Halakhic Process 3 Basis for Rabbinic Authority

Core Premise: Divinity of the Torah / Torah Representative of Divine Will

Focus: What is the basis for Rabbinic authority?

Challenges: Sources of authority, validation of individuals, disputes/disagreements

I. Natural Law vs. Positive Law

1. Hans Kelsen (October 11, 1881 – April 19, 1973) – General Theory of Law and State

Pages 8-9

The will of God is – in the natural law doctrine – identical with nature in so far as nature is conceived of as created by God, and the laws of nature as expressing God's will. Consequently, the laws determining nature have, according to according to this doctrine, the same character as the legal rules issued by a legislator: they are commands directed to nature; and nature obeys these commands, the laws of nature, just as man obeys the laws issued by a legislator. Natural Law, according to its specific doctrine, is not created by the act of human will; it is not the artificial, arbitrary product of man. It can be and has to be deduced from nature by a mental operation. By carefully examining nature, especially the nature of man and his relations to other men, one can find the rules which regulate human behavior in a way corresponding to nature and hence perfectly just. The rights and duties of man, established by this natural law, are considered to be innate or inborn in man, because implanted by nature and not imposed or conferred upon him by a human legislator: and in so far as nature manifests God's will, these rights and duties are sacred.

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Law is always positive law, and its positivity lies in the fact that it is created and annulled by acts of human beings, thus being independent of morality and similar norm systems. This constitutes the difference between positive law and natural law, which, like morality, is deduced from a presumably self-evident basic norm which is considered to be the expression of the "will of nature" or of "pure reason."

II. Biblical Origins of Rabbinic/Judicial Authority

A. The First Judges

2. Ex. 18:13-27

13 The next day Moses took his seat to serve as judge for the people, and they stood around him from morning till evening. 14 When his father-in-law saw all that Moses was doing for the people, he said, "What is this you are doing for the people? Why do you alone sit as judge, while all these people stand around you from morning till evening?" 15 Moses answered him, "Because the people come to me to seek God's will. 16 Whenever they have a dispute, it is brought to me, and I decide between the parties and inform them of God's decrees and instructions."

17 Moses' father-in-law replied, "What you are doing is not good. 18 You and these people who come to you will only wear yourselves out. The work is too heavy for you; you cannot handle it alone. 19 Listen now to me and I will give you some advice, and may God be with you. You must be the people's representative before God and bring their disputes to him. 20 Teach them his

שמות יח, יג-כז

(יג) ויָהִי מַמַּחַרָת וַיָּשָׁב מֹשָׁה לֹשׁפַּט אַת הַעָם : וַיַּעֲמִד הַעַם עַל משָׁה מָן הַבּּקֵר עַד הַעַרָב (יד) וַיַּראַ חֹתַן מֹשָׁה אַת כַּל אֲשָׁר הוּא עשה לַעָם וַיֹּאמֶר מָה הַדָּבָר הַזֵּה אֲשֶׁר אַתָּה עשׁה לַעָם מַדוּעַ אַתַּה יושב לבַדֶּדְ וְכַל הַעַם נְצֵב עַלֵיך מִן בַּקָר עַד עַרָב: (טו) וַיאמֵר משָה לחתנו כַּי יַבֹא אַלַי הַעָם לדרשׁ אַלהִים: (טז) כִּי יָהָיֶה לַהֶּם דַּבַר בַּא אֵלֵי וְשַׁפַּטִתִּי בֵּין אִישׁ וּבֵין רֵעָהוּ וְהוֹדַעִתִּי אֵת חַקֵּי הָאֱלֹהִים וְאֵת תּוֹרֹתַיו: (יז) וַיֹּאמֶר חֹתֵן מֹשֶׁה אֱלַיו לֹא טוֹב הַדַּבַר אֲשֶׁר אֲתָה עשָה: (יח) נַבל תִּבּל גַּם אַתָּה גַּם הַעָם הַזָּה אֲשֶׁר עִמַּךְ כִּי כַבָּד מִמְּךְ הדבר לא תוכל עשהו לבדד: (יט) עתה שמע בקלי איעצד ויהי אלהים עמד היה אתה לעם מול האלהים והבאת אתה את הדברים אַל הָאַלֹהִים: (כ) וְהְזָהַרְתָּה אֵתְהֵם אֵת הַחַקִּים וְאֵת הַתּוֹרת וְהוֹדֵעְתַּ לַהֶּם אֵת הַדֵּרְדְּ

decrees and instructions, and show them the way they are to live and how they are to behave. 21 But select capable men from all the people—men who fear God, trustworthy men who hate dishonest gain —and appoint them as officials over thousands, hundreds, fifties and tens. 22 Have them serve as judges for the people at all times, but have them bring every difficult case to you; the simple cases they can decide themselves. That will make your load lighter, because they will share it with you. 23 If you do this and God so commands, you will be able to stand the strain, and all these people will go home satisfied." 24 Moses listened to his father-in-law and did everything he said. 25 He chose capable men from all Israel and made them leaders of the people, officials over thousands, hundreds, fifties and tens. 26 They served as judges for the people at all times. The difficult cases they brought to Moses, but the simple ones they decided themselves. 27 Then Moses sent his father-in-law on his way, and Jethro returned to his own country.

ָיַלְכוּ בָהּ וָאֶת הַפַּעֵשֶׂה אֲשֶׁר יַעֲשׂוּן: (כא) וָאַתַּה תַחֵזָה מִכַּל הַעַם אַנִשִּׁי חַיָּל יִרְאֵי אַלהִים אַנִשִׁי אָמֶת שֹנְאֵי בָצַע וְשַׂמִתּ עַלְהֶם שַׂרֵי אַלַפִּים שַׂרֵי מֵאוֹת שַׂרֵי חַמִּשִּׁים וְשַׁרֵי עשרת: (כב) ושַפטו אַת הַעַם בַּכָל עַת וְהָיָה בַּל הַדַּבָר הַגַּדל יָבִיאוּ אֵלֶידְ וְכָל הַדָּבָר הַקָּטוְ יִשִׁפְּטוּ הֶם וְהָקֵל מֵעֶלֵיךְ וְנָשִּאוּ אִתָּךְ: (כג) אָם אָת הַדַּבַר הַזֶּה תַּעֲשֶׂה וְצִוְדְּ אֱלֹהִים וְיַכַלְתַּ עֲמֹד וְגַם כַּל הָעָם הַזֵּה עַל מִקֹמוֹ יָבֹא בַשַּלוֹם: (כד) וַיִּשְׁמַע משה לָקוֹל חֹתָנוֹ וַיַּעֲשׁ פֿל אַשֶּׁר אַמֶּר: (כה) וַיִּבְחַר מֹשֶׁה אַנְשֵׁי חַיִל מַכָּל יִשְׁרָאֵל וַיִּתֵן אתַם רַאשִים עַל הַעַם שַׁרֵי אַלָפִים שָׁרֵי מֵאוֹת שָּׁרֵי חַמִּשִּׁים וְשָׁרֵי עֵשֶּׁרת: (כו) וְשַׁפָּטוּ אֶת הַעַם בְּכַל עֵת אֶת הַדַּבַר הַקַּשָׁה יִבִיאוּן אֵל משָׁה וְכָל הַדַּבָּר הַקַּטֹן יִשִּׁפַּוּטוּ הַם: (כז) וַיִשַּׁלַּח מֹשֶׁה אֶת חֹתִנוֹ וַיֵּלֶדְ לוֹ אֱל אַרְצוֹ

3. Deut. 1:8-18

9 At that time I said to you, "You are too heavy a burden for me to carry alone. 10 The Lord your God has increased your numbers so that today you are as numerous as the stars in the sky. 11 May the Lord, the God of your ancestors, increase you a thousand times and bless you as he has promised! 12 But how can I bear your problems and your burdens and your disputes all by myself? 13 Choose some wise, understanding and respected men from each of your tribes, and I will set them over you." 14 You answered me, "What you propose to do is good."

15 So I took the leading men of your tribes, wise and respected men, and appointed them to have authority over you—as commanders of thousands, of hundreds, of fifties and of tens and as tribal officials. 16 And I charged your judges at that time, "Hear the disputes between your people and judge fairly, whether the case is between two Israelites or between an Israelite and a foreigner residing among you. 17 Do not show partiality in judging; hear both small and great alike. Do not be afraid of anyone, for judgment belongs to God. Bring me any case too hard for you, and I will hear it." 18 And at that time I told you everything you were to do.

דברים א, ט-יח

(ט) ואמר אלכם בעת ההוא לאמר לא אוכל לַבַדִי שָּׁאַת אַתְכֶם: (י) יִקוַק אַלהֵיכֶם הַרְבַּה אַתְכֶם וְהָנָכֶם הַיּוֹם כָּכוֹכְבֵי הַשַּׁמַיִם לַרֹב: (יא) יקוק אלהי אבותכם יסף עליכם ככם אַלַף פַּעַמִים וִיבַרַדְּ אַתְּכֶם כַּאֲשֶׁר דְּבֵּר לַכֶם: (יב) אֵיכָה אֵשָּׁא לְבַדִּי טַרְחֵכֶם וּמַשַּׂאַכֶם וריבכם: (יג) הבוּ לכם אַנשׁים חַכְמִים וּנָבֹנִים וִידָעִים לַשָּׁבְטֵיכֶם וַאֲשִּׁימֵם בראשיכם: (יד) ותענו אתי ותאמרו טוב הדבר אשר דברת לעשות: (טו) ואקח את ראשי שבטיכם אַנשים חַכַמִים וידעים ואַתּן אותם רַאשִׁים עַלֶיכֶם שַׁרֵי אֲלַפִּים וְשַׂרֵי מאות ושרי חמשים ושרי עשרת ושטרים לַשְּבַטֵיכֶם: (טז) וַאֲצוָה אַת שׁפַטֵיכֶם בַּעַת הַהָּוֹא לֵאמֹר שַׁמֹעַ בִּין אַחֵיכֶם וּשְׁבַּטְתֵּם צֵדֶק בין איש ובין אַחַיו וּבין גַרוֹ : (יז) לא תַכּירוּ פַנִים בַּמִשָּׁפַט כַּקָטן כַּגַּדֹל תִּשָּׁמַעוּן לא תַגוּרוּ מַפָּנֵי אַישׁ כִּי הַמִּשָּׁפַּט לֵאלהַים הוּא וְהַדַּבַר אשר יקשה מכם תקרבון אלי ושמעתיו: (יח) וַאֲצַוָּה אֶתְכֶם בַּעֵת הַהָּוֹא אֶת כַּל : הַדְבַרִים אֲשֶׁר תַּעֲשׂוּן

B. Permanent Established Judicial System

4. Deut. 16:18-20

18 Appoint judges and officials for each of your tribes in every town the Lord your God is giving you, and they shall judge the people fairly. 19 Do not pervert justice or show partiality. Do not accept a bribe, for a bribe blinds the eyes of the wise and twists the words of the innocent. 20 Follow justice and justice alone, so that you may live and possess the land the Lord your God is giving you.

5. Deut. 17:8-13

8 People will bring their cases to your courts. But some cases will be too hard for you to judge. They might be about murders, attacks or other crimes. Then take those hard cases to the place the Lord your God will choose. 9 Go to a priest, who is a Levite. And go to

דברים טז, יח-כ

(יח) שׁפְטִים וְשֹׁטְרִים תִּתֶּן לְךְּ בְּכָל שְׁעָרֵיךְ אֲשֶׁר יְקֹנָק אֱלֹהֶידְּ נֹתֵן לְךְּ לִשְׁבָטֶיךְּ וְשָׁפְטוּ אֶת הָעָם מִשְׁפַּט צֶדֶק: (יט) לא תַּטֶּה מִשְׁפָּט לא תַכִּיר פָּנִים וְלֹא תִקַּח שֹׁחַד כִּי הַשִּׁחַד יְעַנֵּר עִינֵי חֲכָמִים וִיסַלֵּף דְּבְרִי צַדִּיקִם: (כ) צֶדֶק צֶדֶק תִּרְדֹּף לְמַעַן תִּחְיֶה וְיָרָשְׁתָּ אֶת הָאָרֶץ אַשֶּׁר יִקֹנָק אֵלהֵיךְ נֹתֵן לָדְ:

2. דברים יז

(ח) כִּי יִפָּלֵא מִמְּךְּ דָבָר לַמִּשְׁפָּט בֵּין דָּם לְדָם בֵּין דִּין לְדִין וּבֵין נֶגַע לָנֶגַע דְּבָרֵי רִיבֹת בִּשְׁעָרֶיךְ וְקַמְתָּ וְעָלִיתָ אֶל הַמָּקוֹם אֲשֶׁר יִבְחַר יִקֹוַק אֱלֹהֵיךְ בּוֹ : the judge who is in office at that time. Ask them for their decision. They will give it to you. 10 They'll hand down their decisions at the place the Lord will choose. You must do what they decide. Be careful to do everything they direct you to do. 11 Act in keeping with the laws they teach you. Accept the decisions they give you. Don't turn away from what they tell you. Don't turn to the right or the left. 12 Someone might willfully ignore the judge. Or he might make act presumptuously regarding the priest who serves the Lord your God at the place he will choose. If the man does that, he must be put to death. Remove that evil person from Israel. 13 All of the people of Israel will hear about it. And they will be afraid to act presumptuously [regarding of a judge or priest] again.

ַט) וּבָאתָ אֶל הַכּּהֲנִים הַלְוִיִם וְאֶל הַשֹּׁפֵּט אֲשֶׁר יִהְיֶּה בַּיָּמִים הָהֵם וְדָרַשְׁתָּ וְהִגִּידוּ לְךְּ אֵת דְּבַר הַמִּשְׁפָּט: אֵת דְּבַר הַמִּשְׁפָּט: הַמֶּקוֹם הַהּוּא אֲשֶׁר יִבְּחֵר יְלְּוָק וְשָׁמַרְתָּ לֵצְשׁוֹת כְּכֹל אֲשֶׁר יוֹרוּךְ: (יא) עַל פִּי הַתּוֹרָה אֲשֶׁר יוֹרוּךְ וְעַל הַמִּשְׁפָּט אֲשֶׁר יִגִּידוּ לְךְּ תַּצְשֶׂה לֹא תָסוּר מִן הַדָּבָר אֲשֶׁר יַגִּידוּ לְךְּ תַּעֲשֶׂה בְּזָדוֹן לְבַלְתִּי שְׁמֹע (יב) וְהָאִישׁ אֲשֶׁר יַצְשֶׂה בְּזָדוֹן לְבַלְתִּי שְׁמֹע אָל הַכּּהֵהָן הָעִמֵּד לְשָׁרֶת שָׁם אֶת יְלְוָק אֱלֹהֶיךְ

מִישְׂרָאֵל: (יג) וַכָּל הַעַם יִשְׁמִעוּ וִיַרָאוּ וַלֹא יִזִּידוּן עוד:

III. Divine Law in Human Hands

A. Retrieval from Sinai

6. M. Avot 1:1

Moses received the Torah from Sinai and transmitted it to Joshua; Joshua to the elders; the elders to the prophets; and the prophets handed it down to the men of the Great Assembly. They said three things: Be deliberate in judgment, raise up many disciples, and make a fence around the Torah.

7. B. Eiruvin 54b

Our Rabbis learned: What was the procedure of the instruction in the oral law? Moses learned from the mouth of the Omnipotent. Then Aaron entered and Moses taught him his lesson. Aaron then moved aside and sat down on Moses' left. Thereupon Aaron's sons entered and Moses taught them their lesson. His sons then moved aside, Eleazar taking his seat on Moses' right and Ithamar on Aaron's left. R. Judah stated: Aaron was always on Moses right. Thereupon the elders entered and Moses taught them their lesson, and when the elders moved aside all the people entered and Moses taught them their lesson. It thus followed that Aaron heard the lesson four times, his sons heard it three times, the elders twice and all the people once. At this stage Moses departed and Aaron taught them his lesson. Then Aaron departed and his sons taught them their lesson. His sons then departed and the elders taught them their lesson. It thus followed that everybody heard the lesson four times. From here R. Eliezer inferred: It is a man's duty to teach his pupil [his lesson] four times. For this is arrived at a minori ad majus: Aaron who learned from Moses who had it from the Omnipotent had to learn his lesson four times how much more so an ordinary pupil who learns from an ordinary teacher.

6. משנה אבות א משנה א

משה קבל תורה מסיני ומסרה ליהושע ויהושע לזקנים וזקנים לנביאים ונביאים מסרוה לאנשי כנסת הגדולה הם אמרו שלשה דברים הוו מתונים בדין והעמידו תלמידים הרבה ועשו סייג לתורה:

7. תלמוד בבלי עירובין נד:ב

תנו רבנן, כיצד סדר משנה! משה למד מפי <u>הגבורה,</u> נכנס אהרן ושנה לו משה פירקו. נסתלק אהרן וישב לשמאל משה. נכנסו בניו ושנה להן משה פירקן, נסתלקו בניו, אלעזר ישב לימין משה ואיתמר לשמאל אהרן. רבי יהודה אומר: לעולם אהרן לימין משה חוזר. נכנסו זקנים ושנה להן משה פירקן, נסתלקו זקנים, נכנסו כל העם ושנה להן משה פירקן. נמצאו ביד אהרן ארבעה, ביד בניו שלשה, וביד הזקנים שנים, וביד כל העם אחד. נסתלק משה, ושנה להן אהרן פירקו. נסתלק אהרן שנו להן בניו פירקן. נסתלקו בניו, שנו להן זקנים פירקן. נמצא ביד הכל ארבעה. מכאן אמר רבי אליעזר: חייב אדם לשנות לתלמידו ארבעה פעמים. וקל וחומר, ומה אהרן שלמד מפי משה, ומשה מפי הגבורה - כך, הדיוט מפי הדיוט -על אחת כמה וכמה.

B. Divine Sanction

8. B. Bava Metzia 59b

On that day R. Eliezer brought forward every imaginable argument, but they did not accept them. Said he to them: 'If the halachah agrees with me, let this carob-tree prove it!' Thereupon the carob-tree was torn a hundred cubits out of its place — others affirm, four hundred cubits. 'No proof can be brought from a carob-tree,' they retorted. Again he said to them: 'If the halachah agrees with me, let the stream of water prove it! Whereupon the stream of water flowed backwards — 'No proof can be brought from a stream of water,' they rejoined. Again he urged: 'If the halachah agrees with me, let the walls of the schoolhouse prove it,' whereupon the walls inclined to fall. But R. Joshua rebuked them, saying: 'When scholars are engaged in a halachic dispute, what have ye to interfere?' Hence they did not fall, in honour of R. Joshua, nor did they resume the upright, in honour of R. Eliezer; and they are still standing thus inclined. Again he said to them: 'If the halachah agrees with me, let it be proved from Heaven!' Whereupon a Heavenly Voice cried out: 'Why do ye dispute with R. Eliezer, seeing that in all matters the halachah agrees with him!' But R. Joshua arose and exclaimed: 'It is not in heaven.' What did he mean by this? — Said R. Jeremiah: That the Torah had already been given at Mount Sinai; we pay no attention to a Heavenly Voice, because Thou hast long since written in the Torah at Mount Sinai, After the majority must one incline. R. Nathan met Elijah and asked him: What did the Holy One, Blessed be He, do in that hour? — He laughed [with joy], he replied, saying, 'My sons have defeated Me, My sons have defeated Me.'

8. תלמוד בבלי בבא מציעא נט:ב

תנא: באותו היום השיב רבי אליעזר כל תשובות שבעולם ולא קיבלו הימנו. אמר להם: אם הלכה כמותי - חרוב זה יוכיח. : נעקר חרוב ממקומו מאה אמה, ואמרי לה ארבע מאות אמה: אמרו לו: אין מביאין ראיה מן החרוב. חזר ואמר להם: אם הלכה כמותי - אמת המים יוכיחו. חזרו אמת המים לאחוריהם. אמרו לו: אין מביאיו ראיה מאמת המים. חזר ואמר להם: אם הלכה כמותי - כותלי בית המדרש יוכיחו. הטו כותלי בית המדרש ליפול. גער בהם רבי יהושע, אמר להם: אם תלמידי חכמים מנצחים זה את זה בהלכה -אתם מה טיבכם! לא נפלו מפני כבודו של רבי יהושע. ולא זהפו מפני כבודו של רבי אליעזר, ועדין מטין ועומדין. חזר ואמר להם: אם הלכה כמותי - מן השמים יוכיחו. יצאתה בת קול ואמרה: מה לכם אצל רבי אליעזר שהלכה כמותו בכל מקום! עמד רבי יהושע על רגליו ואמר : לא בשמים היא. -מאי +דברים לי+ לא בשמים היא! - אמר רבי ירמיה: שכבר נתנה תורה מהר סיני, אין אנו משגיחין בבת קול, שכבר כתבת בהר סיני בתורה +שמות כייג+ אחרי רבים להטת. - אשכחיה רבי נתן לאליהו, אמר ליה: מאי עביד קודשא בריך הוא בההיא שעתא? - אמר ליה: קא חייך ואמר נצחוני בני, נצחוני בני.

C. Divine Intervention

9. Ramban Deut. 17:11 s.v. Yamin Usemol

(Gerona, Spain 1194 – Israel, 1270)

Even if it appears to you that [the sages] confuse the right with the left, and certainly if it appears to you that what they call "right" is in fact "right," for the spirit of God rests on his holy servants and they will be forever protected from mistakes and stumbling

9. רמב"ן דברים יז:יא

אפילו יהיה בעיניך כמחליף הימין בשמאל, וכל שכן שיש לך לחשוב שהם אומרים על ימין שהוא ימין, <u>כי רוח השם על משרתי</u> <u>מקדשו ולא יעזוב את חסידיו,</u> לעולם נשמרו מן הטעות ומן המכשול.

10. Tertullian De Pudicita, 21

(Bettenson Early Christian Fathers p. 113)

Carthage (c. 160 – c. 220 AD)

For the Church is properly and primarily the Spirit, in whom is the trinity of the one divinity, the Father, the Son, and the Holy Spirit. The Spirit makes the assembly of the Church, which the Lord established in three persons. And thus, the whole number of those who have leagued together in this faith is given the status of the Church by the Church's author and consecrator... For the right of judgment belongs to the Lord, not to the servant; to God himself, not to the priest.