

The Oral Law



CHAIM H. SCHIMMEL

THE
ORAL
LAW

The Rabbinic Contribution
to *Torah sheBe'al Peh*

with notes & comments by
HaGaon HaRav Simcha Wasserman zt"l

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The Oral Law
The Rabbinic Contribution to Torah sheBe'al Peh

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משה פיינשטיין
ר"ם תפארת ירושלים
בנוא יארק

בע"ה

אנה בא לפני מהר"ר חיים שימפעל שליט"א מלאנדון וזראה לי ספרו
"תורה שבעל פה" ובקש הסכמתי עליו. ובאחר שנכתב בשפת אנגלית, מסרתיו
לנכדי, הרה"ג מזהר"ר מרדכי טנדלר שליט"א שקראו לגברי ושבתו מאד
לפני, כספר שמבאר באופן מברוא וקל להבין, בדאיות ומקורות, כמה
יסודות עיקריות בענין התורה שבעל פה.

ועל כן חריני שולח בזה ברכתי להמחבר שליט"א, שיצליחתו השי"ת
בהפרצת ספרו זה, ושיהיה לתועלת להרבות בכלל ישראל ידיעות היסודות
אודות תורתנו הקדושה, ושיגרום הרבצת תורה שבזכותה נזכה כולנו
בקרוב להרמת קרן התורה ע"י משיח צדקינו.
הכו"ם לכבוד תורה ביום כ"א שבת תשמ"ג בנוא יארק.

משה פיינשטיין

משה פיינשטיין



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ניכר שהמחבר עמל רבות כדי שיצא מתחת ידו דברים ברורים הכתובים בבחירות רבה ובסגנון אשר יאפשר לקורא להבין גם את הדברים הקשים ביותר. קלות.

אם כי הספר נועד כתחילתו לקהל הרחב, אבל בטוחני שגם בני ישיבה ויכולו להפיק תועלת מהקריאה בו.

ואין לי אלא לברכו, יהא רעוא מן שמיא, שדבריו יתקבלו בבי מדרשא ויפוצו מעינותיו הוצה להנגיל תורה ולהאדירה, אמן.

החתימת ספרים התורה לנחמיה

To the memory of my parents ז"ל

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Foreword

I have loved the Torah of R. Chaim (Harry) Schimmel ever since I first encountered it and him. He brings a penetrating mind and a loving heart to “the word of God; that is, Jewish law.” His Torah always strives to be *emet le’amito* – not just about truth on the surface but also its connection to a deeper truth beneath. That is the difference – and it is all the difference – between being clever and being wise. The insights of this book are wise.

One of the striking features of *The Oral Law* is its insistence on getting to fundamentals, in particular the tension between two essential truths: first, that there is nothing within the Oral Law that was not already given to Moshe at Sinai; second, acknowledgement of the remarkable contributions made by our Sages themselves, that made them conclude that in some sense “a Sage is greater than a prophet.” They knew how to hear the voice of Sinai and distill it into rules of action, so that God’s will could become real in the life of the community, the Divine word translated into human deed.

One of the particular fascinations of this new edition is its important chapter on the moral *svara*, the rabbinic axiom that the morality of the Torah is fundamental to its interpretation. That fact cannot be sufficiently emphasized. The Sages knew that this was at the heart of the Judaic enterprise. In the only place in the Torah that explains why God

chose Avraham, we read: “For I have chosen him so that he will instruct his children and his household after him that they may keep the way of the Lord by doing what is right and just...” (*Bereshit* 18:19). Doing right and justice stand at the core of the Torah’s enterprise.

Interestingly, the prophet Hoshea added two other key words: “I will betroth you to me forever; I will betroth you in right and justice, loving-kindness and compassion” (2:19). Why the difference? Because Avraham, as the first Jew, lived in a world of strangers, and in such a world the operative principles are the relatively thin ones of right and justice. That is an ethic between strangers. Hoshea belongs to a time many centuries later when Jews had long been a people in their own land, and as not just a nation but an extended family, they were bound not only by thin imperatives of right and justice but also by the thick bonds of loving-kindness and compassion.

When we speak of the moral *svara*, it is important to note that the Sages traced their ancestry not to the priests but the prophets: “Moshe received the Torah at Sinai and handed it to Yehoshua, Yehoshua to the elders, the elders to the prophets, and the prophets handed it to the men of the Great Assembly” (*Avot* 1:1). It was the prophets who – more eloquently than anyone else in history – were the moral voice of the nation, telling it time and again that it was not simply military strength, however important that was, but moral and spiritual strength that would ultimately decide its fate. The Sages saw themselves as their heirs.

How are we to understand the connection between bold ethical principles of the Torah and the prophets and the detailed exposition of Jewish law that we associate with the Sages? There are two key texts here. One is Ramban’s commentary on the verse: “You shall do the right and the good” (*Devarim* 6:18):

Our rabbis have a fine interpretation of this. They said, “This refers to compromise and going beyond the requirement of the law.” The intent of this is that initially he [Moshe] had said that you shall observe the laws and the statutes which He has commanded you. Now he says that with respect to what He has not commanded, you should likewise take heed to do what is good and the right in His eyes, for He loves the good and the right. And

this is a great matter, for it is impossible to mention in the Torah all a person's actions towards his neighbors and acquaintances, or his commercial activity, or all his social and political institutions. So after He had mentioned many of them, such as: "You shall not go about as a tale bearer," "You shall not take vengeance or bear a grudge," "You shall not curse the deaf," "You shall rise up before the elderly," and the like, He continues to say generally that one should do the good and the right in all matters, including compromise and going beyond the strict letter of the law ...¹

The Torah gives many examples of ethical imperatives. But one cannot spell out the whole of the ethical life, much of which is too situational and time-bound to lend itself to an exhaustive set of principles. Hence the Torah adds in general terms: "You shall do the right and the good," indicating that there is an entire area where the Torah expects moral behavior from us, even though this involves going beyond what it explicitly commands.

Further clarification comes from the second source, Rabbi Vidal of Tolosa, in his work *Maggid Mishneh*:

Our perfect Torah sets forth general principles for the cultivation of virtue and good behavior. The statement "you shall be holy" means, as the rabbis said: "Sanctify yourself in what is permitted to you," so that you should not be overindulgent in the satisfaction of your desires. Similarly, the Torah says: "You shall do the right and good," meaning that you should deal well and uprightly with people. It was not appropriate in all this to command details, because the commandments of the Torah are obligatory for every period, all time and in every circumstance, but the virtues of human beings and their conduct vary according to the time and the people concerned. The Sages of blessed memory specified some useful particulars included under these principles, some of which they made binding law, others recommendations before

1. Ramban on *Devarim* 6:18.

the fact but not binding or actionable after the fact, and still other rules for those who seek the way of special piety.²

The *Maggid Mishneh* is telling us that the Sages, knowing that the Torah's ethical concerns were not restricted to matters explicitly commanded or forbidden, availed themselves of a range of imperatives – some categorical, others aspirational, but in each case carrying through the moral program of the Torah itself. The Sages did not see themselves as moral innovators; to the contrary: if it had not been said at Sinai they could not have taught what they taught. But they recognized that it was their task to bring the sacred word of God down from heaven to earth so that it became real in the lives of the nation as a whole.

The very way that the Torah structures these commandments, by sketching them out in broad strokes rather than comprehensive detail, was itself a mandate to the Sages both to institute certain *Takkanot* and to use the ethical principles of the Torah itself to interpret Halachah.

One of the most interesting elements in the new chapter of the book on the moral *svara* is the distinction between cases where the law itself has a moral dimension, as in the case of the prohibition against putting a stumbling block before the blind, and a case where we say: *ein lecha bo ela chiddusho bilvad*, one cannot extend a stated *chiddush*. R. Schimmel brings the view of R. Shmuel Landau, son of the *Noda B'yehuda*, that a *chiddush* is a command that runs contrary to *svara*. When there is a moral dimension the Sages tended to give an expansive interpretation to the command, but when there was dissonance they gave it a restrictive reading. Moral concern, in other words, was fundamental to the way the Sages interpreted the biblical text, and it determined whether they read it broadly or narrowly. In so doing, they were honoring their self-definition as heirs to the prophets.

The same spirit animates the Sages' *Takkanot*. Think of such principles as *mipnei takkanat hashavim*, certain leniencies in restoring stolen property so as not to make it too difficult for offenders to atone and make restitution. This echoes the spirit of Yechezkel's message: "As surely as

2. *Maggid Mishneh* on *Hilchot Shechenim* 14:3.

I live, declares the Sovereign Lord, I take no pleasure in the death of the wicked, but rather that they turn from their ways and live” (33:11).

Or consider the principle *kedei shelo levayesh et mi she'in lo*, to avoid embarrassing those who are disadvantaged or in need. On certain days of the year when young ladies went out to dance before potential suitors, they wore borrowed clothes so as not to put those who did not have new clothes to shame. The equal dignity of all is implicit in the first chapter of the Torah, which tells us we are all equally in God's image. It would be hard to imagine another society so sensitive to the feelings of the poor.

Or the principle *chasa haTorah al mamonam shel Yisrael*, that the Torah is considerate of the financial concerns of Israel. This was derived from one of the biblical laws of sacrifices and became a general principle of the Sages in cases where they feared that the cost of living a Jewish life was in danger of becoming prohibitive. The poor must have the same access to the Divine as the rich.

One of the most interesting and far-reaching of rabbinic *Takkanot* was the principle of *marit ayin*, the appearance of wrongdoing. There is a difference between this and the principle of *chashad*, suspicion. The latter referred to cases where one is doing something permitted but an observer might think one is doing something forbidden. In such a case we are bound to avoid suspicion under the principle: “You shall be innocent before the Lord and before Israel” (*Bemidbar* 32:22). *Marit ayin* is different. It occurs when people seeing what a person is doing might come to do something forbidden because they do not realize the special circumstances that apply in that person's case. What this implies is remarkable: *We are expected to behave as if we were a living Shulchan Aruch*. Just as a code of law should be unambiguous, so should our conduct be. People should be able to see how we act and from that learn how to live.

These are all profound indications of how interfused morality and Halachah were for the Sages, and how deeply they had internalized the spirit of the prophets from whom they traced their descent, as well as the overarching themes of the Torah itself.

The Oral Law is a fine book by an exceptional Torah scholar. How beautiful it is that this new edition will be published as R. Chaim and his *ezer kenegdo* Hannah have now moved to the Holy City, Jerusalem,

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where they are both participating in and contributing to the realization of Isaiah's prophecy: "For the Torah shall come forth from Zion" (2:3).

May the book find many new readers and re-readers. They will be enlightened, impressed, and blessed.

בברכה וכבוד רב,

Rabbi Jonathan Sacks

May 2019

Acknowledgments

Vigilance dictates that one should not be excessively vigilant.

(Rabbenu Bachaya Ibn Pekudei,
Introduction to *Chovot HaLevavot*)

Vigilance would have advised that I do not undertake this work at all. It requires a man very much more qualified than I, to do justice to a subject of such sanctity and magnitude – to analyze the structure of the Oral Law, upon which the entire edifice of traditional Judaism rests.

But I undertook this work because it was of great interest to me, and my lifetime friend, Professor Cyril Domb F.R.S., encouraged R. Yaakov Feldheim to publish my work. I am deeply grateful to my friends for their involvement. The relative success of this book goes to show how wise are the words of Rabbenu Bachaya.

I must now express my thanks to Mr. Matthew Miller and R. Reuven Ziegler, who suggested to me that they would like to publish a new edition of *The Oral Law* at Maggid Books, for their help throughout bringing this volume to fruition.

This gave me the opportunity to add a new chapter and an afterword on Halachah and morality. Above all, it prompted Rabbi Lord Jonathan Sacks to write an erudite and elegant foreword to this new edition. Rabbi Sacks is not only a Torah scholar but also one of the lead-

ing Jewish thinkers of our time. Rabbi Sacks and Rabbanit Elaine are generous, warm, and dear friends of our entire family.

There are not many books that have the privilege of a contribution from both HaGaon R. Simcha Wasserman, and להבחל"ח Rabbi Jonathan Sacks.

I remember with gratitude HaRav Shlomo Zalman Auerbach, who always made me welcome in his home and gave me generously of his time. I had the privilege to raise with him, on occasions, some of the issues discussed in this book. In his presence, one had the unique "vision of greatness" to which I refer in the Introduction.

I must also express my thanks to R. Ephraim Landau, who edited R. Simcha's hand-written notes, and to my dear nephew Mark Schonfeld, who kept me on the right side of copyright law.

Finally, my thanks to the following people who worked on the book at Maggid Books: Shira Finson, Ita Olesker, Avichai Gamdani, Adam Bernstein, Sorelle Spitzer, Yonatan Shai Freedman and Rachel Kellner.

In writing this book, I have benefitted from discussions with my children Jacob, Moshe, Chaim, and Hayley, and on occasion have taken their advice – and, of course, that of my wife Anna. The constant encouragement from my wife made my "learning" possible and my plans for this book a reality. As Rabbi Akiva put it, "*Sheli v'shelachem, shelah hi.*"

This edition is dedicated to the loving memory of my parents ז"ל. Suffice it to say here that in the war years, when this was not taken for granted even in the most Orthodox circles, my parents arranged for me to spend my summer holidays in yeshivah – and eventually to remain in the yeshivah for several years. For this alone – and for so many other things – my debt to them is beyond words.

Finally, a prayer:

מה אשיב לה' כל תגמולוהי עלי... ואני תפילה: יהי רצון מלפניך שלא תמוש התורה מפני ומפי זרעי וזרע זרעי עד עולם.

Introduction

The rabbinic contribution to *Torah sheBe'al Peh* (the Oral Law) is the subtitle and indeed the major concern of this book. The Sinaitic origin of *Torah sheBe'al Peh* – the principle of *Torah min haShamayim* – has been assumed and is the starting point of these investigations. This principle is defined and explained in the chapters of this book, but no attempt has been made to probe or prove its correctness.

There are a great number of writers on this subject who have departed from this principle, while a modern book which deals with the Rabbinic contributions to *Torah sheBe'al Peh* without departing from this principle is hard to come by.

Since the entire Oral Law is from Sinai, how did disputes arise? How did the Sages act when new situations arose that were not provided for in the tradition? To what extent did the Sages enjoy legislative powers? Why are Rabbinic laws binding? Were legal fictions employed to develop Halachah? How did the Mishnah evolve?

These problems are of great importance to anyone who wants to understand what Judaism has to teach, and some of these issues have given rise to great conflicts in our history – such as the schism between the Pharisees and Sadducees some two thousand years ago, down to the conflict between the Orthodox and Reform in our days.

In this book we make it clear that although the law revealed

at Sinai always reigned supreme, the Sages made a massive contribution to its development.

We reject what we call the minimal position, and also the maximal position taken by some modern scholars who are not in the Orthodox tradition. The minimalists make the claim that the Sages never said anything of their own accord. They never did more than pass on traditional teachings which they themselves had received from their masters. They quote *Rishonim* (pre-sixteenth-century Rabbinic authorities) who they claim support this position.

There is indeed a Talmudic saying which might have lent credence to this position. The Gemara states: “R. Elazar said...whoever makes a (halachic) statement he has not heard from his teacher drives the *Shechinah* (Divine Presence) away from Israel” (*Berachot* 27b). The Rosh, however, one of the important *Rishonim* of the thirteenth century, interprets this saying differently. He reads it as if the words in brackets had been part of the text in the following way: “Whoever makes a statement [of his own and claims that he had heard this statement from his teacher whereas in fact] he has not heard [it] from his teacher drives the *Shechinah* away from Israel.”

This interpretation is reminiscent of an admonition by the Chasam Sofer to his pupils: “I do not mind if you say *my* Torah [thoughts] in *your* own name, but I very much mind if you say *your* Torah [thoughts] in *my* name.”

The maximal position, which we reject even more strongly, claims that the Sages acted as though the Oral Law had been their own property, so that they could do with it whatever they pleased. They added to it and subtracted from it as they saw fit. Particularly, they adapted it to suit the ethos of their own environment and time.

In this book, we show – without going into the polemics (we indulge in polemics in this Introduction only) – that the Sages acted only within the rules and limits laid down by the Sinaitic tradition. Further, that they did not aim to adapt Torah to changing times, but rather to preserve Torah in changing times.

The maximalist often quote the *Pruzbal* (see *infra* p.117) in aid of their argument. We think the *Pruzbal* lends no support to their claim at

all. On the contrary, it is a patent illustration of the aim of the Sages to preserve and reinforce Torah values in changing times.

The *Pruzbal* was a device instituted by Hillel to enable a creditor to continue to collect his debt when it became due, even after a Sabbatical year (*Shemittah*). The Gemara makes it quite clear that Hillel initiated the idea of the *Pruzbal* in order to protect the Torah value of lending money to the poor. There is no suggestion that Hillel felt that the *Shemittah* law was out of keeping with the ethos of his time. The Gemara says that “Hillel instituted the *Pruzbal* because he found that people were not lending money to those in need for fear that the debt would be remitted in a Sabbatical year” (*Gittin* 36a).

In the traditional view the great Rabbinic leaders were, so to speak, partners with God in the creation of *Torah sheBe'al Peh*, just as man is partner with God in developing the physical world. And just as man has to act within the boundaries imposed by the laws of physics in developing the world in which he lives, so the Sages had to act within the limits of Sinaitic law in developing *Torah sheBe'al Peh* which they had received (see Chapter 5). The idea that man can become a partner with God by appropriate interpretation of Torah is a time honored tradition, as the Gemara says: “A judge who tenders a perfectly true halachic decision, becomes a partner with God in creation” (*Shabbat* 10a).

The great eminence to which this elevates the Sages should inspire us to accept their sovereignty even in matters we cannot understand, but it should not deter us in any way from attempting to understand and analyze their works, their words and their methodology.

The Rambam says: “It is appropriate for every man to contemplate the laws of the Holy Torah and to understand their full depths according to his power to do so, and what he does not understand...he must still treat with great respect” (*Hilchot Me'ilah* 8:8).

The work of the Sages can conveniently be classified under two headings: *Interpretation* and *Legislation*. It has been said that interpretation is similar to being asked to continue a story which someone else has started and to finish the story in the spirit of the original storyteller. In contrast, legislation is like telling a completely new story.

Applying this analogy, *mutatis mutandis*, to the Oral Law we can understand that wherever the Sages interpreted the law, the interpreta-

tion had the force of Torah law. It is part of the “old story”; it was a discovery of what Torah law had always been. On the other hand, whenever the Sages acted as legislators, they were telling a “new story,” and therefore the law had the status of Rabbinic Law only.

In order for the Halachah to say something new, legislation had to be enacted. Thus, it took legislation to prohibit “weighing and measuring” on the Sabbath, although the Torah had already provided the injunction: “On the Sabbath day...you shall do no work” (*Shemot* 20:10). The Sages could not by way of interpretation give the term “work” a meaning it never had before. If “you shall do no work” did not prevent “weighing and measuring” when the Torah was given at Sinai, it could not be interpreted to do so centuries later either.

Interpretation was mostly by means of *svara* – which is normally translated as “logic,” but is more accurately described in many cases as “sound judgment,” “good sense” or “a moral principle,” rather than strict logic.

There can be more than one single conclusion to a given situation as a result of applying “good sense” and “moral judgment”; hence, the Rambam says of interpretation of laws that it is here, and here only, that there can be a dispute between the Sages as to the correct final, legal conclusion. There can be two or more different possible conclusions and the final decision on occasions may turn on a very fine point. *Elu velu divrei Elokim Chayim* – two different views can at times both be “the voice of God.” (See Rashi, *Ketubot* 57a, s.v. “*Ko mashma lon.*”)

On occasions, interpretation was by means of *drash* – the use of hermeneutic rules of Sinaitic origin. These enabled the Sages to derive laws from the Written Torah. Frequently, however, a law of Sinaitic origin or a law derived by *svara* appear in the Talmud as if it were produced by *drash*. In this case, it is the law that produced the *drash* – not the *drash* that produced the law. This is something which a student would do well to bear in mind when he has difficulty in understanding how a certain *drash* could have produced that particular law. The “why” and “how” of this will be discussed in detail in the relevant chapter of this book.

In addition to their task of interpreting the law and providing new legislation, the Sages had a third task – that of passing on the halachic tradition to future generations.

I would like to suggest that there is a hint of this in the Mishnah (*Avot* 1:1): “The Men of the Great Assembly said three things: Be deliberate in law (*interpretation*), develop many disciples (*pass on tradition*) and make a fence for the Torah (*legislation – Gezerot and Takkanot*).”

The Halachic tradition was passed on by word of mouth from teacher to pupil in the form of a concise halachic statement called a *mishnah*. Some early *mishnayot* appear to date back to Biblical times and in any event, according to a persuasive opinion, the basic text of all *mishnayot* was concluded at the latest in the first century. The only things added to the Mishnah thereafter were disputes among the Sages (known as *Tanna'im*) regarding minor issues or details (see pp.139–140). There were several collections of *mishnayot* arranged by different *Tanna'im*. However, it is the arrangement of *mishnayot* by Rabbi Yehudah haNasi at the beginning of the third century which became the standard accepted text, generally referred to as “our Mishnah.”

The *mishnayot* were never arranged in the manner of a readily accessible code of law. Mishnah always required the personal teacher-pupil relationship – so that even when the time came that the Oral Law was committed to writing, it remained in a sense *Torah sheBe'al Peh*. The teacher was still indispensable to complete the tapestry of Halachah.

We find an example of this with regard to the Mishnah in *Bava Kama* (3:5): “If A places a jug in the street and B stumbles over it and breaks it, B is not obligated to pay compensation to A.” Nothing can be clearer than that statement – or can it? The Talmud asks: “Is B not obliged to look where he is going?” So why is he not liable to pay compensation to A? In answer, the famous Sage of the Talmud, Shmuel, says: “The Mishnah is talking of an accident which happens at night, when it is dark and one cannot see.” We would add here that Shmuel is not saying, “I know as an historical fact that this Mishnah was talking about nighttime.” Rather, he is saying, “I know it as a halachic fact; for my knowledge of Halachah tells me that this statement is true only if it was speaking of an accident at night.”

Questions remain to be asked. Why was the Mishnah, and indeed later the Talmud, never arranged as a more accessible code of law? Why does it not complete a single topic before moving on to the next?

Why does it not start with a general principle and continue from

there to consideration of details? Why, in the case of the *mishnah* we have just considered, was a fact that is absolutely crucial omitted in the text, and why does this pattern repeat itself from time to time throughout the Mishnah?

We would suggest that the Sages always preferred that *Torah sheBe'al Peh* should remain a law which could not be mastered on one's own, whether it was studied by rote or from a written text. We would argue that it was left as an incomplete text not, as some might suggest, in order to facilitate fundamental change. Rather, on the contrary, in order to prevent fundamental changes, it required a teacher who could be relied upon to interpret it in the light of the Divine Giver's intent and the Sinaitic tradition.

It was of paramount importance that not only should a teacher be personally involved in passing on a tradition, but that the teacher himself should be of impeccable character, as the Talmud says: "Let the teacher be like an angel of God, and then seek Torah from his mouth" (*Chagigah* 15b).

The need for a teacher, and the exemplary character of the teacher, combine to preserve the authenticity of the tradition, and to give the student the inspiration and vision of greatness without which Torah education is impossible.

The first chapter of this book emphasizes that "part of the Divine Law...was made by men inspired by *ruach hakodesh*," and the last chapter concludes: "...the Mishnah is [described in *Midrash Tanchuma* as] the mystery of God, and God hands over His mysteries only to the righteous."

It is appropriate that our investigation of the Oral Law should have brought us full circle. For that is the nature of all Jewish learning. It is a continuous cycle of constantly returning to where we began. As we say in concluding a volume of the Talmud: "*Hadran alach* – we shall revisit you," as if addressing a good friend from whom it is hard to part.

Chapter 1

The Origin of the Oral Law

INTRODUCTION

The Jewish People are frequently called “the People of the Book”; yet if one were to search out a people who follow the teachings of the Written Law (*Torah sheBichtav*) literally, one might be led to the Samaritans, who still practice their religion on the outskirts of Shechem, or the Karaites, who are now settled to the south of Tel Aviv, but never to the Jewish People. The Jewish People do not now follow the literal word of the Written Law, nor have they ever done so. They have been fashioned and ruled by the verbal interpretation of the written word, more particularly by the Torah, which embraces both the Written and the Oral Law. Rav D.Z. Hoffman writes as follows:¹

The Bible word read from the written book and the teachings heard from the mouth of the Sages are for the [Jew] the two sources from which he draws the Torah received by Moshe from God on Sinai. The Torah is one, although the source from which it issues is twofold, the teaching which comes to us from the Mishnah is of identical date and origin as that which is derived

1. *Die Erste Mischna* (Berlin, 1882), p. 3.

by interpretation of the Scriptural word; all is given by one God and communicated by one and the same prophet. Hence, when we speak of written law and the oral law, we have in mind one and the same law of God derived in part from the Divine word committed to writing and in part from the authoritative statements of the teachers of tradition.

In this short paragraph, Rav Hoffman sets out one of the fundamental propositions of tradition Judaism which we are about to examine, namely that the substance of the Oral Law is of Sinaitic origin. The remainder of this chapter will discuss how, in addition to this substance of the Oral Law that is of Sinaitic origin, there is the Oral Law that the Sages had not received from Sinai which they produced by interpreting the tradition and by creating new legislation. First, however, we must emphasize the Sinaitic origin of the Oral Law, because it is important not to lose sight of the fact that the basic principles of the Oral Law are of Sinaitic origin and that the law which was *made* rather than revealed takes only a secondary place. Indeed, it will be shown how the power of the Sages to make and interpret law stems from the revealed law and is circumscribed by it. The revealed law reigns supreme, notwithstanding the fact that the other law is also part of the Divine Law and was made by men inspired by *ruach hakodesh*,²⁽⁸⁾ “so that they shall not err in their judgment.”³

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2. **Bava Batra* 12a, *Ramban ad loc.; *Vayikra* 29:4; *Ramban, *Devarim* 17:11; *Divrei Chayim*, *Yoreh De'ah II*, responsum 105: “Everyone agrees that *ruach hakodesh* did not leave the Sages.” Rabbi Yonatan Eibeshutz, **Urim v’Tumim*, quoted by *HaTalmud u’Madai’i HaTevel* (Lvov, 1928), p. 111.
 3. *Vayikra Rabbah* 29:4; Chief Rabbi Jakobovits writes: “Judaism never claimed infallibility for its spiritual leaders. *Journal of a Rabbi* (New York, 1966), p. 229. See *Tashbatz* 2:9.
- * The full text of all “starred” footnotes is printed in the Hebrew Sources section at the end of each chapter. Hebrew letters in parentheses indicate the notes of Rav Simcha Wasserman, which are found at the end of each chapter.

SECTION I: ORAL LAW OF SINAITIC ORIGIN

It is fortunate that whatever proof there is for the Divine origin of the Torah and the Sinaitic origin of the Oral Law, it is never quite sufficient to be altogether conclusive. Otherwise, the Jews would have lost a faith and an inner conviction and would have gained a mere science as a substitute.

The Written Law Cannot Be Understood Without An Oral Law

Nevertheless, it is possible to show that the Written Law could never have stood alone and that at the same time as the Written Law was given at Sinai, it must have been accompanied by an oral tradition.

Hillel attempted to show this when he was faced by an intending proselyte, who was quite willing to accept the Written Law but would not accept the oral tradition. The Talmud⁴ in an *Aggadik* passage relates how Hillel showed him that such an attitude was completely untenable, because without an oral tradition it is not possible even to identify the letters of the *Alef-Bet*.

There are two further arguments of which Hillel might have made use:

1. That it is difficult, if not impossible, to make sense of the Written Law without an oral tradition.
2. That there are principles of Oral Law which date from the same time as the Written Law.

The Necessity for an Oral Tradition

There are countless terms in the Scripture that are undefined – for example the term “work” in sabbatical law, or the term “slaughtering” in *kashrut* law. These are all terms which the Torah uses, but does not define. It does not define what “work”⁵ is forbidden or how animals are to be “slaughtered.”⁶

4. *Shabbat* 31a

5. **Shemot* 31:14.

6. **Devarim* 12:21.

There are basic legal concepts and institutions, the existence of which is assumed by the Torah, but which are not further explained.⁷ For example, without previously specifying the formalities of marriage and divorce, the Torah states that a first husband cannot remarry the wife he has divorced, if in the meantime she has been married to another man.⁸

Read without any oral tradition, there are passages in the Bible which appear contradictory. The number of days during which *matzah* (unleavened bread) must be eaten on Pesach is given as seven in *Shemos*⁹ but as six in *Devarim*.¹⁰ The Oral Law¹¹ explains the discrepancy by stating that the six-day period is one during which the eating of unleavened bread is voluntary, as it is equally permissible to eat potatoes or any other food not containing leavened substance. The seven-day period includes the one day (i.e. the first) on which there is a positive duty to eat *matzah*.

What meaning have such contradictory passages, without some oral tradition? Also, the fact that the Torah frequently deals with the exceptional case, rather than with the principles, indicates the reliance on another statement of law – namely the Oral Law. Rabbi Shimshon Raphael Hirsch, the nineteenth century founder of modern German Orthodoxy, in his commentary to the Pentateuch, points out that in the Scripture, civil and criminal law commences with the words, “These are the laws which you shall put before them,”¹² and the Torah immediately proceeds to the laws of slavery. The Torah does not even consider it necessary to begin by stating the laws and principles concerning personal liberty and freedom, because for these principles, complete reliance is placed on the Oral Law.

Principles of the Oral Law from the Time of the Written Law

The Mishnah, too, yields some evidence of the existence of an Oral Law at the very dawn of Jewish history. There are laws contained in *mishnayot*

7. See R. Yehudah haLevi, *Kuzari, Maamar 3, par. 35.

8. **Devarim* 24:1- 4.

9. *Shemot* 12:15.

10. *Devarim* 16:8.

11. *Pesachim* 120a.

12. *Shemot* 21:1.

which have relevance only to a state of affairs which prevailed before the Jews first settled in the Land of Israel.¹³ We shall mention two examples:

One *mishnah*¹⁴ deals with leprosy signs which had already appeared upon one of the people *before the Torah was given at Sinai*. It rules that such signs did not render such a person unclean, even after the Torah was given.

Another *mishnah*¹⁵ deals with the cities which were set aside as a refuge for a man who killed by accident. There were three such cities east of the Jordan, and three in the Land of Israel.⁽²⁾ The *mishnah* rules that when the Jews first conquered the land east of the Jordan, though they appointed cities of refuge there, these were not operative until all six cities had been designated.

There must already have been an Oral Law in existence at the time of Sinai and when the Jews reached the Jordan; to argue otherwise would mean that these laws were formulated at a time when they no longer applied in practice.

Furthermore, mention should be made of two *mishnayot* which deal with problems that arose when the Israelites first reached the Land of Israel. The problem of *orlah* (which prohibits the free use of the trees until their fifth year), and its effect on these first settlers in Israel is considered by the Mishnah. Did the laws of *orlah* apply to trees that had not been planted by Jews, but were found there when the Land was conquered? The Mishnah¹⁶ rules that *orlah* did not apply, except in the words of the Scripture “when you come to the land and plant.”

The problem of the daughters of Zelofechad when they first came to settle in Israel is considered in another *mishnah*. The fact that Zelofechad had no male descendents had already given rise to some problems in Moshe Rabbenu’s lifetime,¹⁷ when it was ruled that Zelofechad’s property should pass to his daughters. The Mishnah¹⁸

13. The argument developed here and the examples follow Rav Hoffman’s *Die Erste Mischna*.

14. *Mishnah *Negaim* 7:1.

15. *Mishnah *Makkot* 2:4.

16. *Mishnah *Orlah* 1:2.

17. See *Bemidbar* 27:1

18. *Mishnah *Bava Batra* 8:3.

states that the daughters of Zelofechad were entitled to the portion of their father and of their grandfather in the Land of Israel. The Land was to be divided according to the entitlement of those who left Egypt (among whom both their father and grandfather were to be counted) and if they were no longer alive, their descendants took their respective shares.⁽²⁾

All these *mishnayot* indicate that the Oral Law existed from the very outset of Jewish history. These *halachot* are almost as old as the Jewish People themselves. No one with an unprejudiced mind would suggest that these *halachot* were produced after the events to which they relate. It is absurd to suggest that some Sages, centuries after the laws were given at Sinai, enacted a law which applied to people who had leprosy signs before the Torah was given. Who could possibly be affected by such an enactment? So, we find an Oral Law in existence at the time of Sinai and at the time when the Israelites reached the promised land.

*An Oral Law Must Always Have Existed
but What Did It Comprise?*

These *mishnayot* show not only that the Oral Law existed at an early date, but also *what* it comprised. The evidence of the Scripture itself, where certain apparent deficiencies indicate that there must have been an Oral Law to complement the text, does not show *what* this Oral Law comprised. Those who subscribe to the traditional view claim that this Oral Law was the *Torah sheBe'al Peh* taught by the Sages. Others – such as the Saducees – were not prepared to accept that the very *Torah sheBe'al Peh* which the Sages taught was the tradition which had always accompanied the Written Law and which had, in fact, been handed down to Moshe by God Himself. They, too, had to admit that there had always been an oral law to explain, expound and supplement the Written Law, but they would argue that the original Oral Law was not one and the same with that taught by the Sages.⁽⁷⁾ For traditional Judaism, however, it has always been one of the fundamental tenets that “the teaching which comes to us from the Mishnah is of identical date and origin as that which is derived by interpretation of the Scriptural

word;⁽⁷⁾ all is given by one God and communicated by one and the same prophet.”¹⁹

Talmudic Dicta Concerning the Origin of the Oral Law

The Talmud and Midrash contain a number of statements which affirm that the entire Oral Law – including the Mishnah and the Gemara – originated at Sinai,²⁰ where it was given by God to Moshe Rabbenu.²¹ Moshe knew all that a conscientious student of the Torah would ever produce in the future²² and when God gave him the Torah, He explained it to him in all its detail.²³

How do the traditional commentators understand these statements? Rambam,²⁴ the great eleventh-century philosopher and codifier, claims that, for example, when God gave the laws of *sukkah* to Moshe, He did not only say, “You shall dwell in booths seven days.” He added that all men (but no women) are obliged to eat, drink and sleep in the *sukkah*; that the obligation does not apply to those on journeys, or to the sick; that the minimum measurements of the *sukkah* are 7x7x10 *tefachim* (handbreadths) and that certain materials are permissible for constructing the roof, and others are not; and that He gave all the other detailed instructions comprised in the Oral Law.

If this is the case, the question may well be asked: Are not they

19. *Die Erste Mischna*, loc. cit.

20. **Berachot* 5a.

21. See *Tradition*, Vol. 9, nos. 1 and 2, where Professor Wyshograd discusses the Orthodox view regarding “revelation” and the form in which God “spoke.” We would suggest that when the Torah states that God “spoke,” it means that the nearest equivalent in human terms to what took place is “speech,” because the Torah makes use of human terms to describe superhuman events.

22. *Kohelet Rabbah* 1:9; **Talmud Yerushalmi, Pe’ah* 2:4; **Megillah* 19b.

23. **Sifra Behar*. See, however, *Shemot Rabbah* 41, where R. Avia asks rhetorically “and did then Moshe learn the entire Torah?” and he replies, “No, God taught him only the principles.” Also, *Sefer Halkkarim* 3:23 states: “It is not possible to claim that God gave the Torah in such a way that it should provide for all times and all events. Moshe was given only the principles, by means of which the sages of future generations deduced the laws applicable to any situation.”

24. **Introduction to Seder Zera’im*.

right who claim that the Sages did not make any contribution of their own to the Oral Law?

We shall attempt to answer this question.

SECTION II: ORAL LAW OF RABBINIC ORIGIN

Did the Sages make no contribution to the Oral Law? And was everything they said a mere echo of the tradition they had received at Sinai?

At first sight it may appear that at least two great authorities, Rabbenu Chananel and Ra'avad, assert that the Sages contributed nothing original to the Oral Law.

The View of Rabbenu Chananel

Rabbenu Chananel, a tenth-century Biblical and Talmudic commentator, considers the following Talmudic problem. The Talmud²⁵ is faced by two apparently contradictory statements:

1. A statement by the second-century *Tanna*,²⁶ R. Shimon bar Yochai, that those who receive God's Presence are only a few.
2. A statement by the fourth-century *Amora*, Rava, that there are 18,000 who receive God's Presence.

The Talmud accordingly questions the contradiction, "How can R. Shimon say that there are only a few when Rava said there are 18,000 who receive Gods Presence?"

So much for our Talmudic problem. R. Chananel,²⁷ with whose comments on this we are here concerned, has a different problem. He asks: "How can the Talmud challenge a statement of R. Shimon bar Yochai because it contradicts something said centuries later by another of the Sages? Was he to take into consideration in the second century

25. **Sukkah* 45b.

26. A *Tanna* is a teacher quoted in the Mishnah or *Baraita*, in contradistinction to an *Amora*, a teacher whose discussion on the Mishnah is reported in the Gemara.

27. *Commenting on *Sukkah* 45b.

what Rava would be saying in the fourth century?” To this R. Chananel gives the following answer: The words of Rava “merely record a tradition already known to the rabbis...because these statements and others like them cannot be made except when received through the prophets.”

At first this appears to support the view that none of the Sages ever made a statement that they had not received by tradition. However, this cannot be correct because R. Chananel’s statement is qualified by the words “*these statements and others like them,*” words which clearly indicate that he is of the view that the Sages *did* make statements of their own accord. “These statements and others like them” are exceptional, because they deal with a celestial mystery – the question of receiving God’s Presence. In such matters, the Sages would not speak of their own accord nor say anything that they had not received via the prophets.

The View of Ra’avad

There is one other authority who has to be considered in this connection, namely Ra’avad, the twelfth-century Spanish Talmudist, who writes:²⁸ “The Sages of the Talmud and certainly those of the Mishnah never said even a small thing of their own accord, except *Takkanot*, which they instituted anonymously, in order to create a fence around the Torah.”

Here indeed we would have support for the contention that the Sages never contributed anything new to the Oral Law, were it not for the fact that Ra’avad immediately goes on to say:²⁹ “The Sages never had any dispute regarding the principle of any mitzvah; their disputes concerned the details only”; and now come the operative words: “They had heard the principles from their teachers, and had not inquired about the details.” Clearly then, according to Raavad, a substantial part of the Talmud which deals with the detailed application of the mitzvot comprises statements of the Sages not based on information their teachers had received from Sinai, but based on their own understanding of what the law should be, having regard to the principles they had received from their teachers.

28. **Sefer HaKabbalah* (Jerusalem 1956), p. 1.

29. According to one reading of *Vayikra Rabbah* 32:1. See also *Megillah* 19b.

These two authorities do in fact demonstrate that the Sages contributed views, statements and *halachot* of their own. Indeed the very idea that the entire Oral Law was communicated to Moshe is expressed in the words “Moshe knew all that a conscientious student would produce (*mechadesh*) in future,” which indicate further developments of the Law after the time of Moshe. The proposition that the Sages did make original contributions to the Oral Law brings us to another problem: Does this contradict the statement that the entire Oral Law was communicated by God to Moshe at Sinai?

Moshe Did Not Hand Down All the Oral Law He Had Received

There are at least two possible solutions. One is to suggest that although the entire Oral Law was communicated to Moshe at Sinai, Moshe did not pass it all on to future generations. In fact, the *Talmud Yerushalmi*³⁰ suggests that Moshe was not permitted to pass on the entire Oral Law to others. Accordingly, whereas Moshe received the entire Oral Law at Sinai, he did not communicate it all to Yehoshua, his disciple, because he was not allowed to do so.

Much That Was Taught Was Later Forgotten

Another solution lies in the natural erosion caused by the passage of time.³¹ Possibly, in the fullness of time, much that Moshe had passed on was forgotten. The Talmud³² reports that Yehoshua was made to forget three hundred laws as a punishment for a proud answer he once gave to Moshe. Shortly before his death, Moshe invited him to clear up any doubt which he might have regarding *halachah*. The latter gave the proud answer, “I have no difficulties,” and forgot three hundred *halachot* on that

30. **Talmud Yerushalmi, Avodah Zarah* 2:7 and see also *Megillat Esther* on *Sefer HaMitzvot, Shoresh 1* (note 16) and R. Yom-Tov Lipman, *Introduction to *Tosefot Yom-Tov, Masechet Berachot*.

31. See Chazon Ish, *Collected Letters* (Bnei Brak, 1956), Part II, p. 24: “The Sages produced again what had been forgotten.”

32. **Temurah* 16a.

day. Moreover, it would appear that forgetfulness was a penalty exacted from later generations as well, on account of their lack of humility. Had they only had sufficient humility to listen carefully to their elders and diligently absorb their teachings, there would never have been any doubts or controversies regarding the law.⁽¹⁾ As it was, the Talmud reports that the pupils of Hillel and Shammai did not serve their masters as much as was necessary and consequently the number of doubts and controversies increased.³³ The Talmud³⁴ also reports that their master, Hillel, had made a similar complaint against the leaders of his own generation. Had they only listened sufficiently to Shmaya and Avtalyon,⁽¹⁾ the two great teachers, they would not have been in doubt regarding the *halachah*. It may be assumed that all generations were beset by forgetfulness³⁵ and consequently, the Oral Law – communicated in its entirety to Moshe at Sinai – was, by the period of the Sages, incomplete. There were many gaps which remained to be filled, and they were filled by the original contributions of the Sages.

The two categories of law – those which originated at Sinai and those made by the Sages – together formed the *Torah sheBe'al Peh* which is part of the Divine law of God. There is a clear distinction in the nature of the two types of law.

Rambam³⁶ explains that the Oral Law received by the Sages in a direct chain of tradition from Sinai remained for all time clear and certain, free from doubt and controversy, whereas the law which did not come by way of tradition was beset by many disputes; we will discuss this distinction in greater detail.

33. *Sanhedrin* 88b, *Sotah* 47b.

34. *Pesachim* 66a.

35. See **Sukkah* 20a and *Yoma* 81a, *Shabbat* 104a, *Sukkah* 44a.

36. *Introduction to Seder Zera'im*.

**SECTION III: THE TWO TYPES OF LAW DISTINGUISHED
AND THE ORIGIN OF DISPUTES**

While the Sanhedrin Functioned There Were No Disputes

No disputes between the Sages were recorded in early times. If any disputes arose which concerned a matter of law, it was soon settled. The Talmud³⁷ states that all controversies were referred to the Sanhedrin where they were put to the vote. For example, if a question of ritual cleanliness was involved then “if the majority voted unclean, they declared it so; if clean, they ruled even so.” In the result, as long as the Sanhedrin existed, no disputes were recorded.³⁸ The Oral Law spoke with a single voice on every issue. No records had to be kept of the different views,⁽⁷⁾ because once the Sanhedrin had decided the *halachah*, there was only one view that mattered, namely, that which accorded with the decision of the majority. When, however, political conditions no longer allowed a Sanhedrin to function – in the time of Hillel and Shammai – separate schools arose, each having its own view, and there was no forum in which these disputes could be resolved.⁽²⁾

*Even After the Sanhedrin Ceased, Sinaitic
Law Remained Free from Disputes*

However, the position was different regarding Sinaitic laws. The Oral Law which had been transmitted in a chain of tradition from Sinai remained

37. **Sanhedrin* 88b.

38. With regard to these early laws, there is only one recorded dispute which remained unsettled. It arose in the following circumstances (**Mishnah Chagigah* 2:2). Normally, the Torah required a person to lay his hands on his Temple sacrifice (see *Vayikra* 1:4). On the Sabbath and *Yom Tov*, however, the Sages had forbidden the handling of animals. The question then arose whether or not the Rabbinic prohibition against handling animals on *Yom Tov* applied even in this case, when the handling of the animals was required in order to comply with the ritual that the Torah had prescribed for sacrifices. This question divided the Sanhedrin for five generations, the *Nasi* taking the one view and the President of the Court the other. No one can say with certainty why this controversy was not resolved in the same way as the other disputes.

for all time free from controversy and doubt. There was no question of settling disputes, because disputes could never arise. If, in the course of a Talmudic argument, one of the Sages expressed a view that a certain law seemed to him to be open to objection, he would usually take care to add that if that law was based on tradition, he would therefore accept it.³⁹

Yet, even without adding this rider, it was understood that a law could not be challenged if it had been received in a direct line of transmission from Sinai, and so such laws remained for all time free from doubt and controversy.

The Classification Adopted by Rambam

What has been said so far is of the greatest importance in the classification adopted by Rambam.⁴⁰ For he draws a clear distinction between the two types of law, those which are of Sinaitic origin and which are not subject to controversy, and those not of Sinaitic origin, which are subject to controversy. In this classification, the Sinaitic laws consist of:

1. Interpretations received at Sinai of the Scripture
2. *Halachah l'Moshe miSinai*

Non-Sinaitic laws consist of:

1. Laws derived by the Sages⁴¹
2. *Takkanot* and *Gezerot*⁴²

Problems Concerning Halachah l'Moshe miSinai

More will be said about this classification in the next chapter with particular reference to the non-Sinaitic laws. Here we will add only a few remarks concerning *halachah l'Moshe miSinai*.

39. Mishnah *Negaim* 9:3 and 11:7; *Mishnah *Yevamot* 8:3; Mishnah *Kritot* 3:9.

40. **Introduction to Seder Zera'im*.

41. The Sages derived laws by means of *drash* and logic. See next chapter.

42. See Chapter 3 for *Takkanot* and *Gezerot*.

As Rambam defines this term, it applies to laws which have no intrinsic connection with the Scripture but are of Sinaitic origin. This is its strict technical meaning, although the term is sometimes used more loosely to describe laws which are of long standing, even though they are not of Sinaitic origin.⁴³

This definition of Rambam has been much criticized for two reasons. Firstly, according to Rambam, laws of Sinaitic origin are not subject to controversy; yet there are a number of controversies in the Talmud concerning *halachah l'Moshe miSinai*.⁴⁴ Secondly, according to Rambam, laws classed as *halachah l'Moshe miSinai* are distinguished by not having any intrinsic connection with the Scripture; yet the Talmud describes certain laws as *halachah l'Moshe miSinai* and still connects them via *midrash* with the Scripture.⁴⁵

43. Mishnah *Yadayim* 4:3, *Bartenura*, ad loc.; Rosh, *Introduction to Mikvaot*.

44. See R. Chayim Bachrach in *Chavot Yair*, Responsum 192, who cites many cases of controversy concerning *halachah l'Moshe miSinai*. It seems, however, that disputes in *halachah l'Moshe miSinai* concern only details which do not go to the root of the law. There is no case of *halachah l'Moshe miSinai* where one *Tanna* declares an object kosher or an act permitted and another declares the identical object or act prohibited.

45. *Shabbat* 103b; *Eruvin* 4b. Rambam, Mishnah *Sukkah* 4:9, distinguishes between an open *remez* (allusion) and one that is hidden (or merely an *asmachta*). See also *Megillat Esther* on *Sefer HaMitzvot*, *Shores* 1.

Notes of Rav Simcha Wasserman זצ"ל

א. צריך ביאור כי לא בשמים היא והרמב"ן מתכוין לסיעתא דשמיא. [הערת העורך: אין כוונת מחה"ס שהם פסקו על פי רוה"ק כעין נבואה אלא שע"י יגיעה בתורה בכל קניניה זוכין לרוה"ק כדי לכוין את ההלכה ואת רצון ה' כמבואר בשו"ת חת"ס או"ח סי' ר"ח ואגרות חזו"א ח"א סי' ל"ג. ונראה שזו גם כוונת הרמב"ן בב"ב דף י"ב.]

ב. אין זו ראייה מוכרחת כי אפשר שלמדו אח"כ מה היה הדין מקודם. מ"מ הוא ראייה שהיה הדין כבר אז.

ג. אין הכרח, הרי ירושת בנות צלפחד נוגעת ליורשיהן. [וא"כ גם אם נקבל טענות רד"צ הופמן באותן משניות שאין להן השלכה מעשית בתקופה יותר מאוחרת, מ"מ משנה זו שנוגעת גם להבא יתכן שהוא מדור מאוחר.] [הערת העורך: גם רי"א הלוי ז"ל ב"דורות הראשונים" הפנה טענות אלה שבהערה ב' וג' אל רד"צ הופמן ז"ל, וע' בזה שו"ת שרידי אש ח"ד ע' רכ"ה.]

ד. בפיה"מ להרמב"ם בפ"א מאבות מ"ג מתבאר שהצדוקים הראשונים כפרו גם בתורה שבכתב ורק חזרו לאמת אותה בכדי שיתקבלו דבריהם בביטול המסורה ותורה שבע"פ. [מתוך מכתב למחה"ס שנרפס בקובץ מאמרים ואגרות ח"ג ע' רצ"ז.]

ה. מדמה משנה לדרשות או דרשות למשנה? (הכוונה להעיר על רד"צ הופמן שמדמה הדרשות לתורה שבכתב למשנה או להיפך, והרי שניהם יסודם מחז"ל ואנו רוצים להוכיח שהמשנה והדרשות ניתנו יחד עם התורה בסיני.) ולקמן בפרק ו' מסתפק [מחה"ס] בקידום נוסחת המשנה. [וכל עוד שלא הוכח קידמת המשנה מסיני אין לנו גבוי לקביעותו של רד"צ הופמן.]

הערת העורך: נראה שכוונת רד"צ הופמן לרמות תוכן המשניות והלכותיה לדינים שנתפרשו להדיא בתורה, ששניהם ניתנו ביחד מרועה אחד בסיני, וכן ממש כתב רי"א הלוי ברורות הראשונים ח"א[ה] עמ' 516 שאין הבדל בין דברי התורה המפורשים "בסוכות תשבּו" לבין הקבלה "שאינ מסככין בדבר המק"ט", שניהם ניתנו מרועה אחד, ואילו נידון מחה"ס בפ"ו הוא רק עריכת הנוסח.

ו. טועה בעיקר הענין, והענין שנחלקו רק בסברא מפני חולשת הסברא ולא מפני השכחה. עיין הקדמה לזרעים [פיה"מ להרמב"ם ד"ה אבל אמרם] על הגמ' בסנהדרין דף פ"ח: משרבו תלמידי שמאי והלל שלא שימשו כל צרכם וכו'. [ע"ש שאין להאשימם בכך שלא נתווכחו לפי רמת שכלם של שמאי והלל.]
הערת העורך: אמת שלא הוזכר כאן שכחה. ועם זה ילה"ע דדברי הרמב"ם אינם מוסכמים, דמחה"ס ציין שגמרא זו הובאה נמי בסוטה דף מ"ז: ולפני כן איתא שם "משרבו זוחי הלב רבו מחלוקת בישראל", ופרש"י שאין מטין את אונם לשמוע יפה מפי רבם וסומכים על בינתם.]

ז. הלל אמר מי גרם לכם וכו' שלא שמשתם ב' גדולי הדור, דהיינו גמרא. [הכוונה דמה שאמרו "שלא שמשתם כו" ענינו הוא מה שנקרא גמרא, דהיינו הבנת טעמי המשניות כמבואר ברש"י ברכות דף ה. ד"ה זה גמרא ודף מ"ז: ד"ה שלא שימש ת"ח וע']

גם רש"י סוטה דף כ"ב. ד"ה שמורין, וא"כ אינו ענין ל"שלא שימשו" המוזכר בסנהדרין דף פ"ח: לפי פיה"מ הנ"ל.]

ח. צ"ע מעדויות פ"א מ"ה למה נזכרו דברי היחיד לבטלן וכו'. [כלומר הרי מבואר במשנה שם כמה תועלויות אשר למענם הוזכרו דברי היחיד במשניות. וא"כ מדוע קבע מחה"ס שלא הוצרכו לתעד את הדעות השונות כאשר נחלקו חכמי הסנהדרין.]

הערת העורך: נראה דבסנהדרין דעת המיעוט בטלה לגמרי, והיחיד חייב לחזור בו ע' רמב"ן על סה"מ שורש א', לעומת מחלוקות אחרות דאף שהוכרעו ג"כ לפי הרוב מ"מ אין זה כח הרוב דאורייתא כיון שלא עמדו למנין במושב אחד כמבואר בגט פשוט בסוה"ס כלל א. ולכן בשעה"ח סומכין על יחיד כשלא איתמר הלכתא להדיא כהרוב ע' ט"ז יו"ד סי' רצ"ג סק"ד וכ"כ באו"ז סוכה סי' ש"ו עפ"י מתני' דעדויות. מיהו הש"ך שם סוס"י רמ"ב נקט שאפי' לא נחלקו במושב אחד פא"פ אלא כמחל' התנאים ואמוראים והפוסקים, הלכה כהרוב מה"ת, וסובר דבדאו' אף בשעה"ד א"א לסמוך על היחיד שהוא כאיתמר הלכתא, ולדבריו הדרה קושית הרש"ו.]

ט. היה סנהדרין לילך אחר הרוב אלא שלא נשאלה הלכה למעשה, וצ"ע בעובדא

דיוחנן החורני סוכה כ"ח. וכו' [ששם היה הנידון למעשה ועכ"ז נשארו זקני ב"ש וב"ה בויכוח]. וגם לא היה אפשר לילך אחר הרוב משום דב"ש מחדדי טפי, עיין יבמות י"ד.

[הערת העורך: ב"יסוד המשנה ועריכתה" להרב ר. מרגליות ז"ל עמוד ח' הוכיח שהרומיים ביטלו בי"ד הגדול [ע' רמב"ם פ"א מממרים ה"ד] מטעמים מדיניים וכאשר תיפקודו התאפשר מחדש נתעוררה השאלה מי ראוי למנות ולהמנות ולכן נתחלקו לבתי מדרש שונים. ובסוף דבריו הזכיר ג"כ שלא היו יכולים לעמוד למנין, דבית הלל לכל אדם שנו ובכך היו גדולים במנין, ואילו בית שמאי היו חריפי טפי.]

Hebrew Sources

SECTION I

Ruach Hakodesh Inspired the Sages in Their Law-Making

2.* *Bava Batra 12a*

אמר רבי אבדימי דמן חיפה, מיום שחרב בית המקדש ניטלה נבואה מן הנביאים וניתנה לחכמים.

2. *Ramban, ad loc.*

הכי קאמר אעפ"י שנטלה נבואת הנביאים שהוא המראה והחזון, נבואת החכמים שהיא בדרך החכמה לא נטלה, אלא יודעים האמת ברוח הקדש שבקרבם.

2. *Ramban, Devarim 17:11*

אפילו יהיה בעיניך כ(אילו החכם) מחליף הימין בשמאל, וכל שכן שיש לך לחשוב שהם אומרים על ימין שהוא ימין. כי רוח השם על משרתי מקדשו, ולא יעזוב את חסידיו לעולם נשמרו מן הטעות ומן המכשול.

2. *Rabbi Yonatan Eibeshutz, Urim vTumim*

מִרְן הַגֵּאוֹן הַרְבִּי ר' יוֹנָתָן זצ"ל בִּסְפֵרוֹ "אוֹרִים וְתוֹמִים" יאמר, דמה שמוכיחים לפעמים איזה דין מחודש ואיזה סברא חדשה מדברי חז"ל מדמשני הכי, ולא משני באופן אחר, שמע מינה דאין הדין כן כמו שנראה מאופן האחר שעלה בדעתנו ליישב, כל זה הוא מפני שהתלמוד ברוח הקודש נאמר, ואילו היה אפשר לתרץ באופן זה בודאי היו מרגישים גם המה מזה האופן, ואם חז"ל לא הביאו אופן זה ותייצבו באופן האמור בגמרא, זה האות שהאופן שלנו שעלה בדעתנו לא נכון הוא ואינה לאמיתה של תורה.

* The numbers correspond to the relevant footnotes.

Terms Which Are Not Defined in the Torah

5. *Shemot 31:14*

ושמרתם את השבת כי קדש הוא לכם מחלליה מות יומת כי כל העשה בה מלאכה ונכרתה הנפש ההוא מקרב עמיה.

6. *Devarim 12:21*

כי ירחק ממך המקום אשר יבחר ה' אלוֹקֶיךָ לשוֹם שְׁמוֹ שָׁם וזבחת מבקרך ומצאנך אשר נתן ה' לך כאשר צויתך. ואכלת בשעריך בכל אות נפשך.

7. *R. Yehudah haLevi, Kuzari, Ma'amar 3, par. 35*

אמר הכוזרי: כן אומרים הקראים אבל אחר שמצאו התורה שלמה אינם צריכים אל הקבלה.

אמר החבר: ...התראה כאשר אמר להם: החדש הזה לכם ראש חדשים על הדמיון לא נסתפק העם אם רצה לומר: חדשי המצרים שהיו בנייהם או חדשי כשדים שהיו עם אברהם באור כשדים, או רצה חדשי השמש או חדשי הירח... ומה ענין הזכיחה ושמא היא נחירה או הרג...

והייתי רוצה שיבאר לי החלב האסור והוא דבר עם המותר במעים והקיבה. ...והייתי רוצה שיבאר לי העוף הטהור מן הטמא, זולת המפורסמים, רצוני לומר: בן יונה או תור, ומאין הוא אומר שאין התרנגולת והאזו והקורא ואלברכיה מהטמאים. והייתי רוצה שיתן לי גבול, אל יצא איש ממקומו ביום השבת, אם הוא ביתו או חצירו או רשותו...

8. *Devarim 24:1-4*

כי יקח איש אשה ובעלה והיה אם לא תמצא חן בעיניו כי מצא בה ערות דבר וכתב לה ספר כריתת ונתן בידה ושלחה מביתו. ויצאה מביתו והלכה והיתה לאיש אחר. ושנאה האיש האחרון וכתב לה ספר כריתת ונתן בידה ושלחה מביתו או כי ימות האיש האחרון אשר לקחה לו לאשה. לא יוכל בעלה הראשון אשר שלחה לשוב לקחתה להיות לו לאשה אחרי אשר הטמאה כי תועבה הוא לפני ה' ולא תחטיא את הארץ אשר ה' א' נתן לך נחלה.

Old Laws in the Mishnah

14. *Mishnah Negaim 7:1*

אלו בהרות טהורות. שהיו בו קודם למתן תורה. (מי שהיתה בו צרעת קודם מתן

The Oral Law

תורה לא היה טמא מחמת אותו נגע לאחר מתן תורה. (ר"ע מבטרנורה).

15. Mishnah Makkot 2:4

להיכן גולין, לערי מקלט. לשלש שבעבר הירדן ולשלש שבארץ כנען. שנאמר (במדבר ל"ה) את שלש הערים תתנו מעבר לירדן ואת שלש הערים תתנו בארץ כנען וגו'.

עד שלא נבחרו שלש שבארץ ישראל, לא היו שלש בעבר הירדן קולטות.

16. Mishnah Orlah 1:2

עת שבאו אבותינו לארץ מצאו נטוע פטור, נטעו אע"פ שלא כבשו חייב.

18. Mishnah Bava Batra 8:3

בנות צלפחד נטלו שלשה חלקים בנחלה. חלק אביהן שהיה עם יוצאי מצרים וחלקו עם אחיו בנכסי חפר ושהיה בכור נוטל שני חלקים.

The Entire Oral Law Originated at Sinai

20. Berachot 5a

וא"ר לוי בר חמא אמר ר' שמעון בן לקיש, מאי דכתיב "ואתנה לך את לוחות האבן והתורה והמצוה אשר כתבתי להורותם". "לוחות" אלו עשרת הדברות, "תורה" זה מקרא, "המצוה" זו משנה, "אשר כתבתי" אלו נביאים וכתובים, להורותם" זה גמרא, מלמד שכולם נתנו למשה מסיני.

22. Talmud Yerushalmi, Pe'ah 2:4

מקרא, משנה, תלמוד ואגדה, אפי' מה שתלמיד ותיק עתיד להורות לפני רבו כבר נאמר למשה בסיני.

22. Megillah 19b

מלמד שהראהו הקב"ה למשה דקדוקי תורה ודקדוקי סופרים ומה שהסופרים עתידין לחדש.

23. Sifra Behar

וידבר ה' אל משה בהר סיני לאמר מה ענין שמיטה אצל הר סיני והלא כל המצות נאמרו מסיני, אלא מה שמטה שנאמרו כללותיה ודקדוקיה מסיני, אף כולם נאמרו כללותיהם ודקדוקיהם מסיני.

24. *Rambam, Introduction to Seder Zera'im*

והנה לך משל: הקדוש ברוך הוא אמר למשה: בסכת תשבו שבעת ימים (ויקרא כ"ג מ"ב) אחר כן הודיע שהסכה הזאת חובה על הזכרים לא על הנקבות. ושאינן החולים חייבין בה ולא הולכי דרך ושלא יהיה סכוכה אלא בצמח הארץ ולא יסככנה בצמר ולא במשי ולא בכלים אפילו מאשר תצמיח הארץ כגון הכסתות והכרים והבגדים. והודיע שהאכילה והשתיה והשינה בה כל שבעה - חובה; ושלא יהיה בחללה פחות משבעה טפחים ארך על שבעה טפחים רוחב; ושלא יהיה גובה הסכה פחות מעשרה טפחים.

SECTION II

The Sages Contributed Statements and Halachot of Their Own Accord

25. *Sukkah 45b*

ואמר חזקיה א"ר ירמיה משום רשב"י ראיתי בני עלייה והן מועטין אם אלף הן אני ובני מהן. אם מאה הן אני ובני מהן. אם שנים הן אני ובני הן. ומי זוטרי כולי האי?

והא אמר רבא תמני סרי אלפי דרא הוה דקמיה קודשא בריך הוא שנאמר "סביב שמנה עשר אלף" (יחזקאל מ"ח) לא קשיא הא דמסתכלי באספקלריא המאירה הא דלא מסתכלי באספקלריה המאירה. ודמסתכלי באספקלריא המאירה מי זוטרי כולי האי? והא אמר אביי לא פחות עלמא מתלתין ושיתא צדיקי דמקבלי אפי שכינה בכל יום?

27. *Rabbenu Chananel, ad loc.*

והלא אביי ורבא דאחרונים הן לגבי רשב"י ואיך מקשינן מדבריהם עליו? אלא ללמדך המסורת שהיה בידם בדברי אביי ורבא כך היה בידי הראשונים בקבלה כהל"מ. ואינם דבריהם, שאלו הדברים וכיוצא בהן אי אפשר להאמר אלא בקבלה מן הנביאים ואלו הדברים שקיבלו מרבותיהם היו מגידין.

28. *Ra'avad, Sefer HaKabbalah*

זה ספר הקבלה כתבנוהו להודיע לתלמידים כי כל דברי רבותינו ז"ל חכמי המשנה והתלמוד כולם מקובלים חכם גדול וצדיק מפי חכם גדול וצדיק. ראש ישיבה וסייעתו מפי ראש ישיבה וסייעתו מאנשי כנסת הגדולה שקבלו מהנביאים זכר כולם לברכה.

ולעולם חכמי התלמוד וכל שכן חכמי המשנה אפילו דבר קטן לא אמרו מלבם חוץ
מן התקנות שתקנו בהסכמת כולם כדי לעשות סייג לתורה.

ואם לחשך אדם לומר מפני שנחלקו בכמה מקומות לכך אני מסופק בדבריהם
אף אתה הקהה את שיניו והודיעהו שהוא ממרה על פי ב"ד ושלא נחלקו דו"ל
לעולם בעיקר מצוה אלא בתולדותיה מפני שלא שמשו כל צרכן. כיוצא בו לא
נחלקו אם מדליקין נר בשבת או לא ועל מה נחלקו במה מדליקין ובמה אין
מדליקין.

Moshe Rabbenu Did Not Communicate the Entire Oral Law

30. *Talmud Yerushalmi, Avodah Zarah 2:7*

א"ר יצחק כתיב "ואותי צוה ה'" (דברים ד') אותי ואותי נאמר לי דברים שנאמר
לכם ונאמר לי דברים שנאמר בינו לבין עצמי.

30. *R. Yom-Tov Lipman, Introduction to Tosefot Yom-Tov, Masechet Berachot*

אבל תועלת חבור המשנה וסיבתה היתה לפי שתורה שבע"פ שמסרה משה ליהושע
ויהושע לזקנים וכו' אע"פ שהיתה ביאור התורה ומצותיה ביאור שלם. אין לך
זמון ודור שלא יתחדש בהכרח ויפלא למשפט. ואל תשיבני דבר ממה שאמרו
בפ"ב דמגילה (יט): מאי ועליהם ככל הדברים וכו'. מלמד שהראהו הקב"ה למשה
דקדוקי תורה ודקדוקי סופרים ע"כ. שאני אומר שזה לא היה מוסר משה לאחרים
כלל. ודקדוק לשונם כך הוא שאמרו מלמד שהראהו ולא אמר שמסר לו או
שלמדו.

In The Fullness of Time Much Law Was Forgotten

32. *Temurah 16a*

אמר רב יהודה אמר רב: בשעה שנפטר משה רבנו לגן עדן אמר לו ליהושע שאל
ממני כל ספקות שיש לך אמר לו רבי כלום הנחתך שעה אחת והלכתי למקום
אחר לא כך כתבת בי "ומשרתו יהושע בן נון נער לא ימיש מתוך האהל (שמות
ל"ג)" מיד תשש כחו של יהושע ונשתכחו ממנו שלש מאות הלכות ונולדו לו שבע
מאות ספיקות....

במתניתין תנא אלף ושבע מאות קלין וחמורין וגזירות שוות ודקדוקי סופרים
נשתכחו בימי אבלו של משה. אמר רבי אבהו אעפ"כ החזירין עתניאל בן קנז מתוך
פלפולו.

35. *Sukkah 20a*

שבתחילה כשנשתכחה תורה מישראל עלה עזרא מבבל ויסדה, חזרה ונשתכחה עלה הלל הבבלי ויסדה, חזרה ונשתכחה עלו רבי חייא ובניו ויסדוה.

SECTION III

In Early Times No Disputes Between the Sages Were Recorded

37. *Sanhedrin 88b*

אמר ר' יוסי מתחילה לא היו מרבינן מחלוקת בישראל. אלא בית דין של שבעים ואחד יושבין בלשכת הגזית ושני בתי דינין של עשרים ושלושה אחד יושב על פתח הר הבית ואחד יושב על פתח העזרה ושאר בתי דינין של עשרים ושלושה יושבין בכל עיירות ישראל הוצרך הדבר לשאל שואלין מבית דין שבעירין אם שמעו אמרו להן ואם לאו באין לזה שסמוך לעירן אם שמעו אמרו להם ואם לאו באין לזה שעל פתח הר הבית אם שמעו אמרו להם ואם לאו באין לזה שעל פתח העזרה, ואומר כך דרשתי וכך דרשו חברי כך למדתי וכך למדו חברי אם שמעו אמרו להם ואם לאו אלו ואלו באין ללשכת הגזית, ששם יושבין מתמיד של שחר עד תמיד של בין הערבים ובשבתות ובימים טובים יושבין בחיל. נשאלה שאלה בפניהם אם שמעו אמרו להם ואם לאו עומדין למנין רבו המטמאים טמאו רבו המטהרין טהרו. משרבו תלמידי שמאי והלל שלא שמשו כל צרכן רבו מחלוקת בישראל ונעשית תורה כשתי תורות.

The Only Recorded Dispute Which Remained Unsettled

38. *Mishnah Chagigah 2:2*

יוסי בן יעזר אומר שלא לסמוך. יוסי בן יוחנן אומר לסמוך. יהושע בן פרחיה אומר שלא לסמוך. ניתאי הארכלי אומר לסמוך. יהודה בן טבאי אומר שלא לסמוך. שמעון בן שטח אומר לסמוך. שמעיה אומר לסמוך. אבטליון אומר שלא לסמוך. הלל ומנחם לא נחלקו. יצא מנחם נכנס שמאי, שמאי אומר שלא לסמוך. הלל אומר לסמוך. הראשונים היו נשיאים ושניים להם אבות בית דין.

A Law Based on Tradition Was Always Accepted

39. *Mishnah Yevamot 8:3*

עמוני ומואבי אסורים. ואיסורן איסור עולם. אבל נקבותיהם מותרת מיד. מצרי

ואדומי אינם אסורים אלא עד שלושת דורות אחד זכרים ואחד נקבות. רבי שמעון מתיר את הנקבות מיד. אמר רבי שמעון קל וחומר הדברים. ומה אם במקום שאסר את הזכרים איסור עולם התייר את הנקבות מיד. מקום שלא אסר את הזכרים אלא עד ג' דורות אינו דין שנתיר את הנקבות מיד. אמרו לו אם הלכה נקבל ואם לדין יש תשובה.

The Classification of Rambam

40. Rambam, Introduction to Seder Zeraim

החלק הראשון - פרושים מקובלים מפי משה ויש להם רמז בכתוב, ואפשר להוציאם בדרך סברא - וזה אין בו מחלוקת אבל כשיאמר האחד "כך קבלתי" - אין לדבר עליו. החלק השני - הדינים שנאמר בהם: "הלכה למשה מסיני" ואין ראיות עליהם כמו שזכרנו, וזה כמו כן - אין חולק עליו.

החלק השלישי - הדינים שהוציאו על דרכי הסברא ונפלה בהם מחלוקת, כמו שזכרנו, ונפסק הדין בהם על פי הרב. וזה יקרה - כשישתנה העיון. ומפני כך אומרים: "אם הלכה - נקבל, ואם לדין - יש תשובה". אבל, נפלה המחלוקת והעיון בדבר שלא נשמע בו הלכה. ותמצא בכל התלמוד שהם חוקרים על טעם הסברא שהוא גורם המחלוקת בין החולקים ואומרים: "במאי קא מפלגי?" או "מאי טעמא דרבי פלוני? או"מאי ביניהו?" והם מביאים אותו על ענין זה ברב מקומות, וזוכרים הטעם הגורם למחלוקת, כגון שיאמרו: רבי פלוני מחזיק טענה פלונית, ולפלוני מחזיק טענה פלונית וכדומה לו.

אבל מי שיחשוב: שהדינים שנחלקים בהם, כמו כן מקובלים מפי משה וחושבים שנפלה המחלוקת מדרך טעות ההלכות, או השכחה, או מפני שאחד מהם קיבל קבלת אמת והשני טעה בקבלתו, או שכח או לא שמע מפי רבו כל מה שצריך לשמוע: ויביא ראיה על זה ממה שאמרו: "משרבו תלמידי שמאי והלל שלא שמשו כל צרכם, רבתה המחלוקת בישראל ונעשית תורה כשתי תורות" - דברים כאלה הם, חי נפשי, דברים מגונים ומכוערים מאד, והנם דברי מי שאין לו ידיעה ואין בידו העיקרים, ופוגם באנשים אשר נתקבלו מהם

המצוות - וכל זה שוא ובטל. ומה שהביאו להאמין באמונה הזאת הנפסדת הוא: מעוט הסתכלותו בדברי החכמים הנמצאים בתלמוד. שהם מצאו: שכל הפרוש מקובל מפי משה והוא אמת; ולא נתנו הפרש בין "העקרים המקובלים" ובין תולדות הענינים שיוציאו אותם בעיון. אבל, אתה, אל יכנס בלבך ספק במחלוקת בית שמאי ובית הלל באמרם: "מכבדין את הבית ואחר כך נוטלים לידים: או נוטלים לידים ואחר כך מכבדין את הבית", ותחשוב שאחד משני הדברים האלו אינו מקובל מפי משה מסיני - אבל הטעם שהוא גורם להיות חולקים, הוא מה שנזכר בתלמוד: שאחד

מהם אוסר להשתמש בעם הארץ והשני מתיר. וכן כל מה שידמה לאלו החלוקות שהם ענפים מענפי הענפים.

אבל מה שאמרו: "משרבו תלמידי שמאי והלל שלא שמשו כל צרכם רבתה מחלוקת בישראל" ענין זה מבואר: שכל שני אנשים בהיותם שוים בשכל ובעיון ובידיעה "העיקרים" שיוציאו מהם הסברות, לא תפול ביניהם מחלוקת בסברתם בשום פנים, ואם נפלה - תהיה מעוטה, כמו שלא נמצא שנחלקו שמאי והלל אלא בהלכות יחידיות, וזה - מפני שדעות שניהם היו קרובות זו לזו בכל מה שהוציאו בדרך סברא. והעיקרים, כמו כן, הנתונים לזה כמו העיקרים הנתונים לזה. אבל כאשר רפתה שקידת התלמידים על החכמה ונחלשה סברתם כנגד סברת הלל ושמאי רבותיהם - נפלה מחלוקת ביניהם בעיון שעל דברים רבים שסברת כל אחד ואחד מהם היתה לפי שכלו ולפי מה שיש בידו מן העיקרים. ואין להאשימם בכל זאת - שלא נכריח אנחנו לשני חכמים מתוכחים בעיון להתוכח בשכל יהושע ופנחס. ואין לנו ספק כמו כן המה שנחלקו בו, מאחר שאינם כמו שמאי והלל, או כמי שהוא למעלה מהם - שהקדוש ברוך הוא לא צונו בעבודתו על ענין זה, אבל צונו לשמוע מחכמי הדור, כמו שאמר: ואל השופט אשר יהיה בימים ההם (דברים יז, ט). ועל הדרכים האלו נפלה המחלוקת, לא מפני שטעו בהלכות ושהאחד אומר אמת, והשני - שקר. ומה מאד מבואר ענין זה לכל המסתכל בו, ומה יקר וגדול זה העיקר במצוות!

והחלק הרביעי - הם הדינים שתקנו הנביאים והחכמים בכל דור ודור, כדי לעשות סיג וגדר לתורה. ועליהם צוה הקדוש ברוך הוא לעשותם, מה שאמר במאמר כללי: ושמרתם את משמרתי (ויקרא יח, ל), ובאה בו הקבלה: "עשו משמרת למשמרת". והחכמים יקראו אותם: "גזרות". ולפעמים תפול בהם מחלוקת - לפי שחכם אחד ראה לגזור כך, ולא יסכים עליו חכם אחד. וזה הרבה בתלמוד שאומרים: רבי פלוני גזר כך משום כך וכך, ורבי פלוני לא גזר. וזה כמו כן סיבה מסיבות המחלוקות. שהרי בשר עוף בחלב היא גזירה מדרבנן, כדי להרחיק מן העבירה, ולא נאסר בתורה אלא בשר בהמה טהורה; אבל אסרו חכמים בשר עוף - כדי להרחיק מן האיסור. ויש מהם מי שלא יגזרו גזירה זו: שרבי יוסי הגלילי היה מתיר בשר עוף בחלב, וכל אנשי עירו היו אוכלים אותו, כמו שנתפרסם בתלמוד. וכשתפול הסכמה על אחת מן הגזירות - אין חולקין עליה בשום פנים, וכשיהיה איסורה פשוט בכל ישראל - אין לחלוק על הגזירה ההיא. ואפילו הנביאים בעצמם לא היו רשאים לבטל אותה. וכן אמרו בתלמוד: "שאליהו, זכור לטוב, לא היה יכול לבטל אחד משמונה עשר דבר שגזרו בית שמאי ובית הלל. והביאו טעם על זה: "לפי שאיסורם פשוט בכל ישראל".

והחלק החמישי - הם הדינים העשויים על דרך החקירה וההסכמה בדברים הנהוגים בין בני אדם, שאין בהם תוספת במצוה ולא גרעון; או בדברים שהם תועלת לבני אדם בדברי תורה, וקראו אותם: "תקנות ומנהגים", ואסור לעבור עליהם.

וכבר אמר שלמה, עליו השלום, על העובר עליהם: ופורץ גדר ישכנו נחש (קהלת י ח). ואלו התקנות רבות מאד ונזכרות בתלמוד ובמשנה: מהן - בענין איסור והתר, ומהן - בענין הממונות: ומהן - תקנות שתיקנו נביאים, כמו תקנות משה ויהושע ועזרא, כמו שאמרו: "משה תיקן להם לישראל שיהיו שואלים ודורשים בהלכות פסח בפסח". ואמרו: "משה תיקן 'הזן' בשעה שירד המן לישראל". אבל תקנות יהושע ועזרא הן רבות. ומהן - תקנות מיוחסות ליחידים מן החכמים, כמו שאמרו: "התקין הלל פורזבול", "התקין רבן גמליאל הזקן", התקין רבן יוחנן בן זכאי". והרכה בתלמוד: "התקין רבי פלוני", "התקין רבי פלוני". ויש מהן תקנות מיוחסות להמון החכמים כמו שאמרו: "באושא התקינו", או כמו שאמרו: "תקנו חכמים" או "תקנות חכמים" וכדומה לזה הרבה.