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The Rule of Ezra or the Rule of Torah?: Ezra's Legal Hermeneutics and the Torah's Legal Authority

Introduction

One of the fundamental elements for any political theory is what legal theorists call the rule of law; it is the principle that a society must be ruled and governed according to pre-established norms, which must be enshrined in a written authoritative text. That is, those who are responsible for decision-making in a community, typically judges, cannot exercise that power according to their own will; that would be the antithesis of the rule of law. Rather, those who are responsible for a community's decision-making do so according to pre-established norms that have been enshrined in an authoritative text. The rule of law is a widely venerated ideal that is deeply entrenched in virtually all of the world's legal systems. For example, Brian Tamanaha notes that despite occasional skepticism "[t]he fact remains that government officials worldwide advocate the rule of law and, equally significant, that none make a point of defiantly rejecting the rule of law."[1] Similarly, Miranda McGowan writes, "It is a truth universally acknowledged that a judge should interpret statutes, not rewrite or impose her own preferred meaning upon them. . . . for the rule of law requires that laws, not persons, decide cases."[2]

Although legal theorists seem to agree that the rule of law is a universal truth (or at least a universally agreed upon ideal) that spans the planet, most scholars do not believe that it is a universal ideal that has spanned all times. Most legal theorists and classicists identify ancient

[1] See, Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004), 1-3.

[2] Miranda Oshige McGowan, "Against Interpretation," *San Diego Law Review* 42 (2005):711.

Greece as the birthplace of this ideal.[3] Additionally, there is now a growing consensus in the field of biblical and ancient Near Eastern studies that written law was not the source of legal practice in Mesopotamia, due to the lack of any reference to the Mesopotamian law collections in the tens of thousands of legal records that have been preserved. This is particularly felt in the lack of reference to the widely known laws of Hammurabi. Instead, judges seemed to have decided cases *ad hoc* according to their judicial discretion. In other words, the majority of scholars in biblical and ancient Near Eastern studies agree that the law did not rule, but rather judges did.[4]

While a few Bible scholars would agree with the legal theorists and classicists that the rule of law ideal began in ancient Greece (and influenced Jewish communities in the Hellenistic period),[5] many look to Ezra's use of the Torah in the Persian period for the beginning of the rule of law.[6] Bernard Levinson and Gary Knoppers have recently highlighted the importance of

[3] See, Tamanaha, *Rule of Law*, 7-10; Christopher May, "The Rule of Law: Athenian Antecedents to Contemporary Debates," *Hague Journal on the Rule of Law* 4 (2012):235-51.

[4] See, Bruce Wells, "What is Biblical Law? A Look at Pentateuchal Rules and Near Eastern Practice," *CBQ* 70 (2008):224-26, and Gonzalo Rubio, "The Mesopotamian Law Collections: Where they Really Legal Codes?," in *Current Issues in the History of the Ancient Near East* (ed. Gonzalo Rubio and Mark W. Chavalas; Claremont: Regina Books, 2007), 31-34.

[5] This is the entire point of his book. He argues that the rule of law (what he calls "prescriptivism") came through Hellenization, and can only be fully seen in the Mishnah. See, Michael Lefebvre, *Collections, Codes, and Torah: The Re-characterization of Israel's Written Law* (Library of Hebrew Bible New York: T & T Clark, 2006). His theory is recently taken up by Sarianna Metso. See, Sarianna Metso, "Problems in Reconstructing the Organizational Chart of the Essenes," *DSD* 16 (2009):392-93.

[6] See, for example, Bernard S. Jackson, *Studies in the Semiotics of Biblical Law* (JSOT Supplement Series Sheffield: Sheffield Academic Press, 2000), 141–43; Anne Fitzpatrick-McKinley, *The Transformation of Torah from Scribal Advice to Law* (JSOT Supplement Series Sheffield: Sheffield Academic Press, 1999), 172n68. Along these same lines is Peter Frei's theory that Persian imperial authorization ascribed Yehud's local law with coercive legislative force. See, Peter Frei, "Persian Imperial Authorization: A Summary," in *Persia and Torah* (ed. James W. Watts; trans. James W. Watts; Atlanta: Snow Lion, 2001) 5–40.

It should be noted that some scholars date the beginnings of this ideal to Deuteronomy. See, for example, Bernard Levinson, "First Constitution: Rethinking the Origins of Rule of Law and Separation of Powers in Light of Deuteronomy," *Cardozo Law Review* 27 (2006):1853-88. Others argue that written law was always the source of adjudication. See, Klaas R. Veenhof, ""In Accordance with the Words of the Stele": Evidence for Old Assyrian Legislation," *Chicago-Kent Law Review* 70 (1995):1717-44. Recently see, Sophie LaFont, "From the Banks of the Seine to the Bay of Chesapeake: Crossglances on Ancient Near Eastern Law," *Maarav* 18 (2011):56-59.

answering this question of when written law became normative as an important question for understanding the nature and status of the Torah in the Second Temple period.[7]

In this paper I will be examining Ezra's use of the Torah in Ezra 9-10. My goal, however, is not to argue whether or not his use of the Torah marks the beginning of the rule of law ideal for the Jewish community. My goal is not even to try to answer this question of when written law became normative. In fact, I would argue that it is not productive to look at the evidence we have and simply ask the question of when the rule of law ideal began—evidence such as the disparity between the Mesopotamian trial records and the Code of Hammurabi, or the "according to the words of the stele" line found in Old Assyrian trial records,[8] or the Old Babylonian verdicts that were reformulated into general rules,[9] or the numerous exhortations to obey the words of this law found in Deuteronomy and Deuteronomic literature,[10] or Ezra's use of the law.

Instead, I would argue that it is more productive to ask the question of how the law was perceived to have ruled. The rule of law is a complex ideal fraught with methodological and theoretical problems that are discussed at length in the field of legal theory; most legal theorists agree that the rule of law is an ideal that can never be fully achieved,[11] while some legal critics go so far as to argue that the rule of law is fundamentally impossible.[12] I therefore argue that it is more productive to examine the evidence we have, such as Ezra's use of the law in Ezra 9-10, in

[7] See, Gary N. Knoppers and Bernard M. Levinson, "How, When, Where, and Why Did the Pentateuch Become the Torah?," in *The Pentateuch as Torah: New Models for Understanding its Promulgation and Acceptance* (ed. Gary N. Knoppers and Bernard M. Levinson; Winona Lake, IN: Eisenbrauns, 2007), 6.

[8] See, Veenhof, ""In Accordance with the Words of the Stele": Evidence for Old Assyrian Legislation," 1717-44.

[9] See, Dominique Charpin and Jane Marie Todd, *Writing, law, and kingship in Old Babylonian Mesopotamia* (Chicago: University of Chicago Press, 2010), 73-74.

[10] See the discussion in, Lefebvre, *Collections, Codes and Torah.* 58-88.

[11] See, Timothy Endicott, "The Impossibility of the Rule of Law," *Oxford Journal of Legal Studies* 19 (1999):1-18.

[12] This is known as the claim that the law is "radically indeterminate." For an assessment of this claim see, Lawrence B. Solum, "Indeterminacy," in *A Companion to Philosophy of Law and Legal Theory* (ed. Dennis M. Patterson; Cambridge: Blackwell, 1996), 488-502.

the light of this legal-theoretical discourse. I should state at the outset that I do not intend to simply impose modern criteria for establishing whether or not the law rules. Rather, I suggest that legal-theoretical discussion on the nature of how the law rules in modern legal systems can provide a way to approach the question of how the law was perceived to have ruled at different periods in history.[13]

This is my goal in this paper, to answer the question of how the law was perceived to have ruled. I will be examining one instance where the law, or the Torah, is invoked as the basis for a legal decision, found in the case of Ezra and the foreign wives from Ezra 9-10. I will examine this scenario with the goal of employing insight from the field of legal theory to get a clearer picture of how the law was perceived to have ruled at that time. Thus I am not asking whether or not the Torah ruled; I am asking how the authority of the Torah was thought to have been appropriated for the community—how the rule of law was perceived by the authors and editors of this narrative.[14]

My discussion will unfold in four parts. First, I will outline the problem of the depiction of law-obedience in Ezra 9-10. Second, I will examine Ezra's use of the Torah in the light of the theoretical problems with the rule of law. Third, I will outline the two main ways in which legal systems can address the problems with the rule of law. Finally, I will attempt to distinguish how Ezra overcame the theoretical challenges to the rule of law, which will illuminate how the law

[13] My legal-theoretical approach to ancient law is further justified by a recent dissertation by Aryeh Amihay, who employs legal-theoretical categories in the study of law in the Dead Sea scrolls. He writes, "I advocate a stronger reliance on legal theory for the study of legal texts from the Dead Sea scrolls" (p12). See, Aryeh Amihay, "Law and Society in the Dead Sea Scrolls" (Ph.D. dissertation, Princeton University, 2013).

[14] Dating this pericope is a complex and much discussed issue (for example see the survey of approaches in, Juha Pakkala, *Ezra the Scribe: The Development of Ezra 7-10 and Nehemiah 8* (BZAW 347; Walter de Gruyter, 2004), 1-21). My approach in this paper is synchronic and does not deal with the issue of the date. My primary purpose is to identify how the rule of law was perceived in the narrative as it stands in the Massoretic texts (B19a). Whether this perception of the rule of law should be ascribed to the historical Ezra figure in the Persian period, or to creative scribes and editors in later periods is a question that cannot be dealt with here, though it is important.

was perceived to have ruled at that time; I will conclude that, on account of Ezra's status as an expert scribe of the law of Moses, the rule of Torah was synonymous with the rule of Ezra.

1. The Problem with the depiction of law-obedience in Ezra 9-10

The story found in Ezra 9-10 depicts a well-known scene in which the fledgling post-exilic community is presented with a legal problem, to which Ezra is expected to render a verdict. In 9:1-2, the community officials approach Ezra saying,

> The people of Israel . . . have not separated themselves from the peoples of the lands with their abominations. . . . For they have taken some of their daughters to be wives for themselves and for their sons, so that the holy race has mixed itself with the peoples of the lands.[15]

After a stint of weeping (vv. 3-4) and a penitential prayer (vv. 5-15), the problem is resolved with a confession from the guilty parties and a judicial verdict. This is recounted in the words of Shecaniah, who says to Ezra in 10:2-3:

> We have broken faith with our God and have married foreign women from the peoples of the land. . . . Therefore let us make a covenant with our God to put away all these wives and their children, according to the counsel of my lord . . . and let it be done according to the Law.

What is of interest in this story for my purposes is the fact that this verdict, to put away all the foreign wives along with their children, is nowhere commanded in any known version of the Torah; it appears that Ezra has made the Torah say something that it does not say.

There are two main ways in which scholars have dealt with this problem. First, in a much cited article Cornelis Houtman argues that Ezra was working with a different Pentateuch. He analyzes this and several similar instances in Ezra-Nehemiah that depict Torah obedience and

[15] All translations are taken from the ESV.

concludes that Ezra must have been working from an unknown earlier version of the Torah that contained all the missing commands that the community followed.[16]

Alternatively, a host of scholars have explained this, in one way or another, as an instance of creative interpretation; despite the fact that the Torah did not command the expelling of foreign wives, Ezra was able to arrive at that decision through interpretive methods, similar to the type of *midrashic* interpretation found in the Mishnah.[17] Indeed, this suggestion is not without merit. Ezra 9:1 and vv. 11-12 contain two phrases that have been lifted straight from Deut 7:1-4 (which speaks of intermarriage), one phrase lifted from Deut 23:3-6 (which speaks of forbidden unions), numerous unique gentilic terms from Deut 7:1-4 and 23:3-6, and language that bears close resemblance to that of Lev 18 and 20 (which speaks of God putting out unclean foreign nations from the land). Although this "creative interpretation" theory is appealing, it falls short for two reasons. First, the apparent interpretive activity found in the narrative appears in a prayer, not as the source of Ezra's judicial decision. Second, although Ezra's prayer cites a couple of the Torah's prohibitions on marriage, its interpretive activity does not lead directly to Ezra's decision, although it certainly demonstrates his proficiency as a scribe of the Torah.

Hindy Najman has argued for an appealing variation of the "creative interpretation" theory just mentioned. Instead of trying to identify Ezra's textual justification for his verdict, Najman argues that the authority for Ezra's decision lies within Ezra himself, who has the authority as a scribe to declare what the Torah of Moses says, not in his ability to derive his decision from a text. She writes, "[I]t is essential that no such *derivation* [from the Torah] is

[16] Cornelis Houtman, "Ezra and the Law: Observations on the Supposed Relation between Ezra and the Pentateuch," *OTS* 21 (1981):91-115.

[17] See the list of scholars provided by Hindy Najman, "Torah of Moses: Pseudonymous Attributions in Second Temple Writings," in *Interpretation of Scripture in Early Judaism and Christianity* (ed. Craig A. Evans; Sheffield: Sheffield Academic Press, 2000) 209-10n11 or the summary found in, Katherine Southwood, *Ethnicity and the Mixed Marriage Crisis in Ezra 9-10: An Anthropological Approach* (Oxford Theological Monographs Oxford: Oxford University Press, 2012), 75-78.

provided. . . . Nor is there any suggestion whatsoever that Ezra or Shecaniah might need to *justify* their attributions to the Law of Moses" (italics original).[18] Ezra's verdict works in the same way that pseudonymous attribution confers authority on new texts, like Jubilees. Since Ezra is a qualified interpreter, he is able to claim what the Torah of Moses actually says, just like Jubilees claims to recount the Torah, even though it is much different than the Torah.[19] Thus, the authority for the verdict lies in Ezra's identity as a proper and qualified mouthpiece of the Torah, not in his ability to creatively show how the text supports his conclusion.

I basically agree with how Najman explains this disparity between the content of the Torah's provision and the depiction of Ezra's Torah-verdict. On some level, Ezra's activities must be viewed as interpretive. However, his interpretation does not seem to find its legitimacy in his ability to textually demonstrate how the text leads to his verdict; the meaning of the text is made legitimate by the fact that it came from the mouth of Ezra.

In order to understand how this relates to the rule of law ideal, we must now turn to the main challenge to the rule of law ideal and how that relates to Ezra's use of the Torah.

2. Ezra and the problem of the rule of law

The main challenge for the rule of law ideal comes from the conflict between the law's need for one right answer on the one hand—a principle known a judicial bi-bivalence—and the inadequacy of language and legislators to always provide a single answer on the other. It is fundamentally necessary for any legal system to provide judicial resolutions to legal problems; the practice of law demands one answer to every legal case; a judge cannot simply say "the law does not give an answer to this problem, so I cannot render a decision.", a legal system collapses

[18] See, Najman, "Pseudonymous Attributions,", 211.
[19] See, idem., "Pseudonymous Attributions," 202-16.

the moment it fails to render a solution to a legal case. This feature of law is known as judicial bivalence, and it is an essential feature of law.[20]

If judicial bi-valence requires a single right answer to every legal problem, however, then the rule of law requires that every one of those legal decisions be determined by the language of a normative text. This, however, is a burden that law-makers (and the language they employ) simply cannot bear.[21] As Fred Dallmayr put it, "the law can never exhaustively stipulate its range of application."[22] For example, two threats to the rule of law that are common in legal discourse are vagueness and gaps in the law.[23] Vagueness refers to the presence of borderline cases, where it is not clear whether or not a law should apply, like the word "work" in the Sabbath prohibition, for example. Gaps in the law are identified by Barak as when "[t]he text implicitly or explicitly settles certain issues, but fails to regulate other issues that it is supposed to address."[24] Even in modern legal systems, the tension between judicial bi-valence (the law's need for single remedies) and the limited ability of legal texts to fully determine those remedies are ubiquitous.[25]

When the episode of Ezra and the case of the foreign wives is viewed in light of this problem with the rule of law, it becomes clear that Ezra faced the same challenge that all practitioners of law face at one time or another. Although the Torah did have a legal provision that prohibits intermarriage (at least with some nationalities), there was no directive that could instruct Ezra with how to deal with the problem presented to him. Ezra was therefore faced with

[20] Timothy Endicott, *Vagueness in Law* (Oxford: Oxford University Press, 2000), 167. See also the extended discussion in, Ronald Dworkin, "Hard Cases," *Harvard Law Reivew* 88 (1975):1057-1109.

[21] Peter M Tiersma, "The Rule of Text: Is it Possible to Govern Using (Only) Statutes?," *NYU Journal of Law and Liberty* 6 (2011):274-82.

[22] Fred Dallmayr, "Hermeneutics and the Rule of Law," in *Legal Hermeneutics: History, Theory, and Practice* (ed. Gregory Leyh; Berkeley: University of California Press, 1992),12.

[23] Timothy Endicott, "The Value of Vagueness," in *Vagueness in Normative Texts* (ed. Vijay K. Bhatia, et al.; Berlin: Peter Lang, 2005), 27-48.

[24] Aharon Barak, *Purposive Interpretation in Law* (Princeton: Princeton University Press, 2005), 68.

[25] Timothy Endicott, "Law is Necessarily Vague," *Legal Theory* 7 (2001):379-85.

this same type of problem that is fundamental to the rule of law: the principle of judicial bi-valence demanded that Ezra render a verdict, yet his authoritative source of law, the Torah, did not provide him with an answer to his case.

3. Bridging the gap between judicial bi-valence and the limits of legal language

In modern legal systems there are two ways in which this problem is address between the law's demand for a verdict and the legal text's limited ability to always provide a verdict. First, most legal systems recognize that judges have a degree of law-making power. That is, modern legal systems tend to recognize the limitations of legal language, and allow judges to fill the gap by rendering decisions that extend beyond what the law actually says. A classic example is when the New York court of appeals ruled that Elmer Palmer could not inherit the estate of his grandfather, who he murdered, even though New York law was silent on the question of murderers inheriting their victim's property (a clear example of a gap in the law).[26] This case, known as Palmer v Riggs, demonstrates that sometimes judges must simply decide cases according to their own discretion. In these cases, however, it is acknowledged that the law does not rule.

The other, better known, means of dealing with this problem is that judges often bridge the gap between judicial bi-valence and the limits of the normative text by employing interpretive methods. Through interpretation, a judge is able to extend the written provisions to apply to a variety of cases in a way that is otherwise not immediately apparent.

There is much debate over the nature and the limits of legal interpretation, however. Without constraints on legal interpretation, a judge would be free to disguise a decision as an

[26] The Opinion of the Court regarding Palmer v Riggs can be found online in the New York court archives, available: http://www.courts.state.ny.us/reporter/archives/riggs_palmer.htm. For scholarly comment on this case see, Ronald Dworkin, "Law, Philosophy, and Interpretation," in *Law and Legal Interpretation* (ed. Fernando Atria and Neil MacCormick; Burlington: Ashgate, 2003), 3-15, esp. 4, and Barak, *Purposive Interpretation in Law* 63-64.

interpretation, and thus confer the authority of a pre-established norm upon any judicial decision, whether or not it can be reconciled with the wording of the legal text. Indeed, Aharon Barak notes that judges tend to "present all their actions as interpretive. They presume that, in doing so, they will enjoy the legitimacy that interpretation confers on judicial activity. Judges sometimes "cram" noninterpretive activities into interpretative limits, blurring the distinction between giving meaning to a text and acting beyond it."[27]

As a result of this danger, judicial interpretation is constrained by the degree to which a decision can be derived from a normative text and, furthermore, the degree to which a decision can be derived from a normative text is established through legal argumentation. As Aileen Kavanaugh writes,

> [J]udges cannot simply present their conclusion about what the provision means as their interpretation of the legislation. Their conclusion is simply the outcome . . . of an interpretation. . . . To constitute an interpretation, judges must provide reasons supporting that outcome which show why they believe it to be correct.[28]

Thus, in legal interpretation, there is a distinction between: 1) the normative text, which is the interpreted object; 2) legal argumentation, which is the main locus of the interpretive activity; and 3) the legal decision, which is the conclusion that is derived from the interpretive activity.[29] The second step in this process is the most important because, through it, the gap is bridged between the normative text and the final decision; the legitimacy of a legal decision is evaluated

[27] idem., *Purposive Interpretation in Law* , 17. Timothy Enticott calls this "the charm of legalism." See, Endicott, *Vagueness in Law* , 182-84 (where he refers to the same principle as "the charm of legalism.", This tendency to hide innovation in the guise of interpretation relates to a debate between formal and substantive argumentation. Harm Kloosterhuis notes that judges often hide their substantive arguments under a thin veil of formal argumentation. See, Harm Kloosterhuis, "The Strategic Use of Formal Argumentation in Legal Decisions," *Ratio Juris* 21 (2008): 496-506, esp. 497-98.

[28] Aileen Kavanagh, "The Elusive Divide between Interpretation and Legislation," *Oxford Journal of Legal Studies* 24 (2004): 262.

[29] Lawence Solum calls this third step (the legal decision) "construction," which is to be distinguished from interpretation. See, Lawrence B. Solum, "The Interpretation-Construction Distinction," *Constitutional Commentary* 27 (2010):95-118.

based on how well a judge performs this second step; it is the means by which a judge is able to uphold the rule of law and appropriate the authority of a pre-established norm for a particular legal case.

4. The appropriation of the Torah's authority in Ezra's verdict

When Ezra's use of the Torah in the episode of the foreign wives is viewed in this light, it sheds light on how the rule of law was conceived in this narrative. If Hindy Najman's suggestion is correct, then the status of Ezra himself stands in place of the second step in the process of interpretation. That is, the legitimacy of Ezra's decision is not grounded in his legal argumentation—in his ability to demonstrate how the text of the Torah leads to his conclusion, which is what the Rabbis call *midrash halakha*. There is no hint at all that Ezra felt constrained to do that.[30] Instead, it seems that the legitimacy of his interpretation was judged according his qualifications as an interpreter, not on the quality of his interpretive argumentation.

I suggest that this episode of Ezra and the foreign wives must be understood in the light of Ezra's first introduction in Ezra 7, where he is described as "a scribe skilled in the law of Moses" (v 6), who had "set his heart to study the Law of the LORD" (v 10). Through this skill and intensive study, Ezra internalized the written law such that whatever he declared as Torah was identified as Torah itself. He stood as the embodiment of the Torah.

While this may seem to fly in the face of the rule of law, the goal of my inquiry was not to look at Ezra 9-10 and decide whether or not the narrative depicts an instance in which the law rules. By modern criteria for evaluating the law's rule, which depends on the legitimacy of legal

[30] In fact, Steven Fraade has pointed out the general absence of *midrash halakha* in the so-called Qumran corpus in general, which suggests that interpretive conclusions in general at that time, not just legal decisions, were not judged according to the quality of their interpretive argumentation Steven D. Fraade, "Looking for Legal Midrash at Qumran," in *Biblical perspectives: Early Use and Interpretation of the Bible in Light of the Dead Sea Scrolls: Proceedings of the First International Symposium of the Orion Center for the Study of the Dead Sea Scrolls and Associated Literature* (ed. Michael E. Stone and Esther G. Chazon; Leiden: Brill, 1998) 59-79.

interpretation, it surely stands as an instance of the rule of Ezra, and not the rule of law. The goal, however, was to gain an understanding on how the Torah was perceived to have ruled in the narrative. With that goal in mind it becomes clear that for this text's narrator, the law's authority was appropriated through Ezra, a qualified spokesman for the Torah; whatever he declared as Torah was considered Torah itself, thus blurring the lines between the rule of law and the rule of man; because of his scribal status, the rule of Ezra was tantamount to the rule of Torah.

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