Review for *JEWISH LAW ANNUAL* of:

Shai Wozner

Legal Thinking in the Lithuanian Yeshivot: The Heritage and Works of Rabbi Shimon Shkop.

שקופחשיבה משפטית בישיבות ליטא: עיונים במשנתו של הרב שמעון

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Half a century ago, in 1966, I completed my own PhD thesis on what I named "The Analytic School in Rabbinic Jurisprudence" (it was not published in full until 1993). There could be no more satisfying "jubilee gift" (though not intended as such) than to receive a review copy of Shai Wozner's fine Hebrew thesis on the methodology of one of the pioneers of the school, R. Shimon Shkop.

Wozner repeatedly remarks on the Analytic Movement as in some sense a reaction to Haskala; like other reactions, it selectively adopts language and concepts from its opponents. I coined the term "Counter Haskala" for this phenomenon, by analogy with "Counter Reformation," but it has not caught on. Reaction to Haskala extends far beyond the limited sphere of the conceptual analysis of halakha; indeed, the whole trajectory of post-Enlightenment Orthodoxy can only be understood in this context.

The challenge was not merely, or even primarily, intellectual. The social and educational measures for "improvement" of the Jews initiated under Czar Nicholas I (1825-55), who amongst other things formally abolished the Kahal in 1843, were supported by Maskilim, but were perceived by much of the traditional religious leadership as a threat to their own authority. If Jews became citizens of the states in which they lived, as they had done in England, France and some German states (and of course America), they would be subject to the jurisdiction of those states, and not to Torah law as administered by the rabbis.

Aspersions cast by Maskilim on the Talmud and its laws were therefore a matter not just for defending the intellectual and moral integrity of the rabbinic tradition, but for sustaining the

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authority of the rabbis, whose survival in the traditional role of justices depended on their ability to demonstrate the moral superiority of Torah law, above all in matters of civil and criminal jurisdiction and personal status. This is at least part of the reason for the focus on *Neziqin* and *Nashim*.

Wozner has divided his book into five well-focused chapters, of which the first is devoted to a biography of Shkop, who was born in Turetz (Minsk, now Belarus) in 1859. Shkop entered Valozhyn Yeshiva at 14, and in the six years he remained there came under the influence of Hayyim Soloveitchik (1853-1918), at the same time fashioning an original method and style which he was able to develop successively at Telšiai (Telz), Maleč (Maltsh), Bryansk and finally Hrodna (Grodno), where he remained until his death in late 1939. A member of Agudas Israel, he was by no means unsympathetic to Zionism, maintained cordial relations with Rav Kook, and even made an abortive attempt to establish a yeshiva in Palestine.

What led him, like Soloveitchik, to forge a novel approach to *halakha*, in contrast to the 'official' Valozhyn method, inherited from the Vilna Gaon and staunchly upheld by the Netziv (Naftali Tzvi Yehuda Berlin, head of the Valozhyn Yeshiva)? Novelty, of course, always has it attractions, but why this particular kind of novelty, which Wozner aptly calls a 'paradigm shift' of technical discourse? Where did the ideas and the vocabulary come from? Shkop had certainly not received any formal education outside the Yeshiva – though his wife had – nor is there clear evidence as to whether he knew Russian, law, was directly acquainted with haskala works, or had read medieval Jewish philosophy, from which much of the new vocabulary appears to derive.

Do we have here an instance of "*Hamlet* without the Prince of Denmark"? Sometime between 1993, when my thesis was published, and 1998, when the first edition of my *Historical Dictionary of Judaism* appeared, I came across the halakhic writings of Rabbi Jacob Isaac Reines and wrote, perhaps overstating the case: "The technique of conceptual analysis that characterizes the Analytic Movement was introduced by Jacob Isaac Reines, who already in 1880 and 1881 had published his two-volume *Ḥotem Tokhnit*,[2] in which he set out the conceptual basis of *halakha*, aiming to demonstrate its logical integrity and its relationship with other systems of jurisprudence. For his vocabulary he drew heavily on the Jewish philosophical classics, and specifically on the Hebrew translation of Maimonides' *Treatise on*

[2] "The seal of perfection" (cf. Ezekiel 28:12).

Logic; in particular, he developed the *ḥaqira*, or conceptual distinction, which is the hallmark of the Analytic technique."[3]

Two questions arise. Was Shkop (and/or Soloveitchik) aware of Reines' innovations, and if so why is Reines never cited? There can be little doubt that the answer to the former is in the affirmative. Reines was in Valozhyn from 1855-57, and made his mark there as the 'Karliner *illui* (genius)'. Admittedly, when Reines left Valozhyn he had by no means perfected his system (though he had absorbed the philosophical vocabulary of Ibn Tibbon's translation of Maimonides' *Millot ha-Higgayon*), Soloveitchik was about 4 years old and Shkop was not yet born, so there is no question of direct influence. However, in 1880/1, at about the time Soloveitchik was officially appointed to teach at Valozhyn, Reines' published his *Ḥotem Tokhnit*, sketching the new system, and it created quite a stir[4]. Reines and his ideas must surely have been known in the circles in which Shkop and Soloveitchik moved.

So why was he not credited with his innovations, and why has he been frozen out of Yeshiva discourse to the present day? A letter from the Netziv, dated Tuesday 31st day of the Omer, 5647 (=10 May 1887), indicates that Reines had sent him a copy of his *Urim Gedolim* with an open letter inviting comment. Berlin did not approve. He addresses Reines with the usual rabbinic honorifics, but candidly admits that after spending a few hours with the book he could make no sense of it, nor had he been able to make sense of *Ḥotem Tokhnit* (presumably received some years previously). He categorically rejects the notion that the hugely difficult task of correctly interpreting rabbinic texts could be accomplished by simply clarifying basic concepts, and points out a few "errors" in Reines' work, caustically remarking that he knew Reines would be unwilling to accept criticism which would lead him to abandon his system. [5] In subsequent years Reines was further distanced by the Ḥaredi establishment both on account of his educational work (at Lida he founded his own Yeshiva, in which general subjects were taught side-by-side with traditional texts) and because of his involvement with Zionism (he founded the Mizrachi movement).[6]

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[3] This is the slightly modified version in the 3rd edition (2015) of Norman Solomon, *A Historical Dictionary of Judaism* 3rd ed. (2015) Lanham MD: Scarecrow Press, s.v. Analytic Movement.

[4] Details in Wanefsky, Joseph, *Isaac Jacob Reines: His Life and Thought*. New York: Philosophical Library 1970, 25.

[5] Naftali Tzvi Yehuda Berlin *Responsa Meshiv Davar* 5:44. See Lindell, Yosef, "A Science Like Any Other? Classical Legal Formalism in the Halakhic Jurisprudence of Rabbis Isaac Jacob Reines and Moses Avigdor Amiel," in *Journal of Law and Religion* 28/1 (2012), 179-224.

[6] Marc Shapiro, who devotes a whole chapter of his *Changing the Immutable* (Oxford: Littman Library of Jewish Civilization, 2015) to the marginalizing of Rav Kook by the Ḥaredi community, notes on p. 146 the removal by a Ḥaredi editor of a complimentary reference to Reines.

This raises a further question. If the new method of "conceptual analysis" was not approved at Valozhyn, how did Soloveitchik and Shkop get away with it? First and foremost, neither made extravagant claims, as Reines had done, to 'explain' the system of halakha and aggada as a whole. Both of them defensively claimed not to be making *ḥiddushim* (innovations), but merely making plain the opinions of the Rishonim (early authorities); Soloveitchik (though not Shkop) eschewed overtly philosophical vocabulary; both avoided reference to 'external' sources, that is, to sources other than those traditionally acceptable in Yeshiva circles. In short, they established themselves as 'insiders' in a way Reines did not.

In his second chapter Wozner describes the new style of learning (שיטת הלימוד החדשה), setting it against the background of the Vilna Gaon's method. The Gaon, as understood at Valozhyn, had rejected "scholastic" pilpul and also the Polish *ḥilluqim* in favour of אסוקי שמעתא אליבא דהלכתא *asuqé shemata aliba d'hilkhata* ("reading the topic in such as a way as to reach the [correct] halakhic decision"). Set in this context, the new method of conceptual analysis was indeed a revolution, in which Soloveitchik and Shkop were pioneers. What is less clear is how they differed from each other. Wozner claims that Shkop, particularly when established at Telšiai, focused more on *legal* concepts, particularly in the tractates of the Orders *Nashim* and *Nezikin*, and adopted a method of analysis different from Soloveitchik's. A review of the contents of Shkop's *Shaarei Yosher* scarcely bears out the former claim – the first section, for instance, is devoted to issues of ספק *safeq* (doubt(, which range over almost every area of halakha – while Soloveitchik's seminal חידושי רבנו חיים הלוי על הרמב"ם gives full reign to topics in *Nashim* and *Nezikin*. The claim that the two rabbis' methods of analysis differed significantly would be more convincing if backed by examples; there are evident differences of terminology, but it is not clear that these amount to different 'methods' of analysis.

After some comments on legal and analytic reasoning, Wozner homes in on issues raised by legal formalism, that is, by treating law as a self-consistent, coherent system, from which deductions can be made without recourse to extraneous values. Positive law was very much in favour, for instance, among the German Pandectists of the early nineteenth century. But similar tendencies can be detected in earlier Jewish sources, not least the Talmud itself, as well as among more recent authorities such as Aryeh Leib Gunzberg (שאגת אריה), Akiva Eger and Aryeh Leib Heller (קצות החשן) whose works were eagerly studied in the Lithuanian Yeshivot. After all, if "the law of the Lord is perfect" (Psalm 19:8) it should not be necessary to look elsewhere for guidance.

Towards the end of the chapter Wozner observes that Lithuanian Rashei Yeshiva were theoreticians, not practical halakhists; their focus was on the theoretical basis of halakha, on an ideal world rather than the actual one, so they did not address the life of society, which is what halakha is traditionally seen to be about. This may be true of their writings, which are essentially *shiurim* they delivered to their students, but it understates their personal achievements; both Soloveitchik and Shkop, even if they preferred to delegate fine halakhic decisions to others, were effective and respected leaders who certainly addressed the needs of their communities, and of Jewish society in general as they understood it. Wozner's parallel between the pursuit of Torah study for its own sake and current theories of "narrative law," such as Robert Cover's, which read law systems as narratives of world views, is valuable; but reading Torah in this way is not unique to the Analytic School.

The third chapter, headed חשיבה אונטולוגית ונטורליסטיקה משפטית ("Ontological reasoning and legal naturalism"), addresses Shkop's ideas on the relationship between Torah law and human reason. What is the connection, for instance, between Torah law and ownership? Does the Torah *create* ownership, or does it merely recognize it as prior fact? Shkop inclines to the view that ownership – the connection between a person and a physical object – is some sort of objective fact of nature, recognized by human reason and the "laws of the nations". It is not the only "fact of nature" so recognized; qualities such as טומאה *tuma* (ritual impurity) and קדושה *qedusha* (holiness) likewise have ontological status, independently of the application of Torah law.

The objective status of ownership, personal status and qualities such as holiness and purity places limitations on the operation of Torah law itself. Sometimes this is trivial; for instance, you cannot reuse a paid-up IOU for a subsequent identical transaction, since it has lost its connection with the 'objective' debt it once represented. But sometimes there are serious ethical consequences. In difficult cases of conversion, divorce or bastardy "naturalism" inhibits otherwise appropriate ethical action on behalf of the victims; the objective fact ("ontology") recognized (not created) by the Torah is that X is a gentile or that Y is married or that Z is a bastard, and no process of Torah law can change that.

Wozner wonders whether the ontological statements of the halakhists should be taken at face value, or whether we should understand them as metaphors. He is convinced that at least some of the texts *are* intended literally. But even if not, the use of that kind of language of itself determines a way of thought which produces results of the kind described - "matter

rises over the one who shapes it, language rises over thought" (citing Kendall M. Walton, *Mimesis as Make Believe*).

This leads into Chapter 4, on the concept of איסור *issur* ("prohibition"). Is the fact that, e.g. non-kasher food is prohibited, an ontological status rather than a behavioural norm? Shkop maintains that things forbidden are actually harmful, a point of view already adopted by several medieval rabbis; like them, he maintains that the purpose of the prohibitions is to protect you from harm, whether physical or spiritual. The prohibition, that is, stems from the intrinsic nature of the act/substance. God forbade things because they are bad; they are not bad simply because God forbade them (cf. Plato *Euthyphro*). However, things forbidden by the rabbis are not intrinsically bad, or else the Torah would have forbidden them; you are obliged to refrain from them simply because that is what rabbinic law demands.

This leads to strange consequences in torts. Supposing A handles some food belonging to B in such a way as to render it ritually impure, causing a loss of market value (fewer people may now eat it) but without causing any physical defect (ניכרהיזק שאינו *heizek sheeino nikar* – invisible damage). The Talmud (bGittin 52b/53) records a debate as to whether A must compensate B; eventually, the rabbis ruled that A must indeed compensate B, but they acknowledged that strict Torah law did not require this. But surely if impurity is a "fact of nature" rather than merely a product of law, causing impurity should be regarded as objective damage, requiring compensation in principle rather than merely by rabbinic edict?

In response, Shkop asks whether, in general, the obligation to pay compensation for damaging someone's goods arises from (a) the physical damage caused, and the consequent obligation to restore the object or (b) the pecuniary loss arising from the decrease in value of the goods. If (a) is the operative principle, non-physical damage would not require compensation, but if (b) is the operative principle it would. This, says Shkop, was the original debate, but the final decision was made in accordance with (a).

We then arrive at a further distinction, common to the Analysts, between איסור *issur* and חלות איסור *ḥallot issur*; (in English we might say between the prohibition itself and its application in a specific situation). As understood by Shkop, *issur* is normative – a command that demands obedience from the one addressed; *ḥallot issur* is a property, such as holiness or impurity, inhering in an object (human or material). "Realism" means this property cannot be reduced to a command.

This difference generates normative complexities. For instance, a minor is not subject to commands. However, the fact that he is not forbidden e.g. to eat non-kasher meat doesn't mean the meat is kasher. It still has the property of non-kasherness, and can harm him, which is why it should not be fed to him. Likewise, you should eat non-kasher meat if necessary to save your life; this does remove its property of non-kasherness, but the danger from that is minor relative to the value of life.

The idea of *ḥallot issur* – that is, of a prohibition alighting , or being placed, on an object - though not the term, is present in the Talmud, which distinguishes between two kinds of oath (b*Nedarim* 2a). A person who, e.g., who vows not to drink wine might formulate his oath or vow in either of two forms. He may say "I swear not to drink wine," or he may say "wine is forbidden to me"; the former, technically *shavu'a* (oath), is classed as איסור גברא *issur gavra* (prohibition on the person), the latter, *neder* (vow), as איסור חפצא *issur ḥeftza* (prohibition on the object). Whether there is any connection here with the Roman law distinction between *actio in personam* and *actio in rem* is open to question. Shkop, at any rate, analyses this distinction in terms of סבת האיסור *sibbat ha-issur* ("cause of the prohibition"); in the case of *neder* there a proper *ḥallot issur* is placed on the object – a sort of 'poison', but this is not the case with *shavu'a*. The 'bottom line' is that we have three different concepts: *ḥallot issur* in the object, *ḥallot issur* on the person, behavioural norm.

The final Chapter, 5, is devoted to the distinction between commercial law (דיני ממונות) and Torah law in general. It is best introduced by a quotation from Shkop himself:

בעשה ול"ת ... ובדיני ממונות אינו כן, דקודם שחל עלינו מצות ה' לשלם בכל המצוות הוא מה שהזהירה לנו תורה או להשיב, צריך שיוקדם עלינו חיוב משפטי

"The *mitzvot* in general are what the Torah commands either positively or negatively … but the laws of property (*mamon*) are not like that, for before the divine command to pay or restore can apply to us, there must be [in existence] (on us) a legal obligation." (*Shaare Yosher* 5:1)

What does Shkop mean by *ḥiyyuv mishpati*, a 'legal obligation' prior to, and independent of, Torah legislation? Is he saying that *halakha* in general derives from divine command, while property *halakha* is instituted by men (Sages) on the basis of human reason? Is he saying, as argued by Avi Sagi[7], that property *halakha* is some kind of "Natural Law"? Wozner thinks

[7] Sagi, Avi, המשפטיתהמצווה הדתית והמערכת , in 35 *DAAT* (1994), 114-99. Sagi presents a broader picture in his "Natural Law and Halakha—A Critical Analysis" tr. Batya Stein, in 13 Jewish Law Annual (2000), 149-196.

this is inexact; Shkop is thinking of property *halakha* as instituted by humans, not as stemming from natural law. But human institution is not divine command, so it would seem that although halakhic decision is in the main based on 'divine' sources, other sources may occasionally supplement this.

It would hardly be earth-shaking if Shkop was claiming that property law was a rational system knowable independently of divine revelation – many medieval Jewish thinkers, not least Maimonides, held that most of the Torah's laws might be known through the correct application of human reason. But Wozner thinks this is not the point Shkop is making. Rather, Shkop is making a distinction between definition and obligation; the part played by human reason is simply definition, and definition (*pace* Shkop) does not of itself create obligation; a minor, for example, can owe money – this arises from the definition of property – but he is not subject to an obligation to pay. (Jurists might dispute this; they could argue that a minor is under an obligation to pay, but it is not enforceable.) Be that as it may, the remainder of Chapter 5 is devoted to a skilful analysis of the novel way Shkop utilizes his distinction between definition and obligation to deal with long-standing rabbinic problems such as why, given that theft is undoubtedly a Torah prohibition, it is not subject to the general rule that in doubtful cases one should follow the more stringent ruling.

Wozner's book is the first full-length academic study to be devoted to R. Shimon Shkop. It is clearly and skilfully written, well-focused, and makes a valuable contribution to a difficult area of research which demands not only a mastery of traditional yeshiva-style learning but also the ability to set the material in appropriate historical, social and juristic contexts. The main text is complemented with a comprehensive bibliography of Shkop's works, both published and unpublished, including *shiurim* written up by disciples, as well as rabbinic and general bibliographies and indexes of names and subjects.

Earlier discussion on the position of halakhists in relation to theories of natural and positive law may be found in 6 and 7 Jewish Law Annual (1987 and 1988).