

# K'lalei Horah

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## Section One The Background

### **Introduction:**

The Rules we live by in both the physical and spiritual world are necessary outcomes based on the Source of all of creation<sup>1</sup>. Hashem created both worlds from His Essence (which we have no way of defining or even approaching), and as such they reflect a singularity of purpose and design. Creation has immutable laws, physical and spiritual, that are such because of Who their Creator is, and His own Immutability. It is thus not any more philosophical to ask “why should G-d care if I turn a light on on Shabbos?” than it is to ask “why should G-d care, if I eat this wild mushroom with the purple dots?”. Both are poisonous, and necessarily so because of their higher sources! One is not any more arbitrary than the other, and neither is arbitrary. Halacha is therefore a search for and definition of those immutable spiritual realities, which if we live by, then we truly live. The Mitzvos and “spiritual living”, for lack of a better term, give life to a higher form of ourselves of which our physical bodies are a mere shadow.<sup>2</sup> The analogy of spirituality being to the soul what food is to the body is more literal than it is mere poetry. The soul has needs much like the body and the human must provide both with their nourishment to truly flourish.

## **The Development of Torah**

### **Moshe Ke'bail Torah M'Sinai**

The G'morah in Brachos (5a) explains<sup>3</sup> that Moshe received on Har Sinai “the 10 commandments, the Written Torah, Neviam/Ksuvim, Mishna, and G'morah”. At face value this G'morah is very difficult. Why, for example, would Moshe send the spies or hit the rock if he was already aware of the devastating consequences? This G'morah (as is true of almost all Agadata) may not be taken at face value. Rather, the G'morah means that Hashem gave Moshe the ideas and laws contained within these works. That is, all of these works tell a Jew how to live, think, and relate to the world around him. *That* is what Moshe received.

- Thus, the Midrash Rabbah<sup>4</sup> says that Moshe received Klalim – General Rules<sup>5</sup>.
- The Rambam<sup>6</sup> explains further that Moshe had a clear understanding of each Mitzvah that included its various Halachos. Additionally, he received the 13 Hermeutical Principles with which to expound the Torah and find these very Halachos within the text of the written Torah itself.

There are G'morahs that seem to contradict the above and imply that Moshe saw even the details of the G'morah and the discussion of the Rabbis.<sup>7</sup> The Tosfos Yom Tov<sup>8</sup> explains that we must differentiate between what Moshe “saw” and what he “received”. What we discussed earlier is the Tradition that Moshe was

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<sup>1</sup> See Drashos HaRan 17(?) for more on this idea that spiritual existence (what he is referring to is reward and punishment in the World to Come) is a science of sorts.

<sup>2</sup> See Intro to Shmiras HaLoshon for more on this idea.

<sup>3</sup> Based on the Pasuk in Shmos 24:12

<sup>4</sup> Shmos 41

<sup>5</sup> This is not to be understood as a simple outline of sorts. Rather Moshe received a very clear understanding of the individual concepts on a totalistic level that automatically led itself to all the eventual details. Thus, for example, Moshe's understanding of the Mitzvah to recite Shma was such that it automatically included the need to say it out loud and to concentrate on different aspects etc.

<sup>6</sup> Intro to commentary on Mishna

<sup>7</sup> See for example M'gillah 19b and Yerushalmi Chagigah 1:8

<sup>8</sup> In his intro to his commentary on Mishna

commanded to pass on – those ideas and Halachos and principles. That is what Moshe “received”. However, Moshe was also given much more, but as a prophetic vision. That is what Moshe “saw”.<sup>9</sup>

### **How Torah Was Transmitted**

Where does the Torah we learn today stem from? What did earlier generations learn? Did Yehoshua learn Baba Basra? Did David HaMelech know Shas and Poskim?

As already mentioned, Moshe Rabbeinu received clear principles and clear definitions of Mitzvos, Torah ideology, and spiritual realities. These were and continue to be the distilled concepts contained within Torah, both written and oral. How to give over those ideas, the exact examples and case laws to use should be adaptable to the students receiving the information. That in fact, according to Rav Shriria Goan<sup>10</sup>, was exactly the case when we speak of earlier generations. That is, before the standardization of the Oral Law, Torah Sh’bal Peh was given over in any way the teacher saw fit. His job was to provide the case laws most appropriate to provide his students with the underlying concept, be it Halachik or Hashkafic. The ends always remained the same, the means however would change to fit the needs of that generation, and more specifically that student.

Thus, the wording of Torah Sh’bal Peh was never held sacred and till this day we do not assume that reciting Talmud has any significance when it is divorced from any understanding to the one reciting it – that is in counter distinction to the recitation of Psalms (for example) which carries great significance even if the reader has no comprehension of the meaning due to the intrinsic holiness of the words themselves. That is, when it comes to the written Torah, the words are G-d given, and in the case of the prophets – G-dly inspired/directed.

**However, the words of Torah Sh’bal Peh are only vehicles to the underlying concepts, and thus the wording that Moshe used to transmit the ideas to his generation are irrelevant to us.** This is one of the reasons Oral Law was meant to remain oral. The standardization of Oral Law undertaken by Rabbi and his colleagues was a necessary evil based on the other alternative (i.e. to be left with almost nothing at all), but it unfortunately carried with it the loss of this flexibility.

Even with the standardization of the text of Oral Law, many of the benefits of the previous Oral tradition were preserved in spite of the new written format. That is, Rabbi sought to (at the very least) preserve the student’s need for a Rabbi so as to preserve the chain of Mesorah as a chain, and to allow the student to gain a fuller appreciation of Torah that can only be harvested from a human embodiment of those ideas. To this end, Rabbi specifically made Oral Law vague and even contradictory so that without a Rabbi, the student would be lost. Ravina and Rav Ashi followed this same vagueness in the Talmud, and to this day one cannot fully appreciate or even comprehend the “Oral” Torah without spending years of study in a Yeshiva.

### **The Chain of Mesorah**

As already mentioned, one of the hallmarks of Torah was its preciously preserved flow from generation to generation, from Rabbi to Talmud. The Written Law was simply transcribed and handed over in the form of a physical scroll or book. The Oral Law, however, was transcribed in the hearts and minds of the Jewish people. It survived and flourished in their individual and collective minds. It illuminated the souls of those fortunate enough to carry it within them, and even more fortunate to truly live by it. Unlike secular Law and knowledge, which is often collected in books that collect dust on a shelf, the Torah was and continues to be a living entity - a fixture of Jewish life.

This chain of Rabbi and Talmud that stretches from Moshe to the present day is extremely long and the intricate details are beyond the scope of this work. It is interesting to note that the chain is recorded in almost exactly the same format by Rishonim who never saw or even communicated with one another. For example, it is brought by the Rambam in the Introduction of his Yad HaChazaka, and is recorded in Ra’avid’s Seder HaKabalah<sup>11</sup>.

The Major links in the chain of Mesorah are as follows:

- Moshe
- Yehoshua
- The Elders
- The Prophets

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<sup>9</sup> We see a similar idea with Adam seeing all of the future leaders and events. It is the idea that the start of something must include within it all of the outcomes, necessarily.

<sup>10</sup> In his Iggeres

<sup>11</sup> Ra’avid #1, not to be confused with Ra’avid #3 – whose comments are recorded alongside the Rambam’s Yad

- The Men of the Great Assembly [Including Shimon HaTzadik. This is the period in which prophecy ended].
- The Early Tanaim [including Antignos, and the “Pairs” such as; Yossi Ben Yoezer & Yossi Ben Yochanan, Yehoshuah Ben Prachia & Natai H’ Arbaili, Yehuda Ben Tabbai & Shimon Ben Shatach, Shamaya and Avtalion, Hillel and Shamai]
- Later Tanaim [R Yochonon Ben Zakkai (In whose era the 2<sup>nd</sup> Temple was destroyed – 70 CE), R Gamliel (of Yavna), R Shimon Ben Gamliel, Rebbi]
- The Amoraim [Including R Yochonon in Eretz Yisrael, and Rav and Shmuel in Bavel, and ending with Ravina & Rav Ashi and the closing of the Talmud<sup>12</sup>]
- Rabanan Savrai
- The Geonim [Including the Great Rav Hai Goan]
- The Rishonim
  - Ashkenazik [Rabbeinu Gershom, R Yaakov ben Yakar, Rashi, The Ba’alei HaTosfos, The Raviah, The Or Zaruah, The MaHaram M’Rotenberg, The Mordechai, The Rosh, Rabbeinu Yerucham, and the Tur]
  - Sefardik [Rabbeinu Chananel, Rif, Ri Migash, Rambam, later on the Ramban, Rashba, Ran, and Ritva].
- The Achronim

### **Closing of the Talmud Bavli**

It was noted above that Moshe received the 13 Principles with which to approach Torah. We, however, no longer use these principles in an innovative way. In fact, the use of these principles to draw out Halacha from the written Torah ended with the closing of the G’morah by Ravina and Rav Assi (502 CE).<sup>13</sup> Furthermore, the closing of the Talmud was also the end of the ability of Chazal to promulgate decrees and statuettes that would be binding on Klal Yisroel as a whole. After the closing, the Jews were dispersed throughout the Diaspora and there was a general breakdown of communication. Each community became its own island, often having little or no contact with other Jewish communities for years at a time. The decrees and Minhagim of those communities therefore remained idiosyncratic and not national.

## **Machlokes**

### **The First Machlokes**

The argument recorded in Chagigah (16a) about whether or not to do Smicha on an offering on Yom Tov was the first *enduring* Machlokes in Jewish history, as pointed out by Rashi there. Tosfos there brings a Yerushalmi that after that Machlokes there were four other points over which Hillel and Shamai disagreed and then their respective schools went on to differ in a considerable amount of areas giving the impression that there were, G-d forbid, two Torahs.

### **The Reasons For Machlokes**

The G’morah explains that the reason Machlokes was so prevalent among the schools of Hillel and Shamai was because the students did not “serve” (i.e. fully learn from) their respective Rabbis.<sup>14</sup>

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<sup>12</sup> In truth there were some minor additions by the following generation to the Talmud, including the work of Rav Ashi’s son. Furthermore the Text of the the Talmud that we have, has a few additions from generations as late as the Geonim, which were mistakenly added by printers as part of the actual body of the G’morah when in truth they were clearly meant to be side comments. The Rishonim often let us know which piece is an add on from the Geonim.

<sup>13</sup> Bava Metziah 86a

<sup>14</sup> Sanhedrin 88b. The G’morah seems to fault the students for this lack of diligence. The exact reason for their failure is not exactly clear. The times were not stable (civil war) and that would clearly contribute to a less than ideal learning environment. The Rambam in his introduction to Mishnayos states that the students are not at all at fault for this lack of “service”. According to the Rambam it seems the expression in the G’morah has a totally different connotation, which is more a statement of fact. That is, they did not reach the level of their rabbeim because they were just lacking the superlative intelligence and abilities of their predecessors.

The Rambam explains that until the time of the first Machlokes all disagreements were solved by way of moving the issue to higher and higher courts until it reached a point where someone had a clear answer or, if none existed, a vote would be taken by the supreme Sanhedrin.

[As an aside, the Rambam adds that Machlokes never occurred in issues that Moshe received as part of the Mesorah. That is, no Machlokes came about due to one side misrepresenting or forgetting aspects of the Mesorah. Rather, when the Mesorah did not address an issue (or if that piece of Mesorah was just never transmitted) then the human involvement in trying to derive the law inevitably would lead to different outcomes with different adherents. However, the Chovus Da'as<sup>15</sup> points out that most Rishonim hold that Machlokes could (and did) occur due to faulty memory of the Mesorah]

There is a deeper spiritual cause for Machlokes that is intricately linked to the idea of Eylu V'eylu, as explained in the next section.

### **“Eylu V'Eylu”**

With all these different opinions how is one ever supposed to arrive at the truth? The G'morah in Chagigah (3b) asks the question but assures us that we need not worry for all of Torah was given by “One Shepherd”. There are different understandings of this G'morah offered by the Rishonim:

- Rashi there explains that due to Torah being G-d given it is intrinsically possible to arrive at the truth. Furthermore, since all sides agree that the Torah is G-d given and therefore all agree that we have to look to the same sources we have the ability to arrive at the truth. It is within our grasp!
- The Ran<sup>16</sup>, however, has a different take on the G'morah. He understands that the G'morah is telling us that both sides of the Machlokes were given by Hashem to Moshe. That is, according to the Ran each side of a genuine Machlokes has valid roots in the Torah and was shown to Moshe on Har Sinai. Additionally, Moshe was told that man through a vote of the majority would decide the eventual truth, and the decision they made would be binding whether or not they chose the “true” side of the debate. That is to say, even according to this approach of the Ran, that whatever decision ultimately chosen by the majority of the sages is the truth, only holds to a certain degree. **There is truth as far as what relates to Halacha in this world. Majority decides that truth. But there is a far greater truth that relates to an ultimate level of Torah – a truth that exists in “higher” worlds that may not be the one that the majority chooses** – but that truth ultimately has little bearing on practical Halacha.

#### *The famous G'morah in Baba Metziah:*

There is a G'morah in Baba Metziah (59a) that brings an interesting incident that surrounded a debate regarding the rules of ritual purity of a certain oven. The debate was being waged between R Eliezer and the Sages and that entire incident relates to the above Machlokes Ran and Rashi. R Eliezer tried to bring different proofs from supernatural events, none of which served to impress the Sages and have them change their ruling. Finally a Bas Kol came out pronouncing the Halacha to be like R Eliezer, and that too was soundly rejected by the Sages in that “Torah is not in Heaven”<sup>17</sup>.

The G'morah according to the Ran is understandable in that the Bas Kol was referring to the ultimate truth in Heaven and that truth was not the one the Sages had gone with – but again that does not matter in terms of practical Halacha. As far as practical Halacha is concerned the truth is in the hands of the majority. According to Rashi the G'morah is referring to the one and only truth that existed for this oven and for technical reasons the Bas Kol could not be accepted as valid proof to that effect. That is, according to Rashi you do your best to arrive at truth, which often means following the majority, and sometimes (like this story in Baba Metziah) you chose the wrong side.

#### *The G'morah in Eruvin That is the Source of the Expression Eylu V'Eylu and How it Relates to the Above:*

Interestingly enough, the G'morah in Eruvin (13b), which is the source for the expression Eylu V'eylu, records a Bas Kol that was accepted. The G'morah there says that debate waged on between the schools of Hillel and Shamai (i.e. Bais Hillel and Bais Shamai) for three years until a Bas Kol pronounced that although both sides are “words of the Living G-d”, the actual Halacha would follow Bais Hillel. What needs to be answered is 1) why would a Bas Kol be accepted here, and 2) how would Rashi explain the expression Eylu V'eylu in light of what he holds about only one side being “true”.

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<sup>15</sup> Responsa 192

<sup>16</sup> Drashos 7

<sup>17</sup> Based on the verse (?)

1. As far as the first issue, Tosfos<sup>18</sup> suggests two approaches:
  - 1) A Bas Kol *is* valid evidence, just not the one in Baba Meiziah since it was suspect as having come just for the honor of R Eliezer (who requested it). The Bas Kol here that pronounced the Halacha to be like Bais Hillel was not suspect and therefore acceptable.
  - 2) A Bas Kol is only valid in defining the rules themselves but not to defy the rules. That is, here the Bas Kol was necessary to decide if the Halacha should follow the majority (Bais Hillel) or the more sharp students (Bais Shamai), since there was no rule for such a conflict. In Baba Metziah, however, the Bas Kol was in effect saying that we should ignore the rule to follow the majority – that a Bas Kol cannot do!
2. As far as the second issue – i.e. how Rashi would understand “Eylu V’eylu – Rashi himself in Ksubos (57a) explains how he understands the expression. He says that in any given Machlokes both sides of the argument have vigorous logical structure and each could be true through a slight changing of the particular situation. That is, in any given situation only one is true but since the logic of each is strong and firmly based, it is conceivable that the other would be the true one in a slightly different situation.

#### More Understandings of Eylu V’Eylu

So far we have discussed two opinions, those of Rashi and the Ran, with regard to the idea of Eylu V’Eylu.

- Rashi holding that there is only one truth but that the other opinion could be the Halacha in a slightly different scenario.
- The Ran, again holding that there were multiple truths shown to Moshe and the Halacha follows the majority. It must be noted that this idea that there were multiple truths shown to Moshe on Har Sinai is very prevalent among different early commentators<sup>19</sup>, and is even found in the Yerushalmi (Sanhedrin 4:2), and the Medrash (Tehilim 12:7).
- The Yam Shel Shlomo<sup>20</sup> brings a very **straightforward understanding** (that could align with Rashi’s opinion that there is one truth). This understanding is that when a scholar is engaged in the study of Torah in an earnest fashion, the opinion he formulates with his mind<sup>21</sup> is the equivalent of a G-d given tradition. It *is* the Word of the Living G-d.
- Finally, the above Yam Shel Shlomo brings a more **esoteric kabbalistic approach** that is hinted to in the Rishonim<sup>22</sup> and is stated in other sources as well<sup>23</sup>. This approach is most likely the background to the opinion of the Ran quoted earlier and that of the other commentators that share his stance. When we received the Torah at Har Sinai, an overwhelming flow of Torah entered this world and our conscience through what is known as “pipes” or “funnels” (Tzinorim). The totality of that spiritual flow was beyond the capacity of any one individual<sup>24</sup>, and each of us (whose souls were all present at that defining moment) received a piece of the overall Truth. We each received what we were capable of receiving based on our individual makeup. Each of those received aspects of the overall picture are true in that they are genuine pieces of the broader totality. However, each piece taken on its own could lead to conflicting rulings. Thus, two people receiving the same spiritual message flow could easily arrive at two different conclusions. It is furthermore conceivable that the overall message was like neither! But again, as far as the practical Halacha would be concerned, the ruling would follow the majority – who ostensibly would be more likely to arrive at the ultimate Truth, and if they did not it would not make much difference as explained earlier in the Ran.

#### *One last note regarding this subject:*

R Moshe, in his introduction to the Iggros Moshe, seems to take on the approach of Rashi, that there is only one truth. He consoles us, however, that if we have erred in trying to arrive at that truth and mistakenly chose the wrong approach to a specific commandment, we need not worry. That is, not only will not be held accountable for performing the mitzvah incorrectly, but we will receive reward for following our understanding arrived at with honest work and an awe for the magnitude of the task at hand.

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<sup>18</sup> 6b s.v. Kan

<sup>19</sup> See Ritva (Eruvin 13b) and Tosfos Shantz (to first Mishna in Edeyus)

<sup>20</sup> Intro to Baba Kama

<sup>21</sup> That has been trained to be intune with Torah methodology and its rigorous thought processes

<sup>22</sup> See the Ritva quoted in footnote 16

<sup>23</sup> See, for example, the introduction to the Shlah, and to the Sefer Be’er Sheva.

<sup>24</sup> With the possible exception of Moshe, for the G’morah Yerushalmi referenced above refers to him as having seen both “49 reasons to forbid, and 49 to permit” implying that he saw a full picture.



## Section Two “But What Do *I* Do?”

### **Getting a Psak:**

Although one is ideally supposed to go through Torah and arrive at conclusions through his own extensive research, the Torah itself accounts for the times where for one reason or another that is just not feasible. The Torah tells us “When the matter is beyond you” you may seek council from authorities in the matter. You may ask a “Sheila” from those who *have* learned through the issue thoroughly. The response you get may very well determine the permissibility of the item in question (assuming it is an item based question) in a very real and lasting sense. It is a binding ruling to a great degree – as discussed in the following section in more detail.

### **Shopping Around for a Psak:**

#### Background

The G’morah in Avoda Zara (7a) makes it clear that you may not ask a second Rav about the permissibility of a certain item when you had already asked another one and he ruled that it was forbidden. That is, you cannot just go looking for a second opinion on the matter. Furthermore, even if you did go and ask another Rav, he may not overrule the first Rav’s Psak. That is you may not ask, and if you do, he may not overrule.

There are guidelines and exceptions to the above and that is dependent on a Machlokes Rishonim as to the underlying reasoning behind these prohibitions. There are two basic approaches to this Sugya in the Rishonim:

- ❑ **The first approach<sup>25</sup> is one of Kuvod.** One may not go and ask a second Rav because it infringes on the honor due to the first one.
  - Based on this approach it would be irrelevant if the first Psak was one of Heter and the second one of Issur or visa versa. In all cases it is disrespectful to disregard the first Psak.<sup>26</sup>
  - Furthermore, according to this approach, it may very well be that if the questioner did ask anyway that the second Psak will override the first one. (This will depend on the Sugya below of when there are different opinions on an issue).
  - The Ran, who likes this opinion, adds that since the issue is one of Kuvod, if the second Rav gets the first to retract or is greater (even if he doesn’t get the first to retract) then the first Psak is overturned. That is, if the first Rav agrees or is clearly on a lesser status than the second, then there is no compromising of his Kuvod.
  
- ❑ **The second approach<sup>27</sup> is one of fixing a status to the item in question.** One may not go and ask a second Rav because once the first one’s ruling forbidding the item, affixes a status of Issur to the item – a “Chalos Shem Issur”.
  - There is however no Chalos Shem Issur when the first Rav is clearly wrong based on a clear authoritative source – i.e. when the first Rav is a “To’eh b’Dvar Mishna”. Such a Psak would not affix a status to anything.
  - Some Rishonim<sup>28</sup> hold that even if the second is of a greater status than the first, he may still not overturn the first one’s ruling. The Rabbeinu Yeruchum argues though and holds that the opinion of someone considerably greater than you makes you into a quasi To’eh B’Dvar Mishna.
  - Tosfos to Avoda Zara seem to go with this approach. They add that if you inform the second Rav that you had already received a Psak from the first Rav, it is permissible to ask – because although the Rav cannot take off the Chalos Shem Issur in general, he can if the first was in fact a To’eh B’Dvar

<sup>25</sup> This is the opinion quoted in the Rashba to the G’morah in AZ, as a “some say”. It is also the opinion that the Ran to AZ leans toward, were it not for the overwhelming support in the Rishonim for the second approach.

<sup>26</sup> If you tell the 2<sup>nd</sup> Rav of the first one’s Psak it may not be disrespectful. Tosfos, who go with the second approach below, bring the permissibility to ask a 2<sup>nd</sup> Rav if you inform him of the first one’s Psak. But it is not clear if that Heter would apply in this approach.

<sup>27</sup> This is the opinion of most Rishonim including the Ry’vid, Rashba, Rosh, Tosfos, and Rabbeinu Yeruchum.

<sup>28</sup> Including the Rashba

Mishna, as above. He may also, according to Tosfos, overturn the first Psak if he is ruling stringently and the first Psak is a lenient one. That is, *there is no Chalos Shem Heter according to Tosfos.*<sup>29</sup>

- The Rosh to AZ argues and holds that there *is* a Chalos Shem Heter!<sup>30</sup>
- Finally, it would be very logical to assume that there is no Chalos Shem unless the question was item based as opposed to action based. Thus, a question on the Kashrus of an item is item based and relevant to Chalos Shem, as opposed to the question of whether one should keep 1 or 2 days Yom Tov – where there may very well be no Chalos in that there is nothing on which the Psak may be Chal.

## HALACHA L'MYSA

The R'ma (YD 242:31) rules the following:

- 1) You may ask a second Rav as long as you inform him of the first one's decision.
- 2) The 2<sup>nd</sup> Rav can overturn the first one's Psak if he was a To'eh B'dvar Mishna OR even if he wasn't but if he agrees that he was mistaken.
  - The Shach (CM 25:14:18) argues that unless the first was a To'eh B'dvar Mishna he cannot retract.<sup>31</sup>
- 3) If the first Rav was not a To'eh b'Dvar Mishna nor does he agree that he was mistaken, then the second rav cannot overrule the first one's Psak even if the first Psak was one of Heter. That is, there is for all intents and purposes a Chalos Shem Heter! This is the Halacha (Rav Moshe).

The Shach (53) adds that there is another way the second can overturn the first one's Psak – where the second is considerably greater. This seems to be the Halacha.<sup>32</sup>

Example: One goes to a Rav regarding a Mareh, and the Rav rules that it is no good. He may go and ask a second Rav as long as he informs him what the first one ruled. The second Rav can overturn the first one's Psak if he was a To'eh b'Dvar Mishna or if the second Rav is on a considerably higher level.

## When There are Differing Opinions On a Matter

### Background

#### *One on One*

The G'morah in Avoda Zara (7a) mentioned earlier goes on to say that if two sages argue on an issue one permitting and one forbidding or the like – the way to decide what you should do (assuming you haven't come to your own conclusion) is as follows:

If one is greater in knowledge or “number”<sup>33</sup> follow him. If not then rule stringently.

- R Yehoshua Ben Korcha however holds that in a Biblical issue go with the stringent opinion, in a Rabbinic issue go with the lenient one.

Now what exactly R Yehoshua Ben Korcha is going back on is unclear. The Rashba<sup>34</sup> learns that he is addressing the last words of the previous opinion. That is, he agrees that we follow the greater authority a priori, he just gives us more detailed guidelines in the absence of one. The Rambam<sup>35</sup>, however, learns that he is totally arguing on the first opinion and rules that in all Biblical issues you rule stringently and in all Rabbinic issues you rule like the lenient opinion – paying no regard to the stature of the individual disputants.

<sup>29</sup> The logic seems to be that the ability to create a Chalos Issur on an item is very similar to the ability to make an item that was previously permitted into a forbidden item through a Neder. That is we see from the Parsha of Nedarim that I have the power to accept a new Issur of sorts on myself. I am the “owner” on the creation of Issurim. That logic does not work for creating a Shem Heter.

<sup>30</sup> That is, according to the Rosh, we must say that the idea of Chalos Shem is not a Nedarim issue, rather it is that a Psak is a defining act. It defines the needs of my soul – as per the different possible approaches to this item as discussed above in Eylu V'Eylu

<sup>31</sup> The Shach assumes that the R'ma is going with the Ran above and that's why he allows the second to overturn the first one's Psak with his agreement. It may be however, that the R'ma is going with the Ry'vid and most Rishonim that the issue is one of Chalos Shem – he just holds that the first one has the ability to retract that Chalos retroactively by taking back his Psak.

<sup>32</sup> Rav Elyashiv however will not overturn anyone's Psak unless he was a To'eh B'dvar Mishna.

<sup>33</sup> I.e. greater number of students or more of the students in general follow him – Or Zaruah quoted in the HaGa'os Ashuri.

<sup>34</sup> Responsa Vol 1 #253

<sup>35</sup> Hilchos Mamrim 1:5



### *Majority Rules*

The Rashba (quoted above) points out that the above G'morah is specifically referring to a Machlokes of individuals. If however there is a majority opinion, then everyone agrees we go with that. The Shach (YD end of 242) points out that this is the Halacha and says that it is based on the verse "Achrei Rabim L'Hatos" (Shmos 23:2).

### *The Rav*

Finally, the Rashba adds that there is no need to rely on these rules of deciding between the different opinions when you have a Rav. In fact, there are communities, he says, that continue to follow the rulings of the Rambam for example, and for all intents and purposes they have made him their Rav.

## HALACHA L'MYSA

With regard to the issues of when two authorities differ on a matter, the R'ma (CM 25:2) rules like the Rashba and therefore holds that if one is clearly a greater authority, that we would follow him. In the absence of such a clear option then we would rule stringently in a D'orysa and leniently in a D'rabanan.

The Shach however, is concerned about the approach of the Rambam and therefore rules stringently like both. So he holds that in a D'orysa we will always rule stringently and in a D'rabanan we will rule like the greater authority and in the absence of one, we will rule leniently. *This is the Halacha.*

However, this all assumes that there is no majority. If a majority exists we would follow them according to everyone (Shach end of YD 242). Furthermore if one has a Rav one would follow him, and in the absence of a specific Rav there are universal Rabbonim that Klal Yisroel have accepted such as the Mishna Brurah (see Kovetz Igeros HaChazon Ish Torah #41).

Thus the hierarchy is as follows:

- 1) Your own researched understanding – but if that is beyond you...
- 2) Your Rav's opinion – if no Rav then...
- 3) The (default) Rabbonim of Klal Yisroel – otherwise...
- 4) The Majority – if there is no majority...
- 5) In a Biblical issue – rule stringently  
In a Rabbinic issue – rule like the greater authority (Unless there is none – then rule leniently).

### *In a Situation of Great Loss*

In a situation of great loss the above rules change slightly. In a situation of great loss, the Halacha is that one may rely on a Da'as Yuchid (as opposed to #4) or a lesser authority (as opposed to #5), as the R'ma to CM 25:2 points out, based on the above Responsa of the Rashba<sup>36</sup>. However, the Shach to YD 242 adds that this is strictly in a question regarding a Rabbinic Issur not a Biblical Issur! *That is the Halacha.*

## **Taking On a Chumrah**

Being Machmir on oneself, as with most things, has its time and place. There are times when it is the right thing to do, and there are times when it is inappropriate.

### *When it is Correct to Take on a Chumrah:*

It is correct to be Machmir when the individual is learned in the issue at hand and feels that the more stringent approach is borne out from the Sugya in the G'morah and Rishonim, notwithstanding the fact that the Poskim follow the lenient opinion.<sup>37</sup>

Example: One feels that the Rambam's definition of a Public domain for purposes of carrying on Shabbos is the most logical explanation of the various G'morahs that deal with the issue. He is convinced that the Rambam's Pshat just fits the best. He should take on the Chumrah of the Rambam with this regard, even if the Ikkur HaDin is like the more lenient opinions.

### *When it is Inappropriate:*

However, even in such an issue there are times when a Chumrah is inappropriate. The following are some examples of such circumstances:

- When it causes harm to others<sup>38</sup> (or oneself for that matter – e.g. resentment etc.), one should not take on the Chumrah.

<sup>36</sup> The Bach holds that the Rashba was not referring to the lesser authority, rather one may never rely on the lesser authority. The Shach, however, argues. We go with the Shach.

<sup>37</sup> Based on Mesilas Yesharim Perek 14

- When it could give the impression of haughtiness, one should avoid such a Chumrah.<sup>39</sup>  
Example: The above individual is in a community where there is an Eruv that does not work according to the Rambam (and which he therefore does not use), and he is walking with his wife who does use the Eruv. She is expecting and is pushing the stroller and their two year old up a hill, he should help her out. Furthermore if he is in a situation where it is clear that he would come across as haughty for not using the Eruv, he should do what it takes not to give that impression, including dropping the Chumrah.
- To take on two Chumrahs that conflict with one another, unless one is unsure of the Ikkur HaDin, is considered moronic and should therefore be avoided.
- To take on a Chumrah when it clearly conflicts with the practiced norms of that area may be a problem of Lo Sisgodayu (i.e. Do Not Cause Fractionalization). See below section entitled “Conflicting Practices Within One City (“Lo Sisgodayu”)” for more details.

### **The Methodology of The Bais Yosef and R’ma**

In their introductions to their respective works the Bais Yosef and R’ma both explain how they went about deciding the Halacha in their S’forim. Interestingly enough they both were working on their momentous works at the same time completely unbeknownst to one another. The Bais Yosef published first, and the R’ma realized that to a large degree his work overlapped that of the Bais Yosef. He therefore chose to turn his work into a commentary of sorts on that of the Mechaber’s to clarify where he differed. The source of their differences is largely based on their different approaches.

Both the Mechaber and the R’ma agreed in principle that it was necessary to codify Jewish law so that it could be accessible to the masses. The multitude of opinions in the Rishonim made arriving at Halacha too difficult for the average Jew. Some decision in each matter needed to be made so that the people had a viable way to truly be Shomer Halacha correctly. However, how exactly to arrive at the Halachik decision for the masses was a point of difference between the two. The Bais Yosef felt that the use of majority was most appropriate, and thus felt we should choose the opinion of the majority of the big Poskim of the Rishonim. He defined those Rishonim to be the **Rif, Rambam, and Rosh**.<sup>40</sup>

The R’ma, however, felt that the G’morah tells us the Klal that Halacha follows the Basruy – the Later Authorities. That is, the later authorities have the advantage that they have seen all the arguments, they have seen all the various recordings of the Mesorah and can choose which they felt was the most authentic. Therefore the Halacha should follow the later Rishonim who were the big Poskim of their time. With the end of the Rishonim the Mesorah was considerably weakened, thus the latest Rishonim is the last possible application of the rule of Basruy. The R’ma’s Basruy were the **Trumas Hadeshen** (otherwise known as the MaHarai) and the **Maharil**.<sup>41</sup>

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<sup>38</sup> Ibid. Perek 20

<sup>39</sup> See Igros Moshe YD 1:62 where he records how although he was personally Machmir with certain unsupervised liquors, he would nevertheless drink them in public so as not to seem haughty.

<sup>40</sup> In the event that one was silent and the others argued, then he would fall back on other Rishonim like the Rashba, Ramban etc..

<sup>41</sup> It seems that the Mechaber felt that the idea of Basrai ended with the period of the G’morah already. It is in fact a novel idea to apply the concept to the period of the Rishonim, whose Mesorah was considerably weaker than that of the Amoraim and even that of the Geonim and Rabbeinu Savaruy. Nevertheless, the R’ma does apply the concept in that the Rishonim still had some semblance of an intact Mesorah. It should be noted that the hierarchy above – which makes no mention of Basruy was assuming that Basruy is not an option – such as if there were no Basruy who dealt with the issue.

## Section Three: Minhagim

### **Conflicting Practices Within One City (“Lo Sisgodadu”)**

The G'morah in Yevamos (13b) brings the prohibition of Lo Sisgodadu – i.e. do not create fractionalization in one place by acting differently from what others do.<sup>42</sup> To do so, even when acting more strictly, causes a breakdown of unity that leads to friction.<sup>43</sup> Additionally, it creates the appearance of there being “more than one Torah”.<sup>44</sup> There are, however, exceptions to this rule that the G'morah quotes;

1. This rule applies only to Halacha and the like, but not to Minhagim which can diverge in one community, (at least according to one stage in the G'morah).
2. When your actions can be explained away in a fashion that would not lead anyone to assume that you are acting against the standards of the community, then such behavior is permitted.  
Example: Not doing Melacha on the morning of the 14<sup>th</sup> of Nissan in a community where they do Melacha, is permitted because people will just assume he has no work to do now.
3. When there are two separate Batei Din in town who rule differently on the issue, according to Rava there is no problem if individuals follow their respective courts. Apparently this does not lead to fractionalization because people will recognize that there are two valid opinions coming from respectable sources. Abaya, however, disagrees and holds that even in such a situation there is a problem of Lo Sisgodadu.

### HALACHA L'MYSA

#### *Differing Courts:*

The Rambam (Hilchos Avoda Zara 12:14) seems to go with Abaya, notwithstanding the fact that normally we go with Rava.<sup>45</sup> The Bais Yosef<sup>46</sup> goes with Rava though, and therefore in a situation of conflicting courts in one city, conflicting actions based on those courts are not problematic. He extends this idea to differences in practice based on S'fardic vs. Ashkenazik backgrounds, as well. Thus, there is no problem for S'fardim to follow the S'fardic P'sak and for Ashkenazim to follow Ashkenazik P'sak.

#### *Actions That are Not Clearly Conflicting And Minhagim:*

The Magen Avrohom (493:3) writes that the G'morah in its conclusion did not hold of all of the above exceptions to Lo Sisgodadu, rather only to exception #3, i.e. two courts in one town. As for conflicting Minhagim not being a problem, L'mysa we do not hold of that, and conflicting Minhagim are like any other conflict. L'mysa though, it does seem that we go with exception #2 as well. See O.C. 468:4 and the Mishna Brura there who does use exception #2.

### **When in Rome...**

The Problem of Lo Sisgodadu applies to visitors as well. Therefore, when a visitor comes to a city he must practice the Chumrahs of that city. He must continue to practice the Chumrahs of his hometown as well so long as he can do so without people noticing.<sup>47</sup> As far as the leniencies of his hometown, he may not do anything that the populace of the town will notice. Thus, he may not do Melacha on the morning of the 14<sup>th</sup> of Nissan in a place where they do not do so, even if he does the Melacha within the confines of his current residence because Melacha is in its very essence something that people hear about.

It is unclear (to me) whether the idea of a visitor practicing his leniency privately means that he can practice any leniency so long as people will likely not hear of it, or if it is an idea that the leniency must be such that

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<sup>42</sup> Although the Rambam in Hilchos Avoda Zara (12:14) implies that it is a Lav D'orysa, in the Sefer HaMitzvos (Neg Com #45) he clearly learns that the idea is Rabbinic.

<sup>43</sup> Rambam Hilchos AZ 12:14

<sup>44</sup> Rashi

<sup>45</sup> See Kesef Mishna there who brings an opinion that the Rambam does in fact go with Rava.

<sup>46</sup> In his Responsa (Avkas Rochel - 32)

<sup>47</sup> Based on Mishna in P'sachim 50a, and G'morah on 51b

even if people do hear about it they can explain it away. For example in Eretz Yisroel where no one wears Tefilin on Chol HaMoed and a visitor from America wants to wear his Tefilin in his hotel room, may he do so? It is in private, but at the same time it is something that cannot be explained away other than going squarely against the minhag of Eretz Yisroel. It seems that the Mishna Brura (OC 468:4) learned the straightforward approach of whether or not it can be done privately – irrespective of whether or not it can be explained away. R. Berkowitz, however, seems to favor the other approach.

This is all with regard to a visitor. As for an individual who has come to live, the Minhagim, stringencies, and leniencies of the new city are binding on him immediately. The ways of his old hometown no longer bind him, including the stringencies as well.

### **Minhagim and Nedarim**

#### *Minhagim/Chumrahs with Strong Basis's*

It seems from the G'morah that the power of a Minhag of a place/family is one of Neder<sup>48</sup> as well as an issue of "Toras Imecha"<sup>49</sup>. It should be noted that the head of a family has the power to accept a Chumrah or Minhag on himself and his family including generations yet to come, and it is binding on those future generations as Toras Imecha.<sup>50</sup> It is a Machlokes Rishonim as to whether such Minhagim may be annulled through Hataris Nedarim. The Rosh<sup>51</sup> holds they can and the Rashba<sup>52</sup> holds they are irrevocable. The Halacha follows the former, and such "Nedarim" may be annulled (YD 214:1 – R'ma).

#### *Baseless Minhagim:*

This goes for Minhagim that are valid and logical, such as the creation of a fence so as not to come to transgress a commandment or the like. As far as Minhagim that have no basis in Halacha and no source are concerned, the rule is as follows; When the adherents to this minhag are not knowledgeable and you come to them and violate this baseless minhag in front of them, you are breaking down certain psychological barriers for them and you are creating the impression that Nedarim are a light matter, which of course they are not. Thus, one should only violate such a minhag in front of knowledgeable people or in private.

#### *Minhagim/Chumrahs Based on Error:*

The above holds true for Minhagim/Chumrahs that have some basis in Halacha, or even if they do not have a basis, the originators of the Minhag understood that. If however, the minhag is based on an error then according to the Rosh quoted above there is no need to annul the "vow" and the minhag need not be followed at all. According to the Rashba, however, the Neder needs annulment. The Halacha again follows the Rosh.

#### *Temporarily Violating a Minhag Based on Extraordinary Circumstances*

The Mechaber (YD 214:2) writes that one who has a Minhag to fast during the 10 Days Of Repentance and becomes weak and thus no longer wants to fast during this period needs to be Matir Neder to eat. The Shach seems to understand this to apply even to an individual who will continue his Minhag next year as well, since the Minhag was taken on without such an exception in mind. The Dugal Mervavah argues that a distinction must be made between an exceptional circumstance where the individual wants a one time "out" of his minhag as opposed to the current case which is of an individual who has become to frail to continue this Minhag indefinitely. Where the current circumstances are such that the individual finds it hard to keep the minhag now, but plans to continue it under other circumstances, then no Hataris Nedarim is necessary and the person may temporarily violate his Minhag. The Minhag was never accepted for abnormal circumstances. This is the Halacha.

Example: The minhag among Ashkenazim is not to rinse out one's mouth with mouthwash or even water on any of the fast days. If one however is suffering from an abnormally bad taste in his mouth he may rinse it out. The minhag was not accepted for such abnormal occurrences.

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<sup>48</sup> see Nedarim 15a and 81b

<sup>49</sup> P'sachim 50b

<sup>50</sup> ibid

<sup>51</sup> Both in his commentary to Nedarim 81b and P'sachim Perek 4 #3

<sup>52</sup> Responsa 3:236