralism should not be misconstrued as unrestricted as some would have us believe. Moses Mendelsohn's dogma of the "dogmalessness of Judaism" is clearly an unacceptable exaggeration, explicitly rejected by *Rishonim* who articulated Articles of Faith (*Ikarrim*) in whatever form, pattern or number. Obviously, there can be no Orthodox Judaism without an absolute affirmation of certain basic concepts of God, of the commitment to a binding halakha based on the concept of *Torah miSinai*, and of the notion of human responsibility and accountability in the form of Divine Providence, reward and punishment, etc. Moreover, beyond adherence to official *Ikarrim*, it is evident that to be acceptable as a legitimate expression of Judaism, a perspective must establish itself by meeting additional basic criteria. It should, for example, have visible roots in authoritative texts or in Rabbinic tradition (*mesora*), and it should be advocated by a religious personality of some stature.

These qualifications notwithstanding, the diversity and range of perspective in *parshanut* and *hashkafa* is impressive and wholly acceptable to Hazal. Statements like "*shiv'im panim la-Torah* (there are 70 dimensions to the Torah)"<sup>4</sup> and "*u-kepatish yefozez sela—ma patish zeh mithalek le-kama nizozot, af mikra ehad yoze le-kama te'amim* (and like a hammer that breaks the rock in pieces—just as [the rock] is split into many splinters so also may one biblical verse convey many teachings)" (*Sanhedrin* 34a), and the view expressed by Ramban in the preamble to his commentary in the Torah (where he formulates the notion of Torah as a Divine text formed by the infinite combinations of Divine names, allowing it to serve as a creative exegetical source of all types of knowledge simultaneously), provide the conceptual underpinning for this reality.

We are witness to diversity of opinion not only on every page of the *Mikraot Gedolot* and *Midrash Rabba*, but within the schemes of particular *parshanim* as well, with each suggestion advanced, claiming for itself a measure of truth. Ramban moves with facility from *derekh hapeshat* to *derekh ha'emet* and Rabbenu Bahyah from *peshat* to *derash* to *sekhel*, etc. We encounter the same phenomenon with regard to *ta'amei hamizvot*. Rambam and Ramban represent diverse approaches to this discipline and certainly to specific *mizvot*. Within individual schemes, such as that promulgated by *Sefer haHinukh*, we are witness to the assertion of multiple purposes and truths.<sup>5</sup>

This approach characterizes discussions of Jewish philosophy even when positions that are developed are mutually exclusive. Debates rage on such fundamentals as the eternity of the universe, free choice, knowledge of particulars, the role of the intellect for prophecy and generally. Passionate argumentation regarding the very legitimacy of such basic orientations as Philosophy, *kabbala*, *hasidut*, and *musar* highlights this theme as does the integration into some personalities of multiple disciplines. The projection by some Jewish historians of an absolute demarcation between Jewish philosophers and kabbalists, for example, represents a distortion as Gershon Scholem has demonstrated.<sup>6</sup> This misreading of Jewish intellectual history derives at least in part from a failure to fully appreciate the wide-ranging hashkafic pluralism of Judaism.

To be sure, a basic consensus and hierarchy of values and perspectives has emerged from the historical process of generations of debate—acceptance, rejection, refinement etc. In this sense, *hashkafa* is self-regulating as it must be. At the same time, it is evident that there is a great deal of flexibility and latitude in establishing legitimacy in this area. Clearly, diversity of opinion and multiplicity of meaning are not only acceptable but contribute to and are consistent with the attainment of the religious ideal in Judaism.

### III

Halakhic controversy, though it too is obviously very prevalent, represents a different kind of problem. The ultimate goal of an halakhic analysis is to arrive at a specific, single solution and halakhic debates generally revolve around mutually exclusive responses, only one of which is purported to represent absolute truth. From this perspective, one should only be able to account for reward for sincere, if failed, effort and for a measure of respect accorded to an opinion that may possibly reflect the authentic view, but no more. Yet, several Talmudic sources indicate otherwise. They project a notion of inherent value of dissenting views and possibly even of multiple truths. Thus, the Talmud (*Eruvin* 13b) relates the following: R. Abba stated in the name of Shmuel:

For three years there was a dispute between Bet Shammai and Bet Hillel, the former asserting, "The halakha is in agreement with our views," and the latter contending, "The halakha is in agreement with our views." Then a *bat kol* issued announcing, "The utterances of both are the words of the living God, but the halakha is in agreement with the ruling of Bet Hillel."

It is particularly noteworthy that this apparent advocacy of multiple truths appears in a context whose primary concern is to establish the halakhic decision according to one particular view.

Another Talmudic passage attributes the legitimate diversity of halakhic perspectives to a single act of revelation despite the obvious logical irony that this entails. The Talmud (*Hagiga* 3b) explains:

"The masters of assemblies": these are the disciples of the wise, who sit in manifold assemblies and occupy themselves with the Torah, some pronouncing unclean and others pronouncing clean, some prohibiting and others permitting, some disqualifying and others declaring fit.

Should a man say: How in these circumstances shall I learn Torah? Therefore the text says: "All of them are given from one Shepherd." One God gave them; one leader uttered them from the mouth of the Lord of all creation, blessed be He; for it is written: "And God spoke all these words." Also do thou make thine ear like the hopper and get thee a perceptive heart to understand the words of those who pronounce unclean and the words of those who pronounce clean, the words of those who prohibit and the words of those who permit, the words of those who disqualify and the words of those who declare fit.

How, then, is one to evaluate this concept and these sources?

One approach might be to view statements such as these as referring to the inherent significance of the process of *talmud* Torah which necessarily includes an exchange of conflicting opinions. The author of *Netivot haMishpat* articulates the view that there is considerable value in halakhic debate which contributes to the process of *talmud* Torah by identifying misconceptions, refining authentic views and honing and sensitizing halakhic intuition. He argues:

Though halakhic errors are inherently false, they nonetheless serve an important didactic function. Indeed, one cannot successfully establish halakhic truth without some measure of initial failure. The early stages of halakhic analysis bear a similarity to a diver who is not yet capable of distinguishing worthless stones from the treasure he wishes to retrieve. More often than not, he surfaces with the former rather than the latter. However, once he has analyzed his error he emerges with an enhanced capacity to discern. The very process of failure increases his sensitivity to the nuances that distinguish precious jewels from stones, enhancing his future prospects for success. When he dives again many of the worthless stones that were initially responsible for his confusion are no longer present, having already been discarded. Those that remain are unlikely to generate further confusion inasmuch as the diver has learned to identify the differences between precious and worthless stones. Thus his initial failure contributes to his ultimate success. As the Rabbis indicate—if he had not drawn worthless objects, we would not have discovered the valuable item which they camouflaged. For this entire process there is a heavenly reward<sup>7</sup>.

These sentiments accurately reflect an ambitious view of *talmud Torah* not simply as a means of attaining *pesak*—*la-asukei shma'ata aliba dehilkheta*—but as constituting the vehicle for dialogue and encounter with *devar haShem*—an intrinsically significant spiritual process and religious experience. As important as this theme is, however, it does not adequately justify the striking language and dramatic formulations that these sources convey.

One might assess the concept of *elu va-elū divre Elokim hayyim* against the background of the overall scheme developed by Neziv in his introduction to the *Sheilot, Kidmat haEmek*, though Neziv himself does not fully explicate his position with respect to this concept specifically<sup>8</sup>. Neziv develops two distinct categories of halakhic decisions. One means of halakhic resolution is rooted primarily in intuition. Objectively, the issue remains unresolved despite the fact that a practically binding normative conduct has been established. The historical model of this kind of *pesak*—classified by Neziv as *hora'a*—can be traced to the methodology of the *kohen* in his function as *posek*. From this point of view, dissenting opinions retain an absolute status as *hefzah shel Torah* with respect to which one could justifiably declare *elu va-elū divre Elokim hayyim*. The second method of *pesak*—characterized by Neziv as *hakhra'ah ledorot*—derives from exhaustive and ultimately conclusive logical analysis, and is the special domain of the *shofet-mehokek* (judge-legislator) whose historical

prototype was Yehudah. When a halakhic issue is resolved in this manner at a particular point in history, the dissenting a position loses at least its equal status as a legitimate expression of Torah. This form of *pesak* was revealed to Moshe at Sinai as the product of a specific individual's definitive analysis—"kol ma she-talmid vatik atid le- horot ne'emar leMoshe miSinai (halakhic decisions that will be formulated in the future by qualified scholars were already, in fact, articulated by Moses at Sinai)"—and is even occasionally designated as *hilkheta gemire*, reflecting: its absolute authority. Thus, Neziv asserts a limited historical double truth theory effective only until the point of absolute logical resolution.

However, Neziv does posit that even within his second motif of decisive *pesak*, there exist two basic categories of rejected opinions. Employing homiletical license, he likens the status of minority opinions to the suggestive connotations of the terms *nizozot* (sparks) and *netu'im* (branches) used respectively in Sanhedrin (34a) and Hagiga (3b). Just as one cannot speak about sparks or branches without acknowledging their diversity of size, significance, function and purpose, one cannot speak about disputed halakhic opinions in uniform terms either. While the resolution of many halakhic debates strip the rejected position of any redeeming value, there are some minority opinions which retain a measure of *or Torah* (light of Torah) though they are in their stated form objectively inaccurate. Thus, for example, the view that a female Ammonite is included in the prohibition of *lo yavo amoni u-mo'avi bi-kehal haShem* (Ammonites and Moabites are prohibited from marrying Jews), is valueless if it is incorrect. However, R Eliezer's assertion that one must fulfill the mizvah of *keriyat shema* before the first third of the night has passed - *ad sof ashmora rishona*<sup>9</sup> - retains the stature of *or Torah* inasmuch as it contains and highlights valuable kernels of conceptual if not practical truth. It establishes that *ashmora rishona* may be a significant halakhic time frame. More significantly, R. Eliezer dramatizes through his radical application that *be-shokhbekha u-vekumekha*—which defines the obligation—may refer to the time period when people go to sleep rather than the time in which they are asleep. This theory possibly serves as the basis of the position of the *hakhamim* who extend the obligation until midnight, though they dispute R. Eliezer's technical restriction of this concept to the period of *ashmora rishonah*. This theme—that radical minority views have considerable conceptual and didactic value—is a common theme in halakha and is especially central to the methodology of conceptual Torah study. From this perspective, the notion that there is value in halakhic debate and more than one absolute truth represents a limited but still meaningful principle.

It is conceivable that this view of the value of rejected opinions in terms of their potential contribution to a more accurate and sophisticated conceptual understanding of halakha underlies Rema's comprehension of yet another problematic Talmudic text. The Talmud (*Sanhedrin 17a*) evidently establishes the capacity for inaccurate mental gymnastics as a prerequisite for judicial appointment to the *Sanhedrin*. Thus we are informed: "*ein moshivin be-sanhedrin ela mi she-yode'a le-tahev et hasherez min ha-Torah*" (the ability to argue convincingly that an insect is not ritually impure is prerequisite for judicial appointment)." The Tosafists accent the apparent difficulty and comment on the dubious value of this characteristic: "R. Tam queried, What is the purpose of such meaningless mental gymnastics?"<sup>10</sup> Rema, in responsum, explains as follows:<sup>11</sup>

If one is capable of logically demonstrating the ritual purity of these animals, one will perceive the Torah's ruling as a *hidush* (revealed, but radical doctrine). This is significant because it dictates that we should limit its application as much as possible. Thus, while the blood of a *sherez* is assigned the status of impurity as is its body, it is conceivable that the minimal measure that generates impurity with respect to the body of the *sherez* (*ke-adasha*) does not apply to its blood. The purpose of this mental gymnastic then, is to reveal to us the innovative character of the Torah's ruling and therefore it yields important substantive results in terms of the limiting of that ruling.

Rema thus argues that this statement does not refer to the meaningless capacity for intellectual gamesmanship nor does it seek only to insure the appointment of judges with an impressive grasp of a great deal of knowledge. In fact, it establishes that a measure of additional sophistication regarding the inner workings of the halakhic process, including the ability to assess the implications of non-normative possibilities and to utilize halakhic debate to shed light on the nuances of a topic which might have some normative impact is a necessary pre-condition to judicial appointment where the stakes are so high.

At the same time, if we accept the general scheme developed by Neziv, it is conceivable that even the *mizvah* of *talmud* Torah would extend only to that class of minority viewpoints that retain the status of or Torah due to some normative or at least conceptual benefit that they may yet provide. This stance is certainly open to debate. In the twentieth century, for example, R. Moshe Feinstein in one of his responsa eloquently argues on the basis of *elu ve-elu divre Elokim hayyim* that in the realm of *talmud* Torah and for purposes of *birkat ha-Torah*, minority positions *are* absolutely equivalent to normative *halakhot*. He goes so far as to suggest that even God and his heavenly retinue (*metivta de-rekia*) spend time discoursing and studying these doctrines in the context of *talmud* Torah<sup>12</sup>.

The possibility of real multiple halakhic truths does not really emerge from Neziv's scheme. This approach is, however, implied by other sources, Rashi for example, seems to affirm this doctrine<sup>13</sup>:

When a debate revolves around the attribution of a doctrine to a particular individual, there is only room for one truth. However, when two Amoraim enter into a halakhic dispute, each arguing the halakhic merits of his view, each drawing upon comparisons to establish the authenticity of his perspective, there is no absolute truth and falsehood. About such issues one can declare that both represent the view of the living God. On some occasions one perspective will prove more authentic, and under other circumstances the other view will appear to be more compelling. The effectiveness of particular rationales shift as conditions of their application change even if only subtly.

This more ambitious approach to our topic is explicated by Ritva, Maharal and Maharshal—each providing their own nuances and subtleties of formulation, each requiring a conceptual underpinning to justify this difficult concept.

Ritva (*Eruvin* 13b) cites the inherent paradox of this theme as raised by the Tosafists<sup>14</sup>: The Rabbis of France asked: How is it possible for conflicting views to both represent the truth? They responded as follows:

When Moshe ascended to receive the Torah, it was demonstrated to him that every matter was subject to forty-nine lenient and forty-nine stringent approaches. When he queried about this, God responded that the scholars of each generation were given the

authority to decide among these perspectives in order to establish the normative halakha.

His response posits that a full range of halakhic options—possibly even of equal status—was revealed to Moshe and sanctioned as *hefza shel Torah*. License was provided to the scholars of every generation to pursue what they deemed to be the most accurate *pesak* on the basis of accepted halakhic methodology<sup>15</sup>. The clear implication of this formulation is that for those scholars halakhic conclusions are not arbitrary but based on rigorous analysis and, consequently, the decisions become normative for that generation<sup>16</sup>.

A similar perspective would emerge if one were to adopt the position that the primary thrust of the Sinaitic *mesora* was not a detailed revelation of the multiple permutations of halakha, but a revelation of general principles<sup>17</sup>. Man's obligation of applying halakhic principles by means of the methodology of hermeneutic principles, etc., would then account for the potential existence of many valid yet technically mutually exclusive solutions to the same problem.

Maharshal affirms the existence of multiple truths, possibly of equal value, and contributes a mystical-historical explanation for it. He states:

One should not be astonished by the range of debate and argumentation in matters of Halakha.... All these views are in the category of *divre Elokim* hayyim as if each was received directly from Sinai through Moshe. This is so despite the fact that Moshe never projected opposing perspectives with respect to any one issue. The kabbalists explained that the basis for this is that each individual soul was present at Sinai and received the Torah by means of the forty-nine paths (*zinorot*). Each perceived the Torah from his own perspective in accordance with his intellectual capacity as well as the stature and unique character of his particular soul. This accounts for the discrepancy in perception inasmuch as one concluded that an object was tame in the extreme, another perceived it to be absolutely *tahor*, and yet a third individual argues the ambivalent state of the object in question. All these are true and sensible views. Thus, the wise men declared that in a debate between true scholars, all positions articulated represent a form of truth<sup>18</sup>.

The Jews who stood at Sinai evidently were not merely the passive recipients of the Torah. Their presence and their acceptance as individuals shaped the very content of the Torah at the critical historical moment it took effect. This formulation dramatizes the spiritual significance that halakha ascribes to human singularity by revealing that the subjective inclinations of individuals invested their perspective of Torah with intrinsic. While this approach shares much in common with Ritva in terms of human input and the focus on broad principles rather than details, it significantly departs from Ritva's perspective in its accent on the historical moment of Sinaitic revelation and with respect to the role of the recipients of the Torah in forming this pluralistic Torah and in establishing its contours.

Maharal represents yet another formulation of the legitimacy of multiple Halakhic truths<sup>19</sup>. He advocates a doctrine of unequal yet intrinsic truths. His comparison of halakhic categories and institutions to the human personality and its manifold complex characteristics suggests a kind of Platonic model which presupposes the existence of an ideal halakhic status which precedes and supersedes the sum of its components. There is often no one decisive response to the issue of *tahara* or *tuma*, for example, since overall proximity to the ideal form represented by the classic case rather than a specific combination of components determines this status. Thus, one may speak of



approximating the ideal sufficiently but not fully, and the same token substantially but not sufficiently, and consequently, a whole hierarchy of truths would emerge. Dilution of some components and combination with competing and undermining characteristics may also contribute to the creation of a quasi-status, whose ultimate fate in the realm of practical halakha is likely to be debated. Maharal's understanding of the statement in *Sanhedrin* (17a) cited earlier flows from this perspective. Even technically inaccurate or flawed halakhic opinions do contribute to a more sophisticated appreciation of the depth of content of Torah which makes the ability to justify all angles of a halakhic problem a proper condition for judicial appointment.

#### IV.

Having established several formulations and theories underlying *elu va-eluyim* regarding the status of dissenting minority views as *hefza shel Torah*, it is now incumbent upon us to examine the impact of these perspectives and the role of rejected minority opinions generally on the institution of *pesak*.

Whatever position one adopts on the value of debate to theoretical study, there clearly is an obligation to arrive at one practical solution based on the sincere conviction of its accuracy. The relationship of *pesak* as an enterprise dedicated to the goal of a single uniformly binding conclusion, and the ambitious formulations of the theory of halakhic pluralism is complex and even double-edged. If one advances the position that there is only one authentic, or at least preferred halakhic truth, then the stakes of *pesak* are high indeed. Halakhic decision becomes a hit-or-miss exercise in which the dissenting view stands in clear opposition to truth. If one has faith in the process which aspires to produce that truth, one cannot consider dissenting opinions as legitimate fallback positions to be possibly rehabilitated or relied upon even under extraordinary circumstances. To do so would be tantamount to expressing a serious lack of faith in the effectiveness of the decision-reaching process. At the same time, if one advocates the objective validity of alternative *pesakim*, then even as they are more palatable as *devar haShem*, they are ironically perhaps less legally significant as practicable alternatives once they have been rejected by the process of *pesak*, for under these circumstances the formal and procedural aspect of halakhic resolution dominates. *Pesak*, according to this view, need not concern itself with the risky uncertain and fallible task of revealing the one authentic truth, but instead focuses on establishing the best truth consistent with its own principles of resolution. In this sense, the conclusions reached are absolutely binding in the realm of normative conduct inasmuch as this view establishes *pesak* as a *din vadai*—an absolute surety. This aspect of the relationship between *pesak* and the theoretical value of alternative perspectives has been largely ignored by those who perceive of *elu va-eluyim* in strictly modern-liberal terms, ignoring the concomitant ascendancy of pure formal procedure in these schemes<sup>20</sup>.

How then does halakha view the right to dissent from majority *pesak*, and how does it evaluate the objective status of dissenting views? Again the question is a complex one since beyond the status of the minority opinion—hitherto analyzed—the resolution of these questions turns on the interaction between two competing values and transcending aspirations of *halakha*: the pursuit of truth and toleration of multiple perspectives on one hand, and the pragmatic need to establish uniformity, discipline

and order—*shelo yiheyu kishte torot* (not to fragment the Torah)<sup>21</sup>—to insure effectiveness, on the other. The very need for *pesak* despite *elu va-elu* divre Elokim hayyim is due to this factor according to Maharshal, *Arukh haShulhan* and others<sup>22</sup>.

The status of *Zaken Mamre* (henceforth Z.M.), the rebellious elder who disputes the *pesak* of the Great Sanhedrin, is one of the best examples of this theme of authority. Ramban explains that the need to publicize the punishment of the Z.M. (Sanhedrin 89a) is due to the fact that he is not executed because of the severity of his offense per se but because of his destructive impact<sup>23</sup>. He is after all entitled to express his sincerely held halakhic convictions, but is put to death anyway because his refusal to acquiesce threatens to undermine the very concept of uniform normative behavior which is crucial to any legal system. The fact that Z.M. is obligated to accept rabbinic authority and its procedures even when they appear to be blatantly inaccurate—"af *al yemin shehu semol, ve'al semol shehu yemin* (even if they declare right to be left and vice versa)"—further accents the significance of formal procedure and principles of *pesak* even at the expense of objective halakhic truth<sup>24</sup>.

According to Neziv the principle of Z.M. applies not only to the *hakhra'ah le dorot* (definitive decision) of the *shofet-mehokek*, but also to the intuitive *hora'at kohen*, since corrosive impact on uniform conduct and respect for rabbinic authority are the crucial components. Thus, he emphasizes the reference to both *kohen* and *shofet* in this context: "*haish asher ya'aseh be-zadon lebilti shemo'a el ha-kohen ve-el ha-shofet* (he who intentionally defies the *kohen* and the *shofet*)."<sup>25</sup>

There are indications that the basic theme of Z.M. also extends to less qualified disputants and less impressive sources of authority. *Derashot ha-Ran*<sup>26</sup> and *Sefer haHinukh*<sup>27</sup> argue that the basic prohibition of *lo tasur* applies to any individual who rejects rabbinic decisions. According to Maharam ibn Habib, this notion of a parallel to Z.M. applies at least to any judge, and is responsible for an obligation of a minority judge to surrender his will and acquiesce to the majority whose ruling would otherwise be ineffective due to the principle of *en holkin be'mamon ahar ha-rov* (majority or probability does not dictate in monetary matters) which appears to exclude majority rule in monetary disputes<sup>28</sup>.

R. Jacob Emden rejects the idea that an individual may continue to adhere to his own halakhic convictions after the principles that regulate *pesak* have rejected them<sup>29</sup>. He too, points to the Z.M. parallel as the foundation of this position. However others dispute the existence of such parallels and limit the motif of authority in favor of greater flexibility in the pursuit of truth.

The tension between the pursuit of halakhic truth and the integrity of halakhic procedure that insures effectiveness as a system pervades a number of topics. These range from a proper evaluation of the story of *tanur shel Akhnai* (Baba Metzia 59b) and its climax of *lo bashamayim hi*, to an issue of judicial deception discussed by Pit'he Teshuva—if a minority judge is permitted to falsely declare himself to be undecided in order that he may delay and possibly lay the groundwork for ultimately reversing the majority decision by undermining the self-sufficiency of the existing court<sup>30</sup>.

The complex status of minority opinions is further reflected in several halakhic contexts. As alluded to earlier, the Tosafists and others were disturbed by the apparent clash between the principles of *en holkin bemamon ahar ha-rov* and judicial majority rule. Various solutions were proposed to resolve this discrepancy. Two of these

underscore opposing perspectives with respect to the concepts of *pesak* and objective halakhic truth.

R. Yonatan Eibschitz distinguishes in his *Tumim* between most majorities which are not mutually exclusive of the minority, while issues of halakha have only one absolute resolution<sup>31</sup>. Thus, in his view, the minority perspective in halakha is totally negated by the majority decision and consequently poses no challenge to it even in the monetary realm. This explanation probably represents a de-emphasis of halakhic pluralism.

R. Jacob Emden in a slightly different context proposes a different approach<sup>32</sup>. He argues that judicial procedure excludes any real doubt (*safek*) since the majority has the capacity to establish—not just reveal—the law. Obviously in the absence of real doubt one cannot be concerned with the weight of presumptive monetary rights (*hezkat mamon*) that determine *en holkhin be-mamon ahar ha-rov*. In this formulation we witness the notion that *pesak*, devoid of the burden of revealing truth which carries with it the potential for error, is an independent and strictly formal process. This view is consistent with a theory of halakhic pluralism.

The insight of *Kli Hemdah* that a judge who is overruled by the majority has a right of appeal to the Great Sanhedrin only in terms of the theoretical issue and its future application, but is denied any possibility of actually challenging and overturning the previous application of that *pesak*, represents an almost ideal balance<sup>33</sup>. It safeguards the integrity of halakhic processes by denying an appeal on the one hand, and at the same time it encourages and reinforces the pursuit of maximal halakhic perfection by allowing for theoretical and future re-evaluation.

Halakhists discussed a similar issue outside the strict confines of court decision. Does an individual have the right to insist that he is convinced of the validity of a minority halakhic position and thus, refuses to comply with the majority held ruling? This question was debated by major halakhists and possibly represents a dispute between scholars of Franco-Germany and Spain. It too reflects several of the themes that are crucial to our evaluation of multiple truths in *halakha* and of the character of halakhic decision-making. Maharik and others who distinguish between the monetary and other realms due to the factor of *hezkat mamon*, certainly appear to view *pesak* as a means of resolving doubt rather than establishing conduct irrespective of halakhic truth<sup>34</sup>. Other halakhists reject such distinctions possibly because of these implications.

The possibility that one might rehabilitate a previously rejected minority opinion or rely upon one in absence of definitive evidence to the contrary is obviously linked to our topic. The *Mishnayot in Edoyot* (1:5, 6) provide us with ambiguous information<sup>35</sup>:

And why do we mention an individual opinion along with the majority, though the halakha follows the majority? That a Court may approve an individual view and rely on him: for a Court cannot gainsay a decision of its fellow Court unless it is greater in wisdom and number....

R. Yehudah said, If so why do we mention an individual view along with the majority unnecessarily? That if a person says, So I have a tradition—he will say to him, You heard it as the opinion of so-and-so.

*Tosafot Sens* interprets the mishna as follows<sup>36</sup>:

Although the minority view was not accepted when initially proposed, if a majority of the scholars of the next generation agree to the rationale that underlies this position, it is established as the normative halakha. The entire Torah was revealed to Moshe with

a range of perspectives yielding opposing conclusions. He was told that the majority position prevails, but that both views retain their status as *divre Elokim hayyim*.

According to this interpretation the mishna refers to a previously minority opinion which has now achieved majority backing and whose implementation is, in fact, based on the principle of majority rule. The issue is simply how to justify the overturning of a previously established truth. *Tosafot Sens'* response projects *elu va-elū divre Elokim hayyim* as a real multiple truth theory which relegates halakhic decision making to legal procedure alone, which justifies the potential for it to be overturned in manner consistent with its own principles. This perspective effectively addresses both the motif of multiple truths and the significance of halakhic process and procedure.

The theme of halakhic pluralism is also central to an issue of codification policy that was the subject of heated debate in rabbinic circles particularly the aftermath of the appearance of Rambam's *Mishneh Torah* in the twelfth century and the *Shulhan Arukh* in the sixteenth century. The omission of minority opinions in these works provoked a critical reaction in some circles. The brother of Maharal of Prague, R. Hayyim, justified his critique of *Shulhan Arukh* on the basis of the inherent spiritual value of even rejected doctrines as reflected by the concept of *elu va-elū divre Elokim hayyim*.<sup>37</sup>

A passage in *Massekhet Soferim* (16:5) accurately conveys the significance of the contribution that minority opinions may offer to the halakhic process:

R. Tanhum b. Hanilai said: If the Torah had been given as a clear-cut code, no judge would have a *locus standi* in laying down a ruling; but now a judge has a *locus standi*, for if he declares a thing to be clean there are [authorities] who declare a thing in a similar condition to be unclean, and if he decides that it is unclean there are [authorities] who declare a thing in a similar condition to be clean.

The juxtaposition between this statement and the very next section (16:6)- "R. Jannai said: The Torah which the Holy One, blessed be He, gave to Moses was delivered to him in forty-nine aspects of uncleanness and forty-nine aspects of cleanness"—which asserts that the initial revelation entailed multiple halakhic approaches and options, provides the justification for this ideal of flexibility in *pesak*.<sup>38</sup>

The Talmudic distinction between two categories of judicial error represents another interesting facet of halakhic pluralism. A fundamental judicial error brought about by ignorance or misreading of basic crucial sources (*ta'ut bi-devar mishna*) invalidates the *pesak*. However, rulings that stem from questionable evaluations or improper adherence to procedures designed to establish the hierarchy of different opinions and sources (*ta'ut be-shikul ha-da'at*) stand, though the judge may be liable and must compensate the victim of his miscalculation. One might propose, at least according to some *Rishonim*, that the policy of ambivalence which characterizes our approach to the category of *ta'ut be-shikul ha-da'at*—in which the ruling is valid and yet one can speak of liability—derives from its status as a possibly legitimate expression of Torah which has been procedurally discarded in terms of conduct. From this perspective, the details that govern and define the two categories of error are instructive indeed.

How we define *ta'ut bi-devar mishna*, for example, should help to determine the boundaries of legitimate halakhic debate. Thus, the discussion among *poskim* if accepted rulings of *Geonim* or *Rishonim* should be classified as *devar mishna* or as *shikul ha-da'at* is very significant. The distinction advanced by some between those

Geonic positions which when revealed are accepted and those that generated opposition, is also striking. At the same time, the position of Rosh that knowledge of an error of *shikul ha-da'at* prior to the implementation of the ruling would still not render *pesak* invalid, perhaps attests to a notion of legitimate pluralism at least of this variety<sup>39</sup>. Moreover, the opinion quoted in *Or Zarua* that a *ta'ut be-shikul ha-da'at* that is motivated not by incorrect application of halakhic rules of resolution, but by a lack of information of the positions of some *poskim* does not create any kind of liability, seems to point to improper procedure alone as responsible for this status, not any flaw in the pursuit of objective halakhic truth<sup>40</sup>.

There are of course significant limitations even to a pluralism grounded in equal truths. This is clearly manifest by the distinction of *ta'ut be-devar mishnah* and *ta'ut be-shikul ha-da'at* as we have just demonstrated, and in other contexts as well. The parameters of *kim le*, for example, attest to this. Even those who accept the affectiveness of the claim of *kim le* impose definite limitations. Maharik believes that one can only resort to this claim when the minority opinion you seek to rely upon is one of definite prominence and stature—the opinion of a Rashi or R. Tam, etc<sup>41</sup>. There are *Aharonim* who require that such a position be cited by the *Shulhan Arukh* or Rema. Some *Rishonim* demand that at least two *poskim* adopt a position before one can declare *kim le*. A position advocated by only one authority is too idiosyncratic to be taken as a serious expression of Torah. *Kuntres ha-Sefekot* characterizes such positions as *mi'uta de-mi'uta* (extreme minority)—an unlikely candidate for halakhic truth even of the pluralistic variety. Others conclude that the precise parameters of legitimacy should be left to the intuition of the halakhic authorities involved in the particular case since it is difficult to quantify such a concept. The broad guidelines of restriction are in any case apparent<sup>42</sup>.

We also encounter definite limitations with regard to the possible permissibility of a minority judge to falsely claim indecision in order to block what he believes to be an incorrect majority ruling<sup>43</sup>. These, too, serve a broader function as models of the parameters of legitimate dispute and dissent.

Clearly, pluralism is not a blank check. There are objective limits to a sincere interpretation of sources. The author of *Arukh haShulhan* (in his introduction to *Hoshen Mishpat*) emphasizes that most halakhic debates revolve around details and application of principles, not the principles themselves. This is particularly true, he argues, about those debates that are characterized as *elu va-elū divre Elokim hayyim*. R. Moshe Feinstein in the introduction to his *Iggerot Moshe* cautions about the need for *yir'at shamayim* (fear of God, piety) and intellectual rigor to insure valid conclusions.

At the same time, in terms of the themes of tolerance and respect for the legitimately arrived at conclusions of others with whom we may disagree, the implications of *elu va-elū divre Elokim hayyim* are crucial. The gemara (Baba Batra 130b) informs us that even a *pesak* that we reject should not be shredded inasmuch as it may be a valid approach:

When a legal decision of mine comes before you (in a written form), and you see any objection to it, do not tear it up before you have seen me. If I have a (valid) reason (for my decision) I will tell (it to) you; and if not, I will withdraw. After my death, you shall neither tear it up nor infer (any law) from it. "You shall neither tear it up" since, had I been there, it is possible that I might have told you the reason; (131a) "nor enter (any law) from it"—because a judge must be guided only by that which his eyes see.

R. Feinstein suggests that the underlying principle of *elu va-elū divre Elokim hayyim* would demand that we treat a rejected opinion relating to a halakhic concept—as opposed to the *pesak* referred to in the Talmudic passage—with a full measure of reverence even if we were familiar with and still not convinced by its argument. The climate of debate between Bet Shammai and Bet Hillel as related in Yevamot (13b-14b) eloquently expresses this theme:

Though these forbade what the others permitted, and these regarded as ineligible what the others declared eligible, Bet Shammai, nevertheless, did not refrain from marrying women from (the families of) Bet Hillel. Nor did Bet Hillel (refrain from marrying women) from (the families of) Bet Shammai....

This is to teach you that they showed love and friendship towards one another, thus putting into practice the scriptural text, "Love ye truth and peace."

The gemara in *Eruvin* (13b), the very source of *elu va-elū divre Elokim hayyim*, concludes that the *halakha* is in accordance with Bet Hillel precisely because they displayed greater fidelity than Bet Shammai to this theme of respect:

Since, however, "both are the words of the living God", what was it that entitled Bet Hillel to have the *halakha* fixed in agreement with their rulings? Because they were kindly and modest, they studied their own rulings and those of Bet Shammai, and were even so (humble) as to mention the actions of Bet Shammai before theirs.

This is a motif which should guide us in relating to other communities and their distinctive customs and *pesakim*.

Finally, it should be stated emphatically that *elu va-elū divre Elokim hayyim* should never be used as an excuse for complacency or mediocrity. Even as we encounter equal truths we must aspire to pursue our own conviction of ideal truth culled from and on the basis of insights that we form from the wealth of legitimate perspectives that we confront. Our pursuit should be intensified and enhanced by these exposures. In this way we will hopefully emerge with the concept of pluralism beautifully depicted by the *Arakh ha-Shulhan* in his introduction to *Hoshen Mishpat*:

The debates of Tanaim and Amoraim and Geonim in fact represent the truth of the living God. All of their views have merit from a halakhic perspective. In fact, this diversity and range constitute the beauty and splendor of our holy Torah. The entire Torah is called a song whose beauty derives from the interactive diversity of its voices and instruments. One who immerses himself in the sea of Talmud will experience the joy that results from such rich variety.

Torah, then, is to be perceived as a harmonious symphony enriched by the diversity of its instruments and variations and bearing the singular message of *devar haShem*.

## NOTES

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<sup>1</sup> A convenient summary of different approaches and orientations regarding the Double Truth theory can be found in *The Encyclopedia of Philosophy* (NY 1967), vol. I, pp 223-226. See also Etienne Gilson, *History of Christian Philosophy in the Middle Ages* (New York, 1955), and C. Touati, "Verite philosophique et verite prophetique chez Isaac Albalag," REJ 71 (1962), pp 35-47.

<sup>2</sup> Norman Lamm has proposed that Niels Bohr's Theory of Complementarity in nuclear physics may be a more accurate analogue to the notion of legitimate epistemological and ontological pluralism. This suggestion is articulated in his recently published *Torah Umadda. The Encounter of Religious Learning and Worldly Knowledge in the Jewish Tradition* (New Jersey: Jason Aronson Inc., 1990), pp. 232-236.

<sup>3</sup> Obviously the precise status of aggadot and midrashim constitutes a complex issue and one which is very much reflective of the overall orientations of the various theorists themselves. Thus, any serious analysis of the topic would require an elaborate and comprehensive independent treatment of the sources. See Marc Saperstein, *Decoding of the Rabbis* (Boston: Harvard U. Press, 1980), pp.1-20 for a summary of basic rabbinic perspectives on aggadah. For our specific purpose in this context, one should see the famous formulations of Rav Sherira Gaon and Rav Hai Gaon as they are recorded in S. Albeck, *Sefer haEshkol* (Jerusalem, 1984), vol. I, *Hilkhot Sefer Torah*, pp. 157-158 and in B. Levin, *Ozar haGeonim, Hagiga* (Jerusalem, 1932), no. 66-69, pp 59-60. One should note in particular the intriguing possibility advanced by R. Hai Gaon that the stature of Talmudic aggadot exceeds that of aggadot whose origin is exclusively midrashic. Nevertheless, even Talmudic aggadot will not be binding, if they do not conform to logic and intuition based on the principle of אין סומכין על אגדה (see also *Yerushalmi, Peah* 2:6). See also the celebrated passages in Maimonides' *Introduction to Perek Helek* (Y. Kafin, *Perush haMishnayot laRambam* (Jerusalem, Mosad haRav Kook, 1965), vol. II, pp. 136-137) where Rambam describes three basic approaches to rabbinic aggadah, associating himself with the more flexible interpretive posture. Some of the literature of the Maimonidean controversies (of 1232 and 1305) revolved around the legitimacy of this view. (See also *Yoreh De'a* [179:12] for an example of an emphatic critique of Rambam's philosophic posture.)

The controversial formulations of Nahmanides in his polemic with Pablo Christiani (Barcelona, 1263), in which he sharply downgrades the significance of midrashim, is also relevant to this topic. He declares for example: וזה הספר מי שיאמין בו טוב, ומי שלא יאמין בו לא

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ועוד אנו קורין אותו הגדה, רוצה לומד שאינן אלא דברים שאדם מגיד לחברו: ויזיק [Vikuah haRamban in C. Chavel, *Kitve haRamban* (Jerusalem, 1963), p.308] There is a whole literature which debates the extent to which these comments should be perceived as accurately reflecting Ramban's authoritative position, or alternatively should be viewed as an insincere but strategic response motivated by the circumstances of Jewish-Christian disputations in which aggadot were often used by Christian advocates to establish the authenticity of their claims. See, for example, the comments of Rabbi Chavel ad loc., Y. Baer in "LeBikoret haVikuhim shel R. Yehiel miParis veshel haRamban," *Tarbiz* 2:2 (193), and S. Lieberman in *Sheki'in* (Jerusalem, 1970), pp. 81-83.

<sup>4</sup> *Bemidbar Rabba* 13:15. Cf. *Responsa of Radvaz* (Venice, 1749) 3:643. Radvaz posits that the multiplicity of legitimate meanings of Torah is responsible for the text being unencumbered by *nekudot* and *te'am'im* which would inhibit many possible readings, though these symbols signal the proper method of public reading *kri'at haTorah* and are of Sinaitic origin.

<sup>5</sup> Introduction to *Sefer haH'inuk* and mizvot 95, 98.

<sup>6</sup> R. Shatz, ed., *HaKaballah beProvence: Lectures of Gershon Scholem*- 1963 (Jerusalem: Akadamon, 1979), pp. 5-21.

<sup>7</sup> Introduction to *Net'ivot haMishpat* on *Hoshen Mishpat*.

<sup>8</sup> *Kidmat haEmk* the introduction to Neziv's commentary on *She'iltot deRav Ahai Gaon* (Jerusalem, 1961), pp. 18-19.

<sup>9</sup> *Berakhot* 2a, 3a, 4b.

<sup>10</sup> *Tosafot, Sanhedrin* 17a, s.v. שידוע לטהר את השרץ

<sup>11</sup> R. Moses Isserles, *Responsa of Rema* (Jerusalem, 1977), no. 107.

<sup>12</sup> R. Moshe Feinstein, *Iggerot Moshe* (New York, 1982), 4:9, 24.

<sup>13</sup> Rashi, *Ketubot* 57a, s.v. קמ"ל.

<sup>14</sup> This view is apparently based on the formulation in *Massekhet Soferim* (16:6). See Talmud Yerushalmi *Sanhedrin* (4:2) where an important aspect of this theme is expressed in a slightly different context.

<sup>15</sup> For an interesting discussion of this basic perspective see the article by Rabbi Yechiel Michal Katz, "וחיי עולם נטע בתוכנו- זו תורה שבעל פה" *Sefer Yevul Ha Yovlot* (New York, 1986), pp. 346-360 and the sources cited therein.



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<sup>16</sup> This view combined with the notion of exclusive human responsibility for the halakhic process as reflected by the principle of *lo bashamayim hi* (see *Baba Mezi'ah* 59b) represents the conceptual underpinning for the somewhat radical view of halakhic autonomy that is manifest in its independence from even Divine interpretation and interference. This doctrine is articulated by *Derashot haRan*, (ed. L. Feldman), and in the famous introduction to the *Ketzot haHoshen* on *Hoshen Mishpat* in his analysis of the concept of halakhic *hiddush*

<sup>17</sup> See, for example, *Shemot Rabba* 41:6 [on *Shemot* 31:12]: וְכִי כָל הַתּוֹרָה לְמַדָּה מִשָּׁה? אֵלֶּא כָּלֵלִים לְמַדְהוּ הַקָּב"ה לְמִשָּׁה... כְּכַלְתּוֹ לְדַבֵּר אֹתוֹ. This position is very clearly formulated by R. Yosef Albo in his *Sefer halkarim* 3:2 and may represent Rambam's view as well. See *Responsa of Havot Yair* (Jerusalem, 1973), 481 (Cf. Maharatz Hayot, *Torat haNevi'im*, ch. 4, *Ma'amar Torah Shebe'al Peh.*)

<sup>18</sup> Introduction to *Yam shel Shlomo* on *Baba Kama*.

<sup>19</sup> Maharal of Prague, *Be'er haGolah* (Jerusalem, 1971), pp. 19-20. See my article, "Personal Initiative and Creativity in Avodat Hashem" in *Torah U-Madda Journal*, ed. Jacob J. Schacter, vol. I (1989), pp. 79-83.

<sup>20</sup> See *supra*, note 16.

<sup>21</sup> *Sanhedrin* 88b.

<sup>22</sup> Introduction to *Yam shel Shlomo* on *Baba Kama*; Introduction to *Arukh ha Shulhan* on *Hoshen Mishpat*.

<sup>23</sup> *Ramban al haTorah, Devarim* 21:18. Cf. *Perush haRadvaz* on Rambam, *Mishneh Torah, Hilkhhot Mamrim* 3:8.

<sup>24</sup> *Sifre* and *Ramban al haTorah, Devarim* 17:11. This theme is, of course, both crucial and controversial in terms of its precise parameters and therefore its wider implications. It requires extensive clarification. I have cited one formulation in this context in order to highlight a particular perspective, but it is by no means the only approach to this topic. See also *Yerushalmi Horayot* (1:1) and Rabbi Elhanan Wasserman, *Kuntres Divre Sofrim*, no. 4, in *Kobetz Shi'urim*, vol. 2 (Tel Aviv, 1963), pp. 106-109. One should also contrast Ramban's position with that of Abravanel, *Devarim* 17:8 and the rationale provided by *Sefer ha H'inukh*, no. 508. *Kli Yakar* (*ad loc.*) directly links the *Sifre's* doctrine with the principle of *elu va'elu divre Elokim hayyim*. Professor Menachem Elon points to the stark contrast between halakha's view of rabbinic license of interpretation and sixteenth and seventeenth-century English Law which in theory severely limited such flexibility (Menachem Elon, *Hamishpat haIvri* [Jerusalem, 1978] vol. I, p. 229, n. 24).

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<sup>25</sup> *Kidmat haEmek*, pp. 6-7.

<sup>26</sup> *Derashot haRan*, Derush 12, pp. 212-213. He projects the principle of *ahare rabim le-hatot* as the basis for this, rather than *lo tasur*. See also Abravanel on *Devarim* 17:8.

<sup>27</sup> *Sefer haHinukh*, no. 508. He perceives this as an extension of *lo tasur*.

<sup>28</sup> This position is also recorded by *Kuntres haSefekot* (6:2). [This work was authored by the brother of the *Ketzot haHoshen* and is printed in many editions of the standard *Hoshen Mishpat* or *Ketzot haHoshen*.

<sup>29</sup> R. Jacob Emden, *She'elat Ya'avetz* (Lemberg, 1884), no. 153.

<sup>30</sup> *Pithe Teshuva*, *Hoshen Mishpat* 18:4, 8. The background to this issue is the sugya in Sanhedrin 5b.

<sup>31</sup> *Tosafot*, B.K. 27b s.v. "ל' Tosafot, *Sanhedrin* 3b, "בדיני ממונות", *Hidushe haGra at haShas*, B.K. 27b, "בענין אין הולכין בממין אחר הרוב" *Kuntres haSefekot* 6:2.

<sup>32</sup> Rabbi Jacob Emden, *She'elat Ya'avetz*, no. 157. Compare this view to the positions regarding majority rule outlined in Rabbi R. Margaliot, *Margalyot haYam al Sanhedrin* (Jerusalem, 1977). *Sanhedrin* 40a, no. 22, pp. 163-164

33 *Keli Hemda al ha Torah*, *Devarim* 17:8, pp. 106-109. C.f. *Margaliyot haYam*, *Sanhedrin* 2a, no. 51.

<sup>34</sup> Joseph Colon, *Responsa of Maharik* (Jerusalem, 1973), no. 14.

<sup>35</sup> See also the interpretation of Or Zarua (Bnei-Brak, 1958), I, *Hilkhot Shevi-it ve-Hadash*, no. 328, and *Sheiltot de-Rav Ahai Gaon Shemot* no. 36.

<sup>36</sup> *Tosafot Sens*, *Eduyot* (1:4).

<sup>37</sup> Rabbi Hayyim b. Bezalel, *Vikuah Mayim Hayyim* (Amsterdam, 1712), 5b. For a further discussion of this position see my article in *Torah U-Madda Journal* (cited in n. 19), pp. 84-85.

<sup>38</sup> Cf. Yerushalmi, *Sanhedrin* 4:2.

<sup>39</sup> This position is disputed by Ramah, see *Tur*, *Hoshen Mishpat* no. 25. A comprehensive analysis is required of the full range of perspectives regarding the subtle criteria that differentiate *ta'ut bi-devar mishna* from *ta'ut be-shikul ha-da'at* and of the implications for the relationship of the twin themes of authority and autonomy in *pesak* that issue from these perspectives. I hope to address this topic elsewhere.

<sup>40</sup> *Or Zaru'a*, *Sanhedrin* 5a.

<sup>41</sup> *Responsa of Maharik*, no. 94:6.

<sup>42</sup> See *Kuntres haSefekot* 6:6 for a review of some of the major positions on this issue.

<sup>43</sup> *Pit-he Teshuva*, *Hoshen Mishpat* 18:4, 8.

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