

# Customary Law and Authoritarian Law<sup>1</sup>

## *Some Considerations of Semantic Differences and Legal Concepts in the Hebrew Bible*

Among the many lexemes used to designate “law” in the HB two roots stand out in particular: שפט and חקק – because of their widespread use in phrases like חקקתי ומשפטי<sup>2</sup> or חקקתי ומשפטי<sup>2</sup>. These combinations have also gained some notoriety among Biblical scholars, as we still wonder, if these two nouns express different concepts or not.

Various answers to this question have been offered. The mainstream view nowadays, however, tends to dismiss semantic differences for the most parts of the HB.<sup>3</sup> The combination would, thus, need to be understood as largely synonymous and, effectively, a hendiadys.

Still, I do not find it plausible to abandon the pursuit to differentiate between שפט and חקק – especially as we need to explain construct forms like those in Num 27:11, or 35:29 (see handout). Drawing on insights from the anthropology of law, I would like to suggest that משפט designates customary law, while חקק/חקה refers to newly introduced authoritarian laws.

## 1 Some Impulses from the Anthropology of Law

For this paper, I am using insights from Leopold Pospíšil’s *Anthropology of Law*. Its basic premise is that law in the strict sense is only represented in the actual legal decisions by a social authority (the *ius*). In contrast, the *leges*, i. e. the written or oral regulations, can and will differ from what is actually decided – and are, hence, of lesser importance to him. In HB-/ANE-scholarship this point of view is, of course, not completely maintainable, as we base our works mainly on texts, i. e. regulations. Still, Pospíšil’s hermeneutics provide an important change of perspective: Provisions in ancient law collections are only the written sediments of legal practice in the background – an issue that might fall from view sometimes.

Secondly, Pospíšil operates with the distinction of three “fields”: the “field of political decisions”, the “field of customs”, and in between these other two the “field of law”<sup>4</sup> (see the

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<sup>1</sup> This paper is the slightly reworked English version of a German journal article shortly to be published: Matthias Hopf, “משפט and חקק/חקה revisited: Neue rechtsanthropologische Impulse für ein altes Unterscheidungsproblem.” *ZAW* 132 (2020), in print. DOI: 10.1515/zaw-2020-4007.

<sup>2</sup> It needs to be mentioned, however, that in this particular wording the phrase does not occur in Priestly literature, as it is mostly use with the accusative particle or in other syntactic variations.

<sup>3</sup> See esp. Norbert Lohfink, *Das Hauptgebot: Eine Untersuchung literarischer Einleitungsfragen zu Dtn 5–11*, AnBib 20 (Rom: Pontificio Istituto Biblico, 1963), 54, and Georg Braulik, “Die Ausdrücke für „Gesetz“ im Buch Deuteronomium,” *Bib* 51 (1970): 39–66, even though the former elsewhere declares משפט as some sort of specification of חק within the two-part phrase, cf. Norbert Lohfink, “Die *ḥuqqîm ûmišpāṭîm* im Buch Deuteronomium und ihre Neubegrenzung durch Dtn 12,1,” *Bib* 70 (1989): 1–30, here 5f. Klaus Grünwaldt, *Das Heiligkeitsgesetz Leviticus 17–26: Ursprüngliche Gestalt, Tradition und Theologie*, BZAW 271 (Berlin, New York: de Gruyter, 1999), 213, concurs with this interpretation. Cf. also Helmer Ringgren, “חקק,” *TDOT* 5:139–47, here 143, and Gerhard Liedke, “חקק *ḥqq* einritzen, festsetzen,” *THAT* 1:626–633, who explicitly speaks of synonymy.

figure on the handout). Only the “field of law” meets all four criteria of law: the attributes of authority, sanction, “intention of universal application”, and “*obligatio*” (i. e. the legal bond between conflicting parties). In the ethical “field of customs” on the one side, the attributes of authority, and – with more distance to the “field of law” – also of sanction are missing. In other words: If something contradicting the prevailing ethos is done, there is no authority to decide on sanctions, or there might be no sanctions at all. On the other side, the “field of political decisions” lacks the “intention of universal application”, as a decision is made only for a specific case and circumstance. However, a political decision, which originally was meant as one-time-only, might be applied repeatedly in a similar manner. Consequentially, it might be accepted, and become *ius*. Here, it is important to remind ourselves that in pre-modern societies such as in HB times, we have no differentiation between legal and political authorities. Accordingly, if a king, an elder or any other kind of authority makes a decision, it is hard for the contemporary onlooker to tell if it is “legal”, or “political”. In any case: From all this we can see the conceptual proximities between all three “fields”, and how fluid their borders are.

As a result, there are two ways for laws to originate: either by moving from the “field of customs” to the “field of law” – customary law –, or by entering from the “field of political decisions” – in which case we are confronted with authoritarian law. Pospíšil stresses that contrary to traditional views also “authoritarian laws are universal phenomena” and the “distinction between the two types [are] ... actually quantitative rather than qualitative”.<sup>5</sup>

The main consequences from this concept for dealing with Biblical laws are the following: First, we need to pay closer attention to the fluidity not only between ethos and law, but also between law and the political sphere. Second, we must take into account the distinct possibility that “authoritarian laws” also exist in the HB. And third, we need to reckon with the fact that it is rather hard to judge if a legal decision originally stems from the ethical or the political sphere. Both types will probably look very much the same, which is even more accurate for the codified provisions, i. e. the laws.

With these hermeneutical foundations below, I would now like to address the two forms of law. I will do this for both משפט and חק/הק based on etymological and semantical considerations, as well as with reference to exemplary textual passages from the HB.

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<sup>4</sup> There are traces of a fourth field, the field of religion”, in Pospíšil’s work, but he does not address it specifically. Still, especially for the needs of HB scholarship it should be added.

<sup>5</sup> Leopold Pospíšil, *Anthropology of Law: A Comparative Theory* (New York, Evanston, San Francisco, London: Harper & Row, 1971), 194.

## 2 מִשְׁפָּט as Customary Law

This first aspect is actually a well-established notion<sup>6</sup> and will probably find not much dissent. Still, the insights taken from Pospíšil's work might help to get a more nuanced and detailed picture – especially if we take the etymology of the root into view:

The basic meaning of the common Semitic root *špt* oscillates between legal judging and political ruling.<sup>7</sup> For Akkadian, this becomes clear from the respective entries in different dictionaries: AHW lists for *šapātu* A only “to judge”,<sup>8</sup> while CAD has “to issue orders, exercise authority”.<sup>9</sup> This range of meaning is even more obvious in the case of the official title *šapītu*, which CAD translates as “district governor” and “judge”.<sup>10</sup> For Ugaritic, we get a very similar picture in the renderings of the root by Olmo Lete/Sanmartín: the verb *t-p-t* is listed with “to judge, to pass judgement”, and “to rule”; also, the job title *tp̄t* II is identified as “judge” and “ruler”.<sup>11</sup> Comparable results could be offered for northwest-Semitic inscriptions for *špt* verbal and nominal derivatives.

In light of this evidence, I would argue that we are not confronted with two different concepts, but with one and the same: The root *špt* has the basic meaning “to decide” – only in the different “fields”, if we follow Pospíšil. Legal decisions are applied accordingly in the future, while political decisions are intended as a unique measure for the given situation.

We might now be tempted to see the root *špt* as authoritarian law. Yet, while there indeed is a conceptual proximity between decisions in the legal and the political spheres, I still think that מִשְׁפָּט in the HB is, on the whole, closer to the “field of customs”. To my mind, this lexeme refers to decisions as they are customarily and repeatedly handed out. In other words: מִשְׁפָּטִים are decisions that have become law because they have been decided that way many times, and since a time people do not even really remember – and, thus, customary law. This is even more plausible when we realize that the noun is most often used as a plural: It denotes the composite of *all* legal decisions as they should be made according to the prevalent sense

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<sup>6</sup> See, for example, Osborne Booth, “The Semantic Development of the Term מִשְׁפָּט in the Old Testament,” *JBL* 61 (1942): 105–10; or Henri Cazelles, “Shiloh, the Customary Law and the Return of the Ancient Kings,” in *Proclamation and Presence: Old Testament Essays in Honour of Gwynne Henton Davies*, ed. John I. Durham and Joshua R. Porter (London: SCM Press, 1970), 239–51.

<sup>7</sup> Cf. the overview over Akkadian, Ugaritic, and Phoenician, as well as the Hebrew semantics by Herbert Niehr, “מִשְׁפָּט *šāpaṭ*” *TDOT* 15:411–31. Gerhard Liedke, “מִשְׁפָּט *špt* richten,” *THAT* 2:999–1009, on the other hand rejects any efforts to trace a specific basic meaning because of the multitude of meanings.

<sup>8</sup> Cf. *AHW* 3:1172.

<sup>9</sup> *CAD* 17A:450f.

<sup>10</sup> Cf. *CAD* 17A:459. Furthermore, the debate on *šiptu* A and B reflected in *CAD* 17C:92, particularly suggests that this is actually a secondary scholarly differentiation of one and the same original meaning.

<sup>11</sup> See Gregorio d. Olmo Lete and Joaquín Sanmartín, *A Dictionary of the Ugaritic Language in the Alphabetic Tradition*, 3rd ed., HdO 112 (Leiden, Boston: Brill, 2015), 912f. Even the circumstance that the noun *mtp̄t/z* (597f.) is not only listed as “command, jurisdiction” but also as “oracle” does not contradict my line of argument, as the textual examples illustrate that they involve an “oracular decree” (ibid, highlighting by MH).

of justice. At least in the case of Biblical Hebrew, there seems to be a certain shift away from the political and towards the legal sphere. Still, the distinctive conceptual proximity of the root to the political sphere is absolutely discernable (and not only in the מִשְׁפָּט of the book of Judges).

As textual references, the following few will probably suffice: The noun מִשְׁפָּט, for instance, is *the* “term” of choice in the presumably oldest legal collection of the HB, the Covenant Code, which is in substance probably closest to customary law (see e. g. Exod 21:1,9,31; 23:6; 24:3). In addition, certain wordings (cf. e. g. Exod 21:9,31) make it clear that these regulations refer to long-standing and customary legal procedures in the background.

This observation holds true even in narrative contexts like 2 Kings 17:24–34, a passage describing the Assyrians’ actions after the fall of Samaria. Here, the prevailing *usus* again plays a significant role, as traditional worship of YHWH is contrasted with the idolatry of the גוֹיִם.<sup>12</sup>

The most obvious argument, however, is the recurring use of מִשְׁפָּט together with דִּקְדָּקָה (see e. g. Gen 18:19).<sup>13</sup> The phrase דִּקְדָּקָה מִשְׁפָּט describes the just cosmic order of fairness and equity, i. e. how decisions should ideally be made – in the legal, as well as in the political sphere.

### 3 קָח / קָהָה as Authoritarian Law

Compared to this, קָח/קָהָה regulations quite probably have moved from the “field of political decisions” to the “field of law”. It is somewhat harder to argue here on etymological grounds, as the evidence of the root קָח in extra-biblical texts is sparse and rather ambiguous.<sup>14</sup> Judging from what we have, however, it can be surmised that the original meaning is something like “to cut” or “to carve”. In Hebrew, figurative meanings seem to have gained ground very early with “to write”, on the one hand, and “to decree” or “to set a limit” on the other. Because of the former meaning, Crüsemann has suggested that קָח/קָהָה envisions written laws in contrast to oral ones. I will come back to that later.

In spite of this broad semantic spectrum, all meanings seem to have one aspect in common: Something is set, something is fixed – and quite probably by some kind of authority as also Ringgren observes in his TDOT-article<sup>15</sup>

Correspondingly, it is only plausible to apply Pospíšil’s considerations: קָח seems to designate a one-time decision by the respective authority that was originally meant to address a

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<sup>12</sup> See especially V. 26,27,34b,37 in contrast with V. 33,34a.

<sup>13</sup> Similarly revealing passages are 2 Sam 8:15; 1 Kings 10:9; Is 9:6; Ezek 45:9; Ps 72:1.

<sup>14</sup> Especially, in reference languages like Ugaritic or Akkadian it does not seem to be attested to at all. Cf. Ringgren, “קָח,” 5:140.

<sup>15</sup> Ibid., 143; the German original, Helmer Ringgren, “קָח *hāqaq*,” *ThWAT* 3:149–157, is somewhat clearer on this issue. Liedke, “קָח,” 1:629, sees it similarly.

specific situation *ad hoc*. Only later on, decisions like these were applied again and again, and, thus, became accepted as universally binding, or internalized, as Pospíšil calls it.<sup>16</sup> This is not too difficult to imagine in a society with no clear distinction between legal authority and political leadership.

There are two arguments against my line of reasoning I would like to address. The first one is that Israelite and Judean kings supposedly had no legislative function, and there were, accordingly, no royally decreed laws, i. e. authoritarian law in Pospíšil's terminology. There are especially two texts that could be pointed to: the so called "Law of the Kings" in Deut 17:14–20, and Samuel's speech to the people in 1 Sam 8:10–18. As it is, neither text makes any explicit remarks on legislative powers of the king. Still, there are two issues with this counter-argument: For one, both texts need to be dated at least to exilic times, and are very critical of monarchic structures. Hence, it would not be prudent for them to picture the kings as legitimately introducing new legal provisions. Furthermore, I would argue that the depiction of royal powers in both texts, but in 1 Sam 8 in particular, must be seen as reminiscences of the fact that, historically, kings *did* issue legally binding decrees on things like conscription, compulsory labor etc. So in my opinion, those texts do not counter, but actually support my view of royal legislative functions.

The second counter-argument to address is the fact that the HB laws as we know them are laws not issued by kings, but by God. This theological grounding of all three legal collections in the HB is indeed striking – especially compared to other ANE laws.<sup>17</sup> Yet, we need to remind ourselves of the fact that they are highly tinged with theological and ideological intentions. The historic reality this side of those idealizations quite probably was that kings did have a formative function when it comes to norms and regulations; and this has already been shown time and again, even by scholars critical of the legislative function of kings. For example, Georg Macholz spoke of continued development and shaping of laws by the kings.<sup>18</sup> Accordingly, I do not think this argument harms my line of reasoning.

In contrast, several passages point to a conceptual connection between the root קקן and authoritarian law as well as the political sphere as a whole. One group among them consists of texts, which use the nominalized *Po.*-participle in the meaning of "scepter". It has been suggested by Zeev Falk that this needs to be seen as the staff of a judge,<sup>19</sup> not that of a ruler. Yet,

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<sup>16</sup> Pospíšil, *Anthropology*, 194–6.

<sup>17</sup> The figure of Moses – in spite of all differences in detail – still bears some basic resemblance to Mesopotamian kings in his mediating role vis-à-vis the divine sphere.

<sup>18</sup> Cf. Georg C. Macholz, "Die Stellung des Königs in der israelitischen Gerichtsverfassung," *ZAW* 84 (1972): 157–82 ("Weiterentwicklung des Rechts"); this seems to particularly apply to 1 Kings 10:9.

<sup>19</sup> Cf. Zeev W. Falk, "Two Symbols of Justice," *VT* 10 (1960): 72–74.

if we look at the specific texts, a conceptual proximity to the political sphere seems much more likely. Gen 49:10, Jacob's blessings for his sons, clearly describes the political dominance of Judah over the עמים, which is represented by the מחוקק.<sup>20</sup> Similarly, in Num 21:18 it is the staff of נדיבים and שרים, i. e. members of the ruling social group.<sup>21</sup>

In Jdg 5:14, the Song of Deborah,<sup>22</sup> the context with its discourse on violent power struggles makes a political interpretation of the office title מחוקק rather plausible.<sup>23</sup> In Is 33:22 מחוקק is, again, used in the sense of an office. Interestingly, we find it in direct combination with שפט and מלך before and afterwards. This bridging function supports at least a partial connotation of authoritative ruling.<sup>24</sup> The connection to the political sphere is most obvious in Mic 6:16, in which חקה explicitly references royal decrees in a pejorative way: the עמרי.

Another group of passages describes the explicit establishment of a new חק or חקה. For the sake of time, I cannot address these predominantly Priestly texts in greater detail. Yet in a general pattern, they utilize *w<sup>q</sup>atal-* or *yiqtol-*forms of היה to express that a new regulation is introduced (for passages see the handout). In particular, it should be noted that similar phrases in combination with משפט are far less frequent. Most commonly, it appears together with חק/חקה in such declarations.<sup>25</sup> The most remarkable passages among those are Num 27:11 and 35:29 with their construct form משפט חקה. If I am right, this phrase needs to be understood as objective genitive, not as an explicative one.<sup>26</sup> It describes the establishment (חקה) of an entitlement (משפט).

At this point, I need to address two such declarations that, at first glance, run somewhat contrary to my interpretation: The first one is 1 Sam 30:25, in which the handling of the spoils of war is declared לחק ולמשפט. In my interpretation, we would rather expect the use of חק alone. In combination with the following עד היום הנה the use of משפט might simply refer to a subsequent customary practice, as well as characterize it as an entitlement. The other passage is the already addressed 1 Sam 8:11, Samuel's threat of משפט המלך to the people. Even though I would have loved it to read חק המלך, I still think the solution is close to what I said just now: This verse is about the customary practice of royal rule, as well as on the king's entitlements to royal powers – which is why it speaks of משפט.

<sup>20</sup> The same applies to Ps 60:9 (parr. 108:9) – both BHS-verse-count.

<sup>21</sup> See, among others, the entries by Conrad, “*ndb*,” *TDOT* 9:219–26, and Herbert Niehr, “*šar*,” *TDOT* 14:190–215 (even though שר indeed seems to have a certain affinity to the root שפט, as well; still, this is probably more due to the fact that the latter basically refers to decision making, as has been pointed out above).

<sup>22</sup> In this verse, מחוקקים might not refer to scepters, but to the act of ruling (which would still point to the political sphere). In its parallel position to the שפט ספר in the same verse, the passage is probably still an allusion to scepters. Interestingly, it is the only combination of מחוקק with the root ספר, thus being one of the very few hints of a conceptual connection to writing, on which Crüsemann's line of argument is based (cf. footnote 25).

<sup>23</sup> This is true even if there are not as obvious accompanying lexemes in the semantic field of political ruling as in the other passages.

<sup>24</sup> The same is true for Prov 8:15–16, in which we find a two-fold parallelism: in V. 15 between the roots מלך and חקק, on the one hand, and between this verse and the following using a combination of the roots שרר and שפט, on the other.

<sup>25</sup> Please note that in most cases, it is hard to decide if the nouns are meant synonymously or synthetically.

<sup>26</sup> Contra Lohfink, “*ḥuqqîm*,” 5–6.

Two final passages that support my line of argument are probably the best two examples for the root *חק* as “authoritarian law”. In Gen 47:26, a passage on Josef handling the famine in Egypt, a remarkable comment on a new agricultural levy is given: וַיִּשְׂם אֹתָהּ יוֹסֵף לְחֹק עַד־הַיּוֹם: הַזֶּה. Here we have the clear instance that a newly established regulation is explicitly labelled as *חק*. The second (and last) example is in Is 10:1–2, which the NRSV renders as follows:

“(10:1) Ah, you who make (*חק* *Po.*) iniquitous decrees (*חק*), who write (*כתב* *Pi.*) oppressive statutes (*מִקְרָב*),<sup>27</sup> (11:2) to turn aside the needy from justice (*דִּין*) and to rob the poor of my people of their right (*משפט*), that widows may be your spoil, and that you may make the orphans your prey!”

These two verses (among other aspects) confront the unjust *חק* with the just *משפט*. Crüsemann has argued that this contrast is based on the friction between oral and written laws. For this, he points especially to the parallelism of the roots *חק* and *כתב* in v. 1.<sup>28</sup> Although I would not want to dismiss this interpretation completely, I think the focus of this comparison is not so much on the form, in which a specific law is transmitted. Rather, the key contrast is between what should be the proper basis for legal decisions: customary legal practice, and not newly established regulations. The reference to writing here simply represents the efforts by the authorities to legitimize their new regulations. In other words: The actual contrast is between customary and authoritarian law – *משפט* and *חק* (be the latter written or not).

## 4 Conclusion

Drawing on Leopold Pospíšil’s reflections on the anthropology of law, I have made the case for identifying *משפט* as traditional customary law, while the nouns *חק* and *חקה* stand for new authoritarian law. I do admit that this differentiation might not completely work in each and every mention of those words – also because of the intrinsic vagueness of Biblical Hebrew. Still, the basic tendency seems to be true, especially with regard to the respective etymological backgrounds. This might offer a path forward in the debate on these lexemes, which has come to a certain standstill in recent years.

An issue I could not address for the sake of time is the diachronic perspective: It would be desirable to revisit my hypothesis with regard to different literary schools and layers – especially since the Deuteronomistic use of the double phrase does in fact cause a certain blurring.

If my observations stand up to scrutiny, *משפטים* should be seen as regulations that “migrated” from the “field of customs” to the “field of law”, while *חקות/חקים* originally derived from

<sup>27</sup> For this reading cf. e. g. Hans Wildberger, *Jesaja: 1. Teilband: Jesaja 1–12*, BKAT X/1 (Neukirchen-Vluyn: Neukirchener Verlag, 1972), 179, and Otto Kaiser, *Der Prophet Jesaja: Kapitel 1 – 12*, 2nd ed., ATD 17 (Göttingen: Vandenhoeck & Ruprecht, 1963), 50.

<sup>28</sup> Cf. Frank Crüsemann, *Die Tora: Theologie und Sozialgeschichte des alttestamentlichen Gesetzes* (München: Kaiser, 1992), 32–34; similarly Richard Hentschke, *Satzung und Setzender: Ein Beitrag zur israelitischen Rechtsterminologie*, WMANT 83 (Stuttgart: Kohlhammer, 1963), 113.

the “field of political decisions”. Yet, as Pospíšil stresses, the boundaries between all three fields are fluid to say the least.

As a consequence of my observations, combined phrases like *הורק ומשפט* are not to be taken as a hendiadys or synonymous, but rather as a synthetic conflation of traditional and new laws. This would fit perfectly with the fact that these mostly plural phrases give witness to the fundamentally composite nature of law. Hence, the “umbrella phrases” *הקמים ומשפטים* and *הקמתי ומשפטי* envision *all* laws, regardless of their origin or age.