Tradition! Tradition? Rambam and the Mesorah

By: ASHER BENZION BUCHMAN

The *Mesorah* of Philosophy, Science, and Metaphysics

In the *Moreh Nevuchim,* Rambam explains the reason for the lack of sophisticated thought amongst the Jews of his day:

> These theories are not opposed to anything taught by our Prophets or by our Sages. Our nation is wise and perfect, as has been declared by the Most High, through Moses, who made us perfect: "Surely this great nation is a wise and understanding people" (*Devarim* 4:6). But when wicked barbarians have deprived us of our possessions, put an end to our science and literature, and killed our wise men, we have become ignorant; this has been foretold by the prophets, when they pronounced the punishment for our sins: "The wisdom of their wise men shall perish, and the understanding of their prudent men shall be hid" (*Yeshayahu* 29:14). We are mixed up with other nations; we have learnt their opinions, and followed their ways and acts. The Psalmist, deploring this imitation of the character traits of other nations, says, "They were mingled among the nations, and learned their works" (*Tehillim* 106:35). Yeshayahu likewise complains that the Israelites adopted the opinions of their neighbors, and says, "And they please themselves with the childish conduct of strangers" (*Yeshayahu* 2:6); meaning, according to the Aramaic version of Yonasan ben Uziel, "And they walk in the ways of the nations." Having been brought up among persons untrained in philosophy, we are inclined to consider these philosophical opinions as foreign to our religion, just as uneducated persons find them foreign to their own notions. But, in fact, it is not so." (*Moreh Nevuchim* 2:11)

In fact, philosophy and science was part of our *mesorah,* part of the Torah learning that began at Sinai; but in our exile amongst ignorant cultures, it was lost.

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> Know that many branches of science relating to the correct solution of these problems were once cultivated by our forefathers, but were in the course of time neglected, especially in consequence of the tyranny which barbarous nations exercised over us. Besides, speculative studies (*Maaseh Bereishis* and *Maaseh Merkavah)* were not open to all men, as we have already stated (Introduction; 1:31), only the subjects taught in the Scriptures were accessible to all… Care having been taken, for the sake of avoiding injurious influences, that the Oral Law should not be recorded in a form accessible to all, it was but natural that no portion of 'the secrets of the Law' (i.e., metaphysical problems) would be permitted to be written down or divulged for the use of all men. These secrets… were orally communicated by a few able men to others who were equally distinguished. This is the principle applied by our teachers, "The secrets of the Law can only be entrusted to him who is a councilor, a cunning artificer, etc." The natural effect of this practice was that our nation lost the knowledge of those important disciplines. Nothing but a few remarks and allusions are to be found in the Talmud and the Midrashim, like a few kernels enveloped in such a quantity of husk, that the reader is generally occupied with the husk, and forgets that it encloses a kernel." (*Moreh Nevuchim* 1:71)

All of these wisdoms were lost, except for what scholars can deduce from the abstract allusions in the Talmud and Midrash.

All that was said on these matters by later authorities was taken from foreign sources.

> In addition you will find that in the few works composed by the Geonim and the Karaites on the unity of G-d and on such matter as is connected with this doctrine, they followed the lead of the Mohammedan Mutakallemim, and what they wrote is insignificant in comparison with the kindred works of the Mohammedans. It also happened, that at the time when the Mohammedans adopted this method of the Kalām, there arose among them a certain sect, called Mu'tazilah, i.e., Separatists. In certain things our scholars followed the theory and the method of these Mu'tazilah. Although another sect, the Asha'ariyah, with their own peculiar views, was subsequently established amongst the Mohammedans, you will not find any of these views in the writings of our authors: not because these authors preferred the opinions of the first-named sect to those of the latter, but because they chanced first to become acquainted with the theory of the Mu'tazilah, which they adopted and treated as demonstrated truth. On the other hand, our Andalusian scholars followed the teachings of the philosophers, from whom

> they accepted those opinions which were not opposed to our own religious principles. You will find that they did not adopt any of the methods of the Mutakallemim; in many respects they approached the view expressed in the present treatise, as may be noticed in the few works which were recently written by authors of that school. You should also know that whatever the Mohammedans, that is, the Mu'tazilah and the Asha'ariyah, said on those subjects, consists of nothing but theories founded on propositions which are taken from the works of those Greek and Syrian scholars who attempted to oppose the system of the philosophers, and to refute their arguments. (Ibid.)

Rambam explains further that the original source for the positions of the Mutakallemim was the earlier Christian scholars. Thus he attributes the understanding of the deepest matters of Jewish theology of most of the Rabbis around him, to adaptations from Christian scholars or Greek philosophers.

Our Halachic *Mesorah*

Rambam explains as well, that not only was our *mesorah* lost with regard to this especially sophisticated element of Torah learning that was originally only taught in private, but even the traditions related to the understanding of *halachah* were lost.

> Even the traditional Law, as you are well aware, was not originally committed to writing, in conformity with the rule to which our nation generally adhered, 'Things which I have communicated to you orally, you must not communicate to others in writing.' With reference to the Law, this rule was very opportune; for while it remained in force it averted the evils which happened subsequently, that being great diversity of opinion, doubts as to the meaning of written words, slips of the pen, dissensions among the people, formation of new sects, and confused notions about practical subjects. The traditional teaching was in fact, according to the words of the Law, entrusted to the Great Tribunal *(Bais Din HaGadol)* as we have already stated in our works on the Talmud (i.e., the introduction to *Mishneh Torah* and the introduction to *Perush HaMishnah*). (*Moreh Nevuchim* 1:71)

Rambam here makes clear why the Oral Law was not to be written down. Teaching Torah via a method of writing books which would be read by students was a method that was inherently inefficient and

fraught with the expectation of error in transmission and understanding; indeed, what was feared "subsequently happened." Texts were unreliable and even accurate texts were misunderstood. As a result of the need to transmit the Oral Law by the written word, the *mesorah* became unreliable.

עת לעשות לה' הפרו תורתיך – In Time of Need

Interestingly, in *Mishneh Torah*, Rambam never mentions the prohibition of writing down the Oral Law. Even though *Chazal* subsequently removed this prohibition, we would expect Rambam to first codify the prohibition and then explain the grounds for permitting it based on עת לעשות לה' הפרו תורתיך—"In time of need for the sake of G-d, they nullified Your Law." Moreover, a powerful principle such as עת לעשות לה', which allows for the suspension of a law, should have been codified in *Mishneh Torah*. If it is merely the principle of הוראת שעה, a temporary enactment,[1] the use of this verse עת לעשות in rare cases is puzzling. Moreover, if this is the explanation, Rambam's omission of the original prohibition and the overriding הוראת שעה is even more puzzling. But, based on his presentation here in the *Moreh Nevuchim*, the explanation of his position can be deduced. It would seem that in fact there was never a specific prohibition of teaching via writing. Rather, imbedded in the *mitzvah* of teaching Torah is the principle that it be taught in the most efficient and reliable manner, and Rambam here explains that only oral teaching provides reliability, and thus the Rabbis insisted that it be taught this way. When this was no longer possible, they then went to the less reliable way, since insisting on oral transmission would have led to total loss of the Oral Law. [2] [3]

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1 See *Hilchos Mamrim* 2:9.

2 Thus it is only fitting to apply this principle in a place where no אסור is being permitted. If in fact it is הוראת שעה, then post-Talmudic courts cannot enact them. If it is the principle we have defined then it cannot be used as the Bais Yosef applies it to allow the taking of money for learning, for Rambam makes clear that in that case it is an issue of חלול השם, which certainly no accommodation for convenience can be מתיר.

3 See *Berachos* 63a, where the use of the principle by Hillel *HaZaken* conforms with this view. The term הפרו תורתיך—they nullified your law—in this case would apparently refer to making the Torah itself weaker by

Rambam makes clear that Torah had always been written down.[4] From earliest times, students wrote their own notes. What changed was the manner of teaching Torah.

> Rabbeinu HaKadosh (Rabi Yehudah *HaNasi*) composed the Mishnah… and from the days of Moshe until his, no one composed a book of the Oral Law that was taught in public, but in every generation the head of the *Bais Din* or a prophet would write an account of the lesson that he learned from his teachers, and he would teach this in public. So, too, each individual would write for himself as best he could an explanation of the Torah and its laws as he heard it, including new laws that were created in each generation that were not handed down but derived from the thirteen hermeneutic principles and agreed upon by the *Bais Din HaGadol*. So things progressed until the days of Rabbeinu HaKadosh. (Introduction to *Mishneh Torah*)

The Change to Text-Based Learning— The Dissolution of the *Mesorah*

The change from learning orally to learning from written texts happened in two stages.

> He gathered all the lessons and all the laws and all the explanations and commentaries that were heard from Moshe *Rabbeinu* and that each *Bais Din* of every generation learned with regard to the entire Torah and composed from it the Book of the Mishnah…And he

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allowing it to be taught in a way that would make its meaning unclear and partially "nullified." See *Teshuvos Pe'er HaDor* 132 where Rambam applies the principle to allow a non-optimal conversion—as in our case, not a violation, but acting non-optimally—when the alternative is worse.

4 Ramban and other *Rishonim* are hard pressed (see *Hilchos Yesodei HaTorah* 6:8 and *Kesef Mishneh*) to explain why there is a prohibition for destroying a text of the Oral Law, since ideally such texts should never have been written and should not be compared to כתבי קודש (Holy Writ). Yet, Rambam presents simply the prohibition of destroying not only כתבי קודש but also פירושיהן וביאוריהן—their commentaries and explanations—for in fact there is no prohibition in writing down the Oral Law and thus it has sanctity.

> taught it in public, and it was left open to all of Israel, and they all copied it down, and it was spread everywhere so that the Oral Law not be forgotten from Israel. And why did Rabbeinu HaKadosh do this, and not leave things as they were, for he saw that the number of students was shrinking, and woes were abounding, and the evil kingdom was spreading throughout the world and getting stronger, and Israel was wandering to outlying areas. So he wrote a single composition to be in every person's hands, so that they could learn it quickly and not forget it. He and his court sat all day and taught it in public… And the scholars of the Mishnah wrote other works, to explain the words of the Torah. Rabi Hoshea the student of Rabbeinu HaKadosh composed a commentary on *Bereishis*. And Rebbe Yishmael explained from *Shemos* until the end of the Torah and this is called the *Mechilta*. And Rebbe Akiva also composed a *Mechilta* and other scholars composed *midrashim*. All this was written before the Talmud Bavli. (Introduction to *Mishneh Torah*)

During the first stage when the Mishnah was being learned, the text served as an aid to study and was coupled with the lectures of the masters of the oral text itself.

The stage that followed the writing of the Talmud, however, was a transformation to independent study from the Talmud itself.

> Ravina and Rav Ashi are the last of the scholars of the Talmud. Rav Ashi composed the Talmud Bavli in Babylonia, about a hundred years after Rebbe Yochanan composed the Talmud Yerushalmi. The two *Talmudim* are commentary on the Mishnah, and an explanation of its depths, with all the material that was initiated in all the *Batei Din* since the days of Rabbeinu HaKadosh until the writing of the Talmud… From the two *Talmudim* and the *Tosefta, Sifra* and *Sfrei,* and the *Toseftos*—what is prohibited and what is permitted, what is unclean and what is pure, what is guilty and what is innocent, and what is fit (כשר) and what is unfit (פסול) is made clear—as has been transmitted orally man to man from the mouth of Moshe from Sinai. One also learns from [these works] the decrees (גזרות) that were made by the Rabbis and prophets in each generation to make a fence around the Torah in accordance to which they had learned from Moshe 'Guard my statutes' (*Vayikra* 18:30)[5]… So, too, the customs that were practiced and *takanos* that were enacted in each generation are clarified there, as the *Bais Din* of each generation saw fit, because it is prohibited to divert from

[5] ושמרתם את משמרתי.

> them… and the judgments and laws that were adjudicated, that were not part of the transmission (קבלה) from Moshe, and *Bais Din HaGadol* derived them with the rules by which the Torah is expounded, and the Elders then established them as law… All this was placed into the Talmud… Thus Ravina and Rav Ashi and their friends are the last of great scholars of Israel who transmitted the Oral Law and enacted decrees and *takanos* and customs that spread to all of Israel, throughout all their dwelling places… And after the *Bais Din* of Rav Ashi which compiled and completed the Talmud in the days of his son, Israel was scattered wide and far throughout all the land, reaching the far corners and distant islands; And discord grew throughout the world, and the roads were destroyed… and Torah learning was decreased, and Israel did not gather to learn in their Yeshivos by the thousands and tens of thousands as in olden days, but single people, the remnant [of Israel], who G-d calls in each city and town gather together and study Torah, and analyze the compositions of all the *Chachamim,* and know from them the path of judgment (דרך המשפט). (Ibid.)

With the dispersion of the Jews, individuals in distant communities would learn the law from the Talmud itself. The text of the Talmud was meant to instruct the students. There was never an assumption that a Rebbe would transmit the full meaning of each line in the Talmud to his student. The Talmud was meant to be self-sufficient instruction. However, the methodology of Talmudic and textual analysis and language skills had to be transmitted in order to facilitate proper study. Understanding Talmudic methodology is an art and a science, for the conceptualizations that *Chazal* dealt with were issues of great depth.

> All the *Chachamim* that arose after the composition of the Talmud and analyzed it, and were acknowledged for their wisdom, are called Geonim. And all these Geonim that arose in the land of Israel and in the land of Babylonia and Spain and France, taught the דרך התלמוד (the path of the Talmud)[6] and brought to light the parts that were hidden and explained its issues, for its path is a very deep path.[7] Moreover, it is in Aramaic mixed with other languages, for that dialect was very well understood in Babylonia by all at the

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6 "The methodology of Talmudic analysis" would seem to be the best translation.

7 לפי שדרך עמוקה דרכו עד למאוד, "Talmudic methodology is very deep."

> time of the composition of the Talmud. But in other places, and [even] in Babylonia in the time of the Geonim, there was none who knew this language without being taught. (Ibid.)

Teshuvos and *sefarim* were composed by the Geonim to explain individual texts and issues in the Talmud.

> Many questions were asked by the people of each city to each Gaon who lived in their days, to explain difficult issues in the Talmud, and they would respond according to their wisdom, and the questioners would collect the answers, and make books out of them to study from. The Geonim of each generation also composed works that explained the Talmud… some explaining individual laws, and some that explained individual chapters that they considered difficult, and some explaining tractates and *sedarim*[8]. In addition, they composed collections of laws regarding what is prohibited and what is permitted and what carries guilt and what does not, responding to the needs of their time, to enable those who could not master the depths of the Talmud… This was the work of the Geonim from the day that the Talmud was compiled until this day,[9] the year 1108 after the destruction [of the Temple]. (Ibid.)

Consistent with what Rambam had said about the *mesorah* in the *Moreh,* he explains that by his time there were a precious few who still understood the methodology of the Talmud and not even many who understood what the Geonim were saying.

> Today many hardships have oppressed us and times have pressured us all, so that the wisdom of our scholars has been lost, and the understanding of those with insight has been hidden, thus those explanations and responses and law [books] that the Geonim compiled, and considered clear, are now considered difficult to decipher, and only a very few really understand them. How much more so [is this the case] with the Talmud itself—the *Bavli*, the *Yerushalmi*, the *Sifra*, the *Sifrei*, and the *Toseftos*—that all require broad understanding, and intelligence, and the devotion of much time. Only after this does one master the proper approach for ascertaining what is prohibited and what is permitted and what are the facts in other laws of the Torah. (Ibid.)

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8 One of the six divisions of the Talmud.

9 Clearly Rambam is a member of the Geonim. Perhaps we should consider him the last Gaon.

There was no longer a *mesorah*. Everything depended on the ability of scholars to analyze the Talmudic texts properly. Should one see a proclamation admonishing some "new" halachic decision that breaks with the tradition of our fathers, he should be aware that there is no tradition that goes back to the Rabbis of the Talmud. By the twelfth century that tradition was long lost, and all that remained are the words of the Talmud.

The Author of the *Perush HaMishnah*

The Rambam of *Mishneh Torah* sounds somewhat negative about the state of learning in his time. In the *Moreh,* which he wrote later in life, we have seen that he is fully critical of the state of disarray. But in the *hakdamah* to his *Perush HaMishnah,* that he began in his teens and finished in his late twenties, we find little of this cynicism.

> And they (the Geonim) compiled compositions on legal decisions, some in Arabic,[10] some in Hebrew, like the *Halachos Gadolos*… and others, and the Laws written by the great rabbi our teacher Yitzchak, *ז"ל*, (Rif), which is sufficient [to stand in place] of all the other works for it includes all the decisions and laws that are necessary [for practice] in our days, [in] the state of exile. And he explained there things that his predecessors had erred on in their decisions—and I had few complaints about his decisions, not reaching the number of ten altogether. And I collected all that I could get of the commentaries of my master, my father, *ז"ל*, and of another man named Rav Yosef HaLevi[11] (RiMigash), for that man's command[12] of the Talmud is frightening to one who looks carefully at his words and the depth of his intellect, until one can almost say 'there was no king before he' relating to his conduct and his approach. And I gathered all that I found of his own commentary[13] and I also include my own explanations according to the weakness of my ability, and what I have learned from wisdom. (Introduction to *Perush HaMishnah)*

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10 How interesting that in these early days, so much was written in the language that was spoken. This demonstrates much about the Geonim's attitude towards Torah learning.

11 רימג"ש.

12 Literally "heart," לב.

13 מן ההלכות בפירושו לנפשו.

While writing this work Rambam does not seem to think he has such a hard job in getting the *halachah* right. The Rif had corrected the mistakes of those who came before him. Rambam is not completely without criticism of even the Rif, and in the final analysis he depends on his own judgment. Nevertheless, he disagrees with him in fewer than ten places. And then he has the RiMigash to depend upon whose understanding is astounding as if "there was no king before he." Note, however, that even with this statement of trust in previous authorities, he is willing to place RiMigash above his predecessors. There seems to be no attitude of giving precedence to earlier authorities. All depends on the individual scholar's acumen and analysis of what is written in the Talmud.

The Author of *Mishneh Torah*

When years later Rambam began working on *Mishneh Torah*, he realized that he would have to first write an introductory work detailing the *taryag mitzvos* and explaining the rationale behind his count. He explains his need to do so in the introduction to that work.

> I considered it fitting to put first, in the introduction of the book, the listing of all the *mitzvos*, positive and negative, so that the book would be divided in correspondence to them, and there would be no *mitzvah* whose laws would not be detailed… And as I began working on listing the *mitzvos*… I was reminded of a fundamental issue that I had long thought about, which is that the many counters of the *mitzvos* erred in matters that are degrading beyond my ability to convey, for every one who tried to count them, or to compose a book with this intent, followed after the words of the *Baal Halachos Gadolos (BeHaG)* and departed only slightly from his intent as if minds were frozen by this man's work. Eventually the author of the well-known *Sefer HaMitzvos* sensed some of the *BeHaG*'s mistakes, considering it unreasonable to count visiting the sick and comforting the mourner, as the *BeHaG* had, and indeed it is unreasonable. Nevertheless, what he did decide to count was more unreasonable than what the *BeHaG* had counted, and he followed the *BeHaG* in even more ridiculous inclusions—as will be evident to anyone who studies the present treatise. G-d knows, and He is sufficient witness that my recognition of the errors in the count, counting that which even a superficial glance can ascertain is inadmissible, and then to have this be followed after by unquestioning readers, made me aware of the tragedy of our plight. And I

> saw that there was a fulfillment of 'The picture of it all is like the closed book which when given to a man of learning with the request 'Please read this,' he will respond, 'I cannot, for it is sealed' (*Yeshayahu* 29:11). And then when I heard of the many *azharos*[14] that were composed near us in Spain, I felt torment on seeing the publication and revelation of this ill. And though we can't condemn [the *azharos*], for their authors were poets and not Rabbis, and within the demands of their profession for producing sweet and beautiful language they did a competent job, still the content was based on the *Halachos Gadolos* and later Rabbis. And when I contemplated this and realized how this count had become widely accepted by the public, I understood that should I list the proper count without bringing proof, the readers will believe that it is in error, the proof being that it differs from what they find recorded by various other personages, for most of the elite of our day do not evaluate the content of a treatise, but to the degree it accords with what preceded it, never questioning the validity of the earlier source. How much more so this is true of the masses. Therefore I decided that it was necessary to preface my composition with this treatise, in which I will explain the count of the *mitzvos* and the methodology for arriving at it, bringing evidence from verses of the Torah and statements of the *Chachamim* explaining [these verses]. And I preface the counting with reliable basic principles for ascertaining the count. And after validating the count with this treatise with clear, irrefutable proofs, it will become obvious to all its readers, the errors of all who counted contrary to our numbering.

Rambam speaks with certainty of the glaring errors made by the Geonim who preceded him. He feels that they lacked a fundamental understanding of what constitutes a *mitzvah* of the Torah. They had no idea as to what the actual *taryag mitzvos* are. Moreover, he feels that there is an unwillingness on the part of even the premier scholars to challenge accepted precedent. He considers both the obvious errors in Torah learning and the unwillingness of scholars to analyze the issues based on primary sources an embarrassing and tragic circumstance. Rambam set about to correct this situation.

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14 אזהרות—literally, "prohibitions"—referring to the many poetic counts of the *taryag mitzvos* written for recital on Shavuos.

A Changed Perspective

In *teshuvos* written after *Mishneh Torah* had been disseminated, Rambam writes about the cause for some confusion that had arisen about his opinions:

> That which is codified in the *chibbur*[15] is undoubtedly correct, and so we wrote as well in the *Perush HaMishnah*, and that which is in your hands[16] is the first version, which I released without proper diligence. And I was influenced in this by the *Sefer HaMitzvos* of Rav Chefetz, *z"l*, and the mistake was in his [analysis], and I just followed after him without verifying. And when I further evaluated and analyzed the statements [of *Chazal*], it became clear that the truth was what we recorded in the *chibbur* and we corrected the *Perush HaMishnah* accordingly. The same happened in many places, and thus the first version of the *Perush HaMishnah,* was subsequently modified tens of times.[17] Each case we had originally followed the opinion of some Gaon, *z"l*, and afterwards the area of error became clear." (*Igros HaRambam,* Shilat ed., p. 647)
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> This confusion that people have with regard to the *Perush HaMishnah* is entirely due to the fact that I corrected it in places. The Creator knows that most of my mistakes were due to my having followed Geonim, *z"l*, such as *Rabbeinu* Nissim in his *Megilas Setarim* and Rav Chefetz, *z"l*, in the *Sefer HaMitzvos,* and others whom it is difficult for me to mention." (Ibid., p. 305)

Rambam blames himself for having relied on the opinions of earlier Geonim without having analyzed the issue fully when he wrote the *Perush HaMishnah*. In his youth he was at least partially guilty of what is apparently the universal fault of others—not doing the full analysis of primary sources that the *Chachmei HaTalmud* expected of us. We now have early drafts of the *Perush HaMishnah* with Rambam's own corrections. There are many corrections. It is also unlikely that what is extant is the final version, for *Mishneh Torah* differs from the

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15 Composition, i.e., *Mishneh Torah*.

16 A variant version of the *Perush HaMishnah*.

17 The text reads עשרה ענינים. Since we know Rambam changed his mind often, Shilat says that the "ten" refers to mistakes made purely because of dependence on Geonim. More likely it should read something like עשריות , i.e., "tens of times," since Rambam says in the second *teshuvah* that most of his mistakes were due to the Geonim he followed.

emended *Perush HaMishnah* in many cases. Rambam in the above *teshuvah* instructs us to follow *Mishneh Torah* over the *Perush HaMishnah* in all cases. It is probable that he was not able to correct all his early mistakes and that even the final version of *Perush HaMishnah* is not fully reliable.[18]

He is not willing to name one of the sources that had misled him, but perhaps we can deduce who it is. We quoted his statement in the *hakdamah* to *Perush HaMishnah*, that he differed from the Rif in fewer than ten places. However, he certainly differs from him in many more than that in *Mishneh Torah*. It would seem likely that it is the Rif, of whom he had once been in awe, that he is not willing to now mention as a source of error.[19] Scholars believe[20] that Rambam was the most reliable source of *halachah* because he had a better *kabbalah* than the *Baalei Tosfos,* going back through his father to the RiMigash and then to the Rif.[21] Still, this was only a starting point for Rambam as with fresh analysis and insight he reconnected with the thinking of the Rabbis of the Talmud.

Indeed, even in issues of *hashkafah,* Rambam of *Moreh Nevuchim* had changed quite a bit from the youth who wrote the *Perush HaMishnah,* although at that time he was already our greatest post-Talmudic thinker. In defining the seventh of the thirteen *Ikkarei Emunah*—that being the belief in the uniqueness of the prophecy of Moshe *Rabbeinu*—Rambam says that to fully explain this phenomenon it would be necessary to discuss the "שיעור קומה", the kabbalistic concept discussed in a Geonic work. Rabbi Kappach[22] points out that Rambam later erased these words so that they were completely removed, rather than in his normal style where the original text could still be discerned. In a *teshuvah* (Blau 117), he later writes of שיעור קומה, "I do not believe that this book was written by the *Chachamim*,

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18 Most probably we do not have the final version, but some earlier draft or scrap copy.

19 I believe I have seen this suggested, though I do not recall where.

20 See Dr. Faur's enlightening article in the present volume.

21 On the issue of weights, Rambam refers to a long tradition in his family פיה"מ בכורות ח:ח "הסלע המדובר עליו בתורה אשר קראו ה' שקל, וקורא אותו גם כסף ... יש במשקלו כ"ד דרהם, משקל הדרהם שש עשרה גרגרים ... והקבלה אשר בידי מאבא מארי זצ"ל מאביו מזקנו איש מפי איש ז"ל שהגרגרים הללו ששוקלים בהן גרגרי שעורים".

22 In the notes to his edition of the *Perush HaMishnah*.

and G-d forbid that it be from them, rather it is just a composition by a European expositor and nothing more. In any event the destruction of this book and the obliteration of its mention is a great *mitzvah*—'the name of other gods dare not be mentioned'—one who has 'a measure', i.e., קומה, is unquestionably a foreign god."[23] It would seem that even Rambam's understanding of fundamentals, carefully formulated in *Mishneh Torah*, was not fully developed by him at the time he wrote *Perush HaMishnah*.

Searching for Truth

Clearly, as Rambam grew older, his trust in the reliability of the *mesorah* of his era constantly declined. Yet this did not deter him from writing what he considered to be the definitive work of Jewish law. He had such confidence in the work he was doing that he wrote to a student (*Igros HaRambam*, Shilat ed., p. 302) that a day would come when "without doubt, all of Israel will suffice with this *sefer* alone, and other *sefarim* will be put aside." He was confident that *Chazal* had left behind in their writing sufficient information to allow the truth to be rediscovered and he spent his life in search of the truths that they had conveyed in their works. Thus he railed against those who would just accept what they read from post-Talmudic scholars without questioning the logic before them. From texts of the *Perush HaMishnah* apparently in Rambam's own hand that are still extant and also from manuscripts of *Mishneh Torah*, we know that Rambam was in a state of constant revision and refinement throughout his life—the result of a constant pursuit of truth.[24]

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23 In the *Perush HaMishnah* he has promised an elaboration on the prophecy of Moshe, and yet in the *Moreh Nevuchim* (2:35) he says he will not speak of it when discussing prophecy for it is really another phenomenon. Apparently, what he once felt could be discussed about relating to G-d, he no longer feels he can discuss. Perhaps discussing what G-d is not—שלילות—has replaced other explanations in Rambam's mind.

24 Note the case of the סתירה in *Mishneh Torah* between *Maachalos Asuros* 9:4 and *Mamrim* 2:9 as to whether בשר חיה וחלב was a Rabbinic or Torah prohibition. See the *Yalkut Shinui Nuschaos* where examination of manuscripts of *Perush HaMishnah* and *Mishneh Torah* demonstrate that Rambam had originally felt the prohibition was of Torah origin and then changed his mind and ruled it was Rabbinic. The contradictory

A prevailing ruling of his time allowed ships to continue their journey on Shabbos on oceans but not on deep rivers. Rambam, in a *teshuvah,* explains that this is an error and that all water journeys may continue as long as the water is sufficiently deep.[25] The questioner argued that since the custom had been established to prohibit this travel, then even if it was technically permissible, the *minhag* should stand. Rambam responds to this argument as follows:

> But that which you said about respecting the custom—indeed *minhag* does require great respect and *Chazal* said explicitly, 'Things that are permissible that some are accustomed to prohibit, one is not allowed to permit it in front of them' (*Pesachim* 50b). But this only pertains in a situation, as the Talmud Yerushalmi clarified (*Pesachim* 4:1), where these people are aware that the thing is in fact permissible but they nevertheless refrained from doing so as a self-imposed stringency. But if those following the *minhag* thought that something that was permissible was prohibited, and they continue to think so, and especially if they have come to accept a halachic principle justifying the prohibition—then it is improper to allow them to continue with these misconceptions in any event. But one must object to what they are doing, and inform them that what they thought was prohibited is permissible, and the prohibition was a mistake. For it is improper to ever establish a mistake as a permanent law, no matter whether it be forbidding the permitted or permitting the prohibited." (*Igros HaRambam*, Shilat ed., pp. 278–279)

In fact, Rambam was not unique in this attitude. In the radical *chiddushim* that the *Baalei Tosfos* were willing to propose and sometimes adopt to resolve Talmudic inconsistencies, we see a similar ap-

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positions found in two places in *Mishneh Torah* would be the result of having the corrections only registered in one of the two places where the law is brought. (However, an alternate *girsa* in the Yemenite manuscripts suggests another answer to this contradiction.) I bring no evidence to Rambam having changed his mind in *Mishneh Torah* from statements to this effect in the *Teshuvos l'Chachmei Luniel,* for Rav Kappach contends that they are forgeries and indeed certainly much and perhaps all of the *teshuvos* were not written by Rambam.

25 Ten *tefachim.*

proach.[26] Ramban was no different in this respect[27] and some, though not all,[28] of the other *Rishonim* whose works are most important to us obviously had this same perspective. The words recorded by Rashbam from his exchange with his grandfather Rashi, after he had pressed him about the importance of פשוטו של מקרא (the simple rendering of the text) are striking. His grandfather admitted to him that "if he had the time he would write other explanations according to the simple meaning that is constantly being revealed to us each day."[29] Even with regard to understanding the *Chumash*, one must use his own intellect to search for truths never before revealed. The belief in precedent as the guiding principle of "Jewish law and thought" that dominates in today's Talmudic community was rejected by many *Rishonim* and abhorred by Rambam.

Along with Talmudic analysis, Rambam also used an academic type of scrutiny of ancient texts to determine the correct *girsa*. He speaks in one case of a mistake the Geonim had made due to a faulty text of the Talmud. He himself searched in old *gemaros*, finding two scrolls that he was able to identify as 500 years old that validated the *girsa* that he had suspected was correct. His ability to identify these texts as 500 years old demonstrates another tool in his arsenal. He writes "written on scrolls in the manner people used to write in, about 500 years ago."[30]

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26 *Rabbeinu* Tam's radical *shittah* establishing two שקיעות because of a contradiction between two *gemaros* is a case in point. His rejections of the *tefillin* of his grandfather based on his reading of the gemara (see *Tosfos Menachos* 34b) is another. One should note that he was not merely adopting Rav Hai Gaon's *shittah,* for that *shittah* historically seems linked with Raavad's order while *Rabbeinu* Tam suggests a new order.

27 Note his statement in his introduction to his *hasagos* on the *Sefer Ha-Mitzvos*. There he defends the words of the Geonim. But still he will not be a "donkey carrying books" and will state his disagreements with them as well.

28 See *Rosh* to *Sanhedrin* 4:6 where the Raavad is "close to saying" that in his generation it is already not permissible to argue with the Geonim. Apparently their words are part of the *mesorah* in his viewpoint. The Rosh there argues.

29 לפי הפשטות המתחדשים בכל יום.

30 *Hilchos Malveh* 15:2. See also *Hilchos Ishus* 11:13.

In addition, Rambam looked to outside sources to help reconstruct the philosophical, scientific, and metaphysical knowledge that had been completely lost. He was thus an avid student of philosophy and already in the *Perush HaMishnah* he used the works of the great Greek and Arab philosophers to shed light upon the cryptic comments of *Chazal*. Nor does he disguise from his readers that this is the case, although he accommodates their sensitivities.

> Know, that what I say in these chapters and in the commentary itself, are not matters that I from my own mind myself advanced… but they were collected from the *Chachamim* in the Midrash and Talmud, and from other of their works, and from the words of the philosophers both early and late, and from works of many men… accept the truth from whoever says it. It is possible that I will sometimes bring an entire section from a well-known book, with the original wording, and there is nothing wrong with this for I am not intending to take credit for this earlier source. I have already admitted [that nothing here is original], even though I do not always quote the source, for doing so would needlessly lengthen the work. Also quoting this particular person[31] would cause a person with no taste to feel that the content of the words are spoiled and evil—and he will not then come to understand it. Therefore I have left out the author, for my purpose is to help the reader and explain to him the matters hidden in this tractate. (Introduction to *Avos*)

Early on, Rambam had taught us his guiding principle "Accept the truth from whoever says it."

Years later, Rambam devoted many chapters in *Hilchos Kiddush HaChodesh* to explain how the movements of the moon could be predicted by *Bais Din* and he lays out the calculations necessary for making the Jewish calendar. At the end he states his sources:

> The reasoning behind all these calculations… and how we know each detail, and the proof for each point—are the sciences of astronomy and geometry, on which the Greek scholars composed many books, and these are what is now found in the hands of scholars. But the works composed by *Chachmei Yisrael* in the days of the prophets who were of the tribe of Yissachar have not reached us… But since all this material has clear proofs that have no flaws to support them… we do not care who the author is, whether it be prophets or gentiles… for anything in which the reasoning has

31 Aristotle.

> been revealed, and the truth become evident, with certain proof—we do not rely on who said it or taught it but on the evidence and the reasoning itself." (*Hilchos Kiddush HaChodesh* 17:9)

The works of the prophets on these matters have been lost so Rambam turns to those who have preserved this knowledge or rediscovered it. But he does not rely on these sources, either. Here, just as in his Talmudic analysis, he accepts these sources because of "proofs that have no flaws." Rambam's basic attitude towards Talmud Torah is that it is the search for truth.

Reconstructing the *Mesorah* and the Precedent for Ignoring Precedent —חדש אסור מן התורה

Rambam's refusal to follow precedent is based on the Talmudic principle that he codifies.

> If *Bais Din HaGadol* expounded using one of the halachic methods of derivation and judged a law according to what they thought was accurate, and then another court that succeeded it saw a reason to overturn their decision, it does so. For the Torah says, 'To the judge which will be in those days' (*Devarim* 17:9)—you only have to follow the court of your generation. (*Hilchos Mamrim* 2:1)

All Talmudic disagreement is in matters that were never clarified to Moshe at Sinai and such issues were left to the scholars in Israel to resolve. Each generation was free to disagree with the conclusions of their predecessors and overturn their decisions.[32] Indeed, there was an immutable *mesorah*. All matters that were taught to Moshe at Sinai were faithfully transmitted from generation to generation. There was no disagreement in Talmudic times on anything that was part of the original *mesorah*. The method of study in the large *yeshivos* protected

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32 הדינים שהוציאו על דרכי הסברה ונפלה בם מחלוקת, כמו שזכרנו, ונפסק הדין בהן על פי הרוב. 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 הסברה שהוא גורם המחלוקת בין החולקים, ואומרים במאי קא מיפלגי, או מאי טעמא דרבי פלוני, או מאי בינייהו, והם מביאים אותו על עניין זה ברוב מקומות. וזוכרים הטעם הגורם למחלוקת, כגון שיאמרו רבי פלוני מחזיק טענה פלונית, ופלוני מחזיק טענה פלונית וכדומה לו.(הקדמה לפירוש המשניות).

the *mesorah* of that which had been handed down from Sinai. The ideal of oral study and oral transmission protected the Oral Law,[33] and only after its dissolution did arguments begin to abound over issues that had once been unanimously agreed upon.

Thus the Elders were given the text of the Torah together with the Oral Law that was comprised of a limited number of explanations of ambiguous statements[34] and rules for analyzing the text in order to be able to resolve ambiguities.[35] Given this information, they were expected to be able to resolve all their doubts. The authors of the Talmud gave over the same tools to the generations that were to follow them, and they, too, expected them to find the truth.

In a famous *teshuvah,* Rambam excoriates a custom of writing verses of the Torah on *taleisim* and explains several reasons as to why it is prohibited, and at the end he adds one last line.

> מצרף אל היות זו גם כן חדשה שלא נעשתה כמוה בישראל לפי ידיעתינו.
> "In addition this is something new, the like of which was never done in Israel as far as we know." (*Igros HaRambam,* Shilat ed., p. 399)

The aphorism that is attributed to the *Chasam Sofer* of חדש אסור מן התורה, "all that is new is prohibited by the Torah," could rightly be attributed to Rambam, some 700 years earlier.[36] But the proper interpretation of "חדש" is that which has been introduced without proper

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33 אבל מי שיחשוב שהדינים שנחלקים בהם כמו כן מקובלים מפי משה, וחושבים שנפלה המחלוקת כדרך 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 מה שנאמר משרבו תלמידי שמאי והלל שלא שמשו כל צרכן רבתה מחלוקת בישראל ונעשית תורה כשתי תורות - זה הדבר מגונה מאוד, והוא דברי מי שאין לו שכל ואין בידו עיקרים, ופוגם באנשים אשר נתקבלו מהם המצות, וכל זה שווא ובטל. (הקדמה לפירוש המשניות) ועי' הל' ממרים א:ג.

34 הלכה למשה מסיני consists of דברי קבלה, which were pieces of information that could not be read into the text, and פירושים מקובלים, that are explanations of what the text means.

35 See *Hilchos Mamrim* 1:2.

36 The aphorism is really a play on words as most simply it refers to the Torah prohibition of grain until after the second day of Pesach.

halachic sources. It refers to errors that have been introduced even 1000 years ago for "it is improper to ever establish a mistake."[37]

Absolute Truth

Not only were the Rabbis of the Talmud expected to be able to resolve all doubts, but as far as Rambam was concerned, they were expected to come to accurate conclusions, and for a time they did so.

> But with regard to what the Talmud says, that 'when large numbers of the students of Shammai and Hillel were insufficiently assiduous, arguments increased in Israel,' the meaning there is quite clear. For any two men who are [exactly] equal in intellect and diligence, and in the knowledge of the fundamentals upon which logical inferences are to be based, will never have differing opinions [on an issue]. And should there be disagreements, they will be few—as in fact between Shammai and Hillel there were only several arguments. This is because their thought processes were very similar to each other and they were equally knowledgeable about all the fundamentals. But when the diligence of the students towards acquiring wisdom lapsed, and their logic weakened relative to that of Shammai and Hillel, arguments concerning analysis began amongst

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37 In one important place, however, Rambam makes a concession to tradition over his own better judgment. Although he calculates the actual year of the *shemittah* cycle (*Hilchos Shemittah V'Yovel* 10), he acknowledges that the calculation of the Geonim differ from what he has stated. Nevertheless, he is willing to follow what has been accepted:
ועל זה אנו סומכין, וכפי חשבון זה אנו מורין לעניין מעשרות ושביעית והשמטת כספים--שהקבלה והמעשה עמודים גדולים בהוראה, ובהן ראוי להיתלות.
In this case, where there is a claim that the count has been ongoing and where his opposition would be radical uprooting of the Jewish calendar, Rambam relents to tradition. However, in a *teshuvah* (Blau 389), he indicates that he only does so with reluctance.
וכמה פירושים שלנו בדברים אלו בחבורים שחברנו ועדיין הדבר אצלנו ספק בשמיטה וחוששין אנו לדברי הגאון זצ"ל שאמר שחשבון זה ירושה בידיהם עד שיתברר לנו יפה יפה היך הם הדברים ויסתלק ספק זה ואשלח ואודיעכם בעזר האל יתע'.
Despite his acquiescence to tradition he still records his own position in *Mishneh Torah*, apparently with the intention that a future *Bais Din* will consider both sides and perhaps come to the same conclusion as he has.

> them on many issues. Each person's logic reflected the limitations of his intellect and grasp of the fundamental principles. We cannot blame them for this. For we cannot expect every two debating scholars to debate with the same intelligence as did Yehoshua and Pinchas.[38] (Introduction to *Perush HaMishnah*)

Ideally it is possible to come to the proper conclusions, and in a debate between great minds arguing with total honesty and without ego, it was possible to come to a universally accepted truth. There is an exact meaning to every word in the Torah. There is an absolute truth as to what the Torah expects us to do in every case and it is possible to find it.[39]

Deciding *Halachah* in Days of Old

How is *Halachah* to be decided?

> On matters of *kabbalah* (tradition) there was never argument, and [thus] any issue in which you find argument is known to be independent of the *kabbalah* from Moshe *Rabbeinu*. Matters that are learned by deduction—if unanimously agreed upon in *Bais Din HaGadol,* are thus settled; but if there is disagreement, law is determined by majority [rule]… When *Bais Din HaGadol* was extant, there was no argument in Israel, for each case in which any Jew had doubt, was presented to the local court… If they knew [the resolution] they gave it, and if not the questioner and the court or its emissary would go up to Yerushalayim and ask the court on *Har Ha-Bayis*. If they knew [the resolution], they would give it, and if not all would come to the court at the gate of the Temple courtyard. If they knew [the resolution] they would give it, and if not all would

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38 Rambam means that Yehoshua and Pinchas also disagreed but they emerged from their debates with the absolute truth.

39 Rambam's view on this matter is in contradistinction to Ramban in his introduction to his *Milchamos Hashem* where he states "that among disputing commentators there are no absolute proofs nor definitive solutions for most problems, for this field is not an absolute science." (See *Hakirah,* vol. 5, p. 40, from which this translation is taken.) This disagreement is the source of other important disagreements between them, but in this essay we only deal with Rambam's *shittah*.

> go up to *Lishkas Hagazis*[40] to *Bais Din HaGadol* and ask them. If the matter that was in doubt to all [the aforementioned parties] was known to *Bais Din HaGadol,* either through a *kabbalah* or via derivation by the halachic rules, they would immediately give them the answer, but if the issue was not obvious to *Bais Din HaGadol* they would deliberate on the issue at that time and debate it until they came to unanimous agreement, or until a vote was taken and the majority was followed. Then they would tell all the questioners that this was the law, and they would leave. (*Hilchos Mamrim* 1:3)

The High Court of Israel would debate issues of doubt and come to conclusions based on a majority decision if they could not achieve unanimity. This high court, comprised of the greatest scholars in Israel, was best qualified to determine the Torah's intent and of course their decisions had to be followed.

So what happened after the dissolution of the High Court? Confusion and doubt set in.

> Once *Bais Din HaGadol* no longer existed, argument increased in Israel. One party would declare [something] impure and give a reason for his opinion and another would declare it pure and supply a reason for his opinion. One 'prohibited' and another 'permitted.' (*Hilchos Mamrim* 1:9)

Nevertheless, while the *yeshivos* of the Amoraim were still intact, it was possible for the Rabbis to make decisions that were binding on all of Israel.

> All issues in the Talmud Bavli are binding on all of Israel; and we force every city and town to follow all the customs that were instituted by the *Chachmei HaTalmud,* and to reiterate their *gezeiros* and *takanos,* since all those matters in the Talmud were agreed upon by all of Israel, as the *Chachamim* who instituted these *takanos, gezeiros,* and *minhagim* or who deduced a law and learned that the judgment was so, were all *Chachmei Yisrael* or the majority of them, and they were the ones who had heard the *kabbalah* on the fundamentals of the entire Torah, man from man linking back to Moshe *Rabbeinu.* (Introduction to *Mishneh Torah*)

Since all the Rabbis were together at that time, the final decisions of the Talmud are the final decisions of the entire body of scholars of

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40 Literally "the chamber of cut wood," a chamber off the courtyard of the *Bais HaMikdash* where the High Court sat in judgment.

Israel. At that time they were all in contact with each other and able to fully debate the issues just as in the time of the Sanhedrin. So, too, these were scholars "who had heard the *kabbalah* of the fundamentals of the entire Torah." They had heard them "man from man linking back to Moshe *Rabbeinu*." Only those who were part of the oral transmission that guaranteed that what Moshe was taught could be faithfully transmitted were entrusted with making decisions that could be relied upon to be the truth and binding on all. In general,[41] one was considered a member of the *kabbalah* when he was granted *semichah,*[42] and Rambam felt that *semichah* continued almost to the closing of *Shas.*[43] The final decisions of the Talmud are binding even if the last decisions were not made by סמוכין, since their knowledge nevertheless qualified as knowledge that was part of the *kabbalah.* The Rif explains[44] that the *halachah* follows the Talmud Bavli rather than the Talmud Yerushalmi based on the principle of הלכה כבתראי—"the law follows the last authority"—for it is the final decision of a unified rabbinic authority.

Deciding *Halachah* in the Future

Rambam had confidence that the people of Israel, before the coming of *Mashiach,* will reestablish סמיכה.

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41 See *Hilchos Sanhedrin* Chapter 4. Shmuel apparently did not have *semichah,* and *semichah* cannot be given outside of Israel, so it is generally assumed most of the Amoraim in Bavel did not have *semichah.* It is apparently not an exact equation, but see the next note.

42 אחד בית דין הגדול, או סנדרי קטנה, או בית דין של שלושה--צריכין שיהיה כל אחד מהן, סמוך מפי סמוך ומשה רבנו סמך יהושע ביד, שנאמר "ויסמוך את ידיו עליו, ויצוהו" (במדבר כז,כג) וכן השבעים זקנים--משה רבנו סמכם, ושרת עליהן שכינה. ואותן הזקנים סמכו לאחרים, והאחרים לאחרים; ונמצאו הסמוכין איש מפי איש, עד בית דינו של יהושע, עד בית דינו של משה רבנו. ואחד הנסמך מפי הנשיא, או מפי אחד מן הסמוכין, אפילו לא היה אותו הסמוך בסנדרי מעולם (הל' סנהד' ד:א).

43 He held that *Batei Dinim* for *Kiddush HaChodesh* existed until the days of Rava and Abbaye and these had to be comprised of סמוכים. It is possible that *semichah* continued even longer, but there were not a sufficient number of סמוכים to make full courts. See *Hilchos Kiddush HaChodesh* 5:3.

44 Rif at end of *Maseches Eiruvin.*

> I believe that if there will be agreement amongst the students and the Rabbis to appoint a man for the yeshivah, i.e., a head; should this be done in the land of Israel, then this person would be the head of the yeshivah and a סמוך who could ordain others should he wish. If you do not say so, it would be impossible to have a *Bais Din HaGadol* ever again, since such a court must consist entirely of סמוכים. And G-d has promised that 'I will return the judges as in days of old.' And lest you say that *Mashiach* will appoint them with no need for them to be סמוכים, this is impossible, for we have explained that *Mashiach* will not add or detract from anything in the Torah….And I believe that the Sanhedrin will return before the revelation of *Mashiach,* and in fact this will be one of the signs [of his imminent arrival] as it says, 'and I will return judges as in days of old and your advisers as before and then it shall be called the city of righteousness.' And this will undoubtedly be when G-d will prepare the hearts of men and they will exceed in goodly actions and their desire for G-d and his Torah will be great and their uprightness will increase before the coming of *Mashiach* as is foretold in *Tanach*. (*Perush HaMishnah, Sanhedrin* 1:3)

Semichah can only be established if there is a person worthy of it, "an outstanding *Chacham* who is able to rule in the entire Torah" (*Hilchos Sanhedrin* 4:8). The *Radvaz* noted that in his time such a person could not be found (ibid. 4:11). Certainly there are people who know all the Talmudic sources—but in his day and ours there is none capable of interpreting the intent of *Chazal*. There is also absolutely no reason to believe that the standards for qualification can ever be compromised.[45] Rambam foresees a day when the Talmud will be understood clearly. Prophecy will return before the coming of *Mashiach (Hilchos Melachim* 12:2), so why should anyone doubt that the understanding of Torah will dramatically rise in the era before *Mashiach*? Indeed, Rambam believes that in those days, *Mishneh Torah* will be understood and its study will lead back to a reestablishment of

[45] Certainly for that reason the project to reestablish *semichah* was abandoned in the days of the Bais Yosef. How ludicrous of the founders of the modern "Sanhedrin" to think that it could be reestablished with the scholars of the present day.

our link with Sinai.[46] His confidence is based first on the promise of the prophets. But also he has confidence in his work to the extent that he believes it will be a conduit to this purpose. And further yet, he also had confidence in the dedication and genius of the Jewish people, both those who wrote the Talmud and those who study it.

Deciding *Halachah* Today

The question now remains, how is *halachah* to be determined? Since the days of the closing of the Talmud, we have lacked both 1) scholars who received the entire Oral Law from the teachers—סמוכין, and 2) all the scholars of Israel being in communication with each other so that they can debate an issue. In modern times, the communications era, it is theoretically possible to rectify both issues—for it is possible to gather all scholars together to appoint a single סמוך and restart the סמיכה process. But in reality it remains an impossibility, firstly because of the animosity between different groups and the unwillingness of all scholars to honestly debate an issue—to listen to the arguments of those they do not respect. Secondly, and even more important, even if we are able to overcome this problem, we are presently lacking in scholars of the stature of חכמי הקבלה, to be appointed as סמוכין. The Talmud, and even the golden words of Rambam, remain clouded in misinterpretation.

> Every court that arose after the Talmud, in every town that enacted *gezeiros, takanos,* and *minhagim* for its town or for multiple towns—did not see their decrees and actions spread throughout all of Israel, because of the large distances between communities and the poor state of the roads. Moreover, these courts are those of individuals, and *Bais Din HaGadol* of seventy-one has ceased to exist some years before[47] the compilation of the Talmud—therefore we do not force people of one town to enact the customs of another town. And we do not tell a court to enact the *gezeiros* enacted by another court in its town… and so, too, if one of the Geonim

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46 As we quoted earlier (*Igros HaRambam*, Shilat ed., p. 302), a day would come when "without doubt, all of Israel will suffice with this *sefer* alone, and other *sefarim* will be put aside."

47 I translate כמה שנים as "some years" not "many years" as Rambam often uses the term כמה פעמים and we are only aware of two instances.

> taught that the proper way of adjudicating a case is in a certain way and it became clear to another court that arose after it that this is not the approach that is written in the Talmud—we do not listen to the first, but to whom logic supports ("מי שהדעת נוטה לדבריו"), whether it be the first or the last." (Introduction to *Mishneh Torah*)

Community courts have the right to make *takanos* for their community.[48] But when it comes to determining practice, the courts or the individual Geonim only act as interpreters of Talmudic law. The individual is not bound by any particular court or Rabbi—not even by the אחרון, the latter authority, who is the most prominent authority of the day. Rambam makes it clear: the *halachah* should follow "מי שהדעת נוטה לדבריו"—the one with the convincing argument.

Clearly, the choice of whom to follow rests with individual Rabbis.

> If two *Chachamim* or two courts are in disagreement at a time when the Sanhedrin is defunct, or [even during the time of the Sanhedrin but] when the case had not yet come up before [*Bais Din HaGadol*], irrespective of whether the disputants are coexistent or from different time periods, with one declaring 'impure' and one declaring 'pure', one prohibiting and one permitting; if you do not know to where the law leans (להיכן הדין נוטה) in a case of Torah law, go after the more stringent opinion, and in a matter of Rabbinic law, follow the more lenient position. (*Hilchos Mamrim* 1:5)[49]

If the individual scholar agrees with one opinion then he should follow that opinion.[50] Only if he cannot decide whom to follow, should he turn to a secondary principle governing the laws of ספק (doubt), which states that in a question of a Torah prohibition we follow the

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48 What constitutes a community and why these *takanos* and *gezeiros* have standing is not the subject of this essay. We deal here only with determining what the *halachah* is on issues that are of Torah law or Rabbinic extensions and *takanos*.

49 The source of this *halachah* is the gemara *Avodah Zarah* 7a. Others disagree with Rambam's interpretation. See the next section.

50 See the מפתח in Frankel's Rambam which brings several commentaries including the Chazon Ish who read Rambam this way.

stringent opinion and with regard to Rabbinic laws we follow the lenient opinion.[51]

Rambam speaks of the calamity caused by "foxes" not qualified to rule who set themselves up as authorities.[52] One could argue that individual Rabbis should therefore not *pasken* for themselves even in making a decision between various authorities. But in fact that is clearly not what Rambam is talking about. He speaks only of those who set themselves up to *pasken* for others.[53] Moreover, in modern times Rama[54] and Rivash[55] contend that present-day ordination qualifies one to rule.[56] Those who are learned enough in their own eyes to feel that they can say להיכן הדין נוטה are expected to do so. One is responsible for the fate of his own soul, and his choice of the path he takes in the service of G-d is his own.

Obviously, if one is not learned and is not capable of making a responsible halachic judgment about whom to follow (לא הגיע להוראה), he does not have the prerogative to make his own deci-

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51 According to Rambam, the fact that we follow the stringent opinion in case of doubt in Torah law, is itself Rabbinic. Were it not for this Rabbinic *takanah*, we could always follow the more lenient opinion when in doubt. (See, for example, *Hilchos Isurei Biah* 18:17. See also the beginning of *Sefer Shev Shematissa*.)

52 ולא כל מי שמת רבו מותר לו לישב ולהורות בתורה, אלא אם כן היה תלמיד שהגיע להוראה...וכל תלמיד שלא הגיע להוראה ומורה הרי זה רשע שוטה וגס הרוח, ועליו נאמר "כי רבים חללים הפילה" (משלי ז:כו). וכן חכם שהגיע להוראה ואינו מורה הרי זה מונע תורה ונותן מכשולות לפני העורים ועליו נאמר "ועצומים כל הרוגיה" (שם). אלו התלמידים הקטנים שלא הרבו תורה כראוי והם מבקשים להתגדל בפני עמי הארץ ובין אנשי עירם וקופצין ויושבין בראש לדין ולהורות בישראל הם המרבים המחלוקת והם המחריבים את העולם והמכבין נרה של תורה והמחבלים כרם ה' צבאות, עליהם אמר שלמה בחכמתו "אחזו לנו שועלים שועלים קטנים מחבלים כרמים" (שיר השירים ב:טו). (הלכות תלמוד תורה פרק ה:ג-ד)

53 See *Tosfos Bechoros* 31a s.v. *d'ha* that a *Talmid Chacham* can decide for himself.

54 *Yoreh Deah* 242:14.

55 *Teshuvas HaRivash* 271.

56 It also takes care of the problem of מורה הוראה לפני רבו. See *Lechem Mishneh* (*Talmud Torah* 5:4) who notes that Rambam does not require one to be forty years old and suggests reasons why.

sions.[57] As long as one has not established himself as an authority, it is expected that he will follow the position of his Rebbe,[58] or the authority he chooses to consult on the particular issue.[59] It is those who are ראוי להוראה ("fit to *pasken*") who are bound by להיכן הדין נוטה.

Accepting Earlier Authority

Whereas Rambam contends that in a case of doubt one must follow the general rules of either leniency or stringency,[60] other authorities, based on their understanding of the Gemara,[61] say that either the

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57 We could argue that a person in this situation should then be bound by the principle of being stringent in Torah laws and lenient in Rabbinic laws (ספק דאורייתא לחומרא וספק דרבנן לקולא) in all disputed cases. But in fact, the above *halachah* was only directed to one who is capable of הוראה, but the non-ordained are always expected to go to an authority to determine *halachah*.

58 This might be, but is not necessarily the prohibition of חולק על רבו—*Hilchos Talmud Torah* 5:1.

59 Rambam does not speak of requiring a person to always go to the same authority to ask questions. Nor is he really explicit that one must present every question to his Rebbe. Moreover, if the principle of חולק על רבו does mean that one does have to consult his Rebbe—this only applies to רבו מובהק (*Hil. Talmud Torah* 5:9) which is not a common position in our day. We will not dwell on this issue, for our main concern is the halachic process and whom a ראוי להוראה should follow.

60 Depending on whether it is a Torah or Rabbinic law.

61 *Avodah Zarah* 7a. See *Ramach* who questions Rambam's *psak* contending that Rambam's rule only applies when those arguing are equal in wisdom (perhaps חכמה ומנין). The *Lechem Mishneh* also brings the *teshuvas haRashba* (253) who also contends that one whose "שמו הולכין אחריו" should be followed. Only when שוים (equal) should we follow the rules of ספק, and this means equal in wisdom and, according to some *Rishonim,* equal in numbers—thus contending that majority rule should be followed. But see *Kesef Mishneh* who explains why Rambam concluded differently. The Rama (*Choshen Mishpat* 25:2) follows the Ramach. The Shach (*Hanhagos Horaos B'Isur V'Heter* after *Yoreh Deah* 242) brings other *Rishonim* in accord with Rashba.

more learned person [62](חכם) or the opinion of the majority should be followed.[63] Only if there is exact equality between opposing views should the laws of *safek* be applied. Also, we have seen that Rambam is explicit that preference should be given "neither to the earlier authority nor the latter." However, the Rama (*Choshen Mishpat* 25:2) and Shach (ibid. 21) quote *Rishonim* and early *Acharonim* who argue for giving precedence to either the latter authorities[64] (הלכה כבתראי), who have the benefit of seeing all the arguments of their predecessors, or alternatively to the earlier authorities because of their superior wisdom and superior *kabbalah*—especially when the earlier authorities are of an earlier era. Indeed, Rav Yosef Caro, in deciding that he would primarily follow two out of three when a consensus was lacking amongst Rif, Rambam and Rosh, was using a form of majority rule. However, his choice of these three was a deference to חכמה and also a deference to the wisdom of the era of the *Rishonim*.[65]

By contrast, strictly following Rambam's words it would seem that present-day Rabbis may choose to follow their own analysis, and

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62 They interpret the gemara's statement that when two scholars argue we are presented with a ספק, to be only applicable in a case where the two authorities are equal. When one is greater, it is self-evident that we must follow him.

63 Or a combination of both. See note 29 and *Rama*, *Choshen Mishpat* 25:2.

64 Based on the Rif's argument for choosing the Bavli over the Yerushalmi since it is a latter source. Some argue that the reason for this is that the latter source has seen all before it and is thus better placed for making the best argument. But it is very possible that Rif meant as Rambam explains—the courts of the Bavli were the last courts able to *pasken*. This being the case, there is no reason to extend this principle to post-Talmudic sources.

65 להוסיף טענות וראיות, ואיזהו אשר ימלאו לבו להכניס ומי זה אשר יערב לבו לגשת ראשו בין ההרים הררי קל להכריע ביניהם על פי טענות וראיות לסתור מה שבררו הם או להכריע במה שלא הכריעו הם, כי בעונותינו הרבים קצר מדע שכלינו להבין דבריהם כל שכן להתחכם עליהם. ואל עוד, אלא אפילו היה אפשר לנו לברור דרך זה, לא היה ראוי להחזיק בה לפי שהיא דרך ארוכה ביותר.ולכן הסכמתי בדעתי כי להיות ג' עמודי ההוראה אשר הבית בית ישראל נשען עליהם בהוראתם הלא המה הרי"ף והרמב"ם והרא"ש ז"ל אמרתי אל לבי שבמקום ששנים מהם מסכימים לדעת אחת נפסוק הלכה כמותם אם לא במקצת מקומות שכל חכמי ישראל או רובם חולקים על הדעת ההוא ולכן פשט המנהג בהיפך. ומקום שאחד מן הג' העמודים לא גילה (הקדמה לבית יוסף).

come to conclusions independent of what a *Rishon* says.[66] In fact, Rambam did not instruct his students to abandon *Shas* in coming to their decisions—although he did urge them to give primacy to *Mishneh Torah*. He wrote the *Perush HaMishnah* to aid the study of the Mishnah and works on the Bavli and Yerushalmi to aid in their[67] analysis. In a *teshuvah* to Rav Pinchas HaDayan he makes clear that he never intended the study of the Talmud and Rif and other works to be abandoned and that he himself continued to give *shiurim* on them.[68] He told his student R. Yosef to study "the *halachos* of the Rif, *z"l*, and compare it with *Mishneh Torah* and upon seeing a discrepancy, realize that this is a result of analysis of the Talmud, so search out the reason in the sources."[69] He expected that the premier scholars would combine the study of Talmud and *Mishneh Torah* to gain the full understanding that enabled him to write *Mishneh Torah*. To people who had gained an understanding of his work, he certainly would have allowed dissent—as he explicitly instructs the scholar to follow להיכן הדין נוטה. Thus, students in any era are empowered to *pasken* differently from a *Rishon*.

However, accepted practice is not to take a position that is not supported by any *Rishon*. Rav Shmuel Brudne, *zt"l,* said it best: "We can argue on the *Rishonim,* but we are not that stupid."[70] The concept of giving deference to earlier authority seemingly has precedent in the relationship of Amoraim to Tannaim. *Semichah* still existed late into

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66 It seems apparent that some *poskim* have occasionally chosen to do so.

67 Unfortunately, little is left of these works.

68 See *Igros HaRambam*, Shilat ed., p. 441.

69 *Igros HaRambam,* p. 312. See R. Shilat's note (p. 257) where he downplays Rambam's criticism of those who waste their time with שקלא וטריא. Rambam clearly is emphasizing the importance of understanding the halachic system and how laws fit together based on underlying principles. Theorizing about the meaning of every rejected argument in the Talmud is of much lower priority and should only be engaged in by those who have mastered the fundamental underlying principles. But when there are cases where the ruling has an added subtlety and the law is in question, the student is directed to closely analyze the relevant *sugyos*.

70 Told to Dr. Menachem Epstein.

the Amoraic period[71] and thus, since every court has the right to overturn the rulings of its predecessors, Rava's court could toss out a ruling of Rabi Yehudah *HaNasi* and his court. Nevertheless, the Amoraim, at least in general, followed the rulings of the Tannaim. Rav Yosef Caro says that the Amoraim "accepted this upon themselves" not to argue on the Tannaim.[72] This is probably because, since in the days of the Amoraim (see above), learning was partially from text and only partially *mesorah*, they recognized a decline in the quality of their independent judgment and looked for guidance from a time when the *mesorah* was pure. Thus the custom in later days has been to follow the lead of the Amoraim in deferring to the previous era. Rav Yosef Caro, in the early days of the *Acharonim,* looked to the *Rishonim* to establish *halachah*. He apparently recognized a perceptible difference in the quality of their grasp of the Talmud from that of their successors. Aside from their great genius, the Shach and Vilna Gaon had an advantage over earlier *Acharonim* in that more *sifrei Rishonim* became available in their day and they took full advantage of them.[73] The claim made by authorities like the Chazon Ish, that they would not use newly found *Rishonim* in establishing *psak*,[74] is contrary to the Rambam, Gra, and Shach who did their best to reestablish the links of our *mesorah* to the best of their ability. Based on the texts of the *Rishonim,* the Gra and Shach would choose to overrule the decisions of *Mechaber* and Rama. All of these *Acharonim* base their *psak* on *Rishonim,* but based on the best texts and the best understanding of the intent of these sources, later authorities would reject earlier interpretations.

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71 As Rambam states in *Hil. Kiddush HaChodesh* (5:3) with regard to courts being מקדש החדש.

72 *Kesef Mishneh Hil. Mamrim* 2:1. He also says that it is for this reason that the generations after the Amoraim did not dispute the Talmud. But as we have noted, Rambam explains that this is not an issue of acceptance but rather the Talmud was the last court of all the scholars of Israel.

73 Rabbi Dr. Chaim Soloveichik discusses this in a lecture whose audio tape is freely circulated.

74 בעצם אין הרוב ידוע כי הרבה חכמים היו שלא באו דבריהם על הספר והרבה שלא הגיע ספריהם לידנו [ולכן אין הדין משתנה כאשר מדפיסים כתבי יד חדשים ונהפך המיעוט לרוב]. (מכתבים)

In discussing how to *pasken,* the Chazon Ish[75] considers many factors, not giving hardened rules. He says that we are really not qualified to decide between the positions of two *Rishonim*; nevertheless, one who has preference for particular major *Rishonim* can choose to follow them in matters of dispute. On the other hand, in a particular case the Rabbi may sometimes feel that the evidence strongly supports one position and he has the right to make decisions based on this. One should not abandon the great gift of our intellect that G-d granted man. In one's analysis of להיכן הדין נוטה,[76] one may combine the affinity for a particular *Rishon* and an analysis of the facts of the case itself.

Should one's preference for a specific *Rishon* qualify as a factor in להיכן הדין נוטה? Should not only the evidence of the *sugya* be relevant? One can argue: "Who would wish to argue with Rambam, who had a grasp of the entire Torah at a level we can only speculate about?"[77] In addition to the superiority of his mind, he began his studies with a far superior *kabbalah*, and as we have seen he researched the sources

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75 (מכתב) ידוע כי אין כח רוב אלא במושב ב"ד, אבל חכמים החולקים שחיו בדורות חלוקות או במדינות חלוקות אין נפקותא בין רוב למיעוט, ואותה המדינה שרוב התורה שבידם הוא מרב אחד ומתלמידיו ומתלמידי תלמידיו עושין כרבם אף במקום שרבים חולקים. ובימים אחרונים שספרים מיוחדים של רבותינו לקח חלק העקרי של מסירת התורה לדורות הנוכחות כמו רי"ף ורא"ש רמב"ם רמב"ן רשב"א ריטב"א ר"ן מ"מ מרדכי פרש"י והתוספות, הם היו הרבנים המובהקים של הדורות. כל מקום שיש פלוגתא [וכאמור אין כאן הכרעת כח רוב] היה הדבר מסור להכרעה לכל חכם או להחמיר, או לבחור ביחידים ידועים לילך אחריהם ובמקום שלא הוכרע הדבר ספק ומלבד שאין כאן כח רוב, בעצם אין הרוב ידוע כי הרבה חכמים היו שלא באו דבריהם על הספר והרבה שלא הגיע ספריהם לידנו [ולכן אין הדין משתנה כאשר מדפיסים כתבי יד חדשים ונהפך המיעוט לרוב]. ובכל זאת למיעוט הלבבות, להכריע בסברא, נוטלים לפעמים גם כח רוב המספרי לנטיה לצד זה, אבל ראוי יותר להתחשב עם הפוסקים שתורתם הגיע לידנו בכל מקצועות התורה. אם כי אין אנו נגשים להכריע בין הראשונים בהכרעה שכלית מוחלטת, מ"מ מתלוה תמיד בההכרעה עיון שכלי והרבה פעמים מכריע מרן ז"ל כאחת הדעות מפני שדבריהם מחוורים ביותר ומתיישבת כל הקושיות. ענין מיוחד מצאו הפוסקים לפסוק כבתראי כי מסתמא ראו האחרונים דברי הראשונים כפי שהורנו רבותינו אין לנו לעזוב את שימוש השכלי ועלינו ליסד את משקל הגדול על היקש השכלי שהוא המלאך בין היוצר והיצור.

76 In the introduction to *Mishneh Torah* he uses the term להיכן הדעת נוטה.

77 Although in fact one will often see *Acharonim* and even contemporaries pointing out his "mistakes."

from texts far superior to anything we have. In fact, Rav Yosef Caro[78] writes that "he is the greatest of all legal authorities" and admonishes those who suggest that those who follow him be forced to accept the prevailing *poskim* of the surrounding area.[79] Still, are we qualified to judge that Rambam's grasp was greater than the Rosh's or any other *Rishon's?* Apparently, yes. This choice was apparently made first by the Bais Yosef and then by the followers of Rav Chaim Brisker. His methodology of study, the *Brisker Derech,* focused on Rambam. His major *chibbur*, and that of his son, and his other major student, Rav Isser Zalman Meltzer, were all works on the Rambam. Whereas their analytical method is harmonious with the depth of all the great *Rishonim*, there is something special in their relationship to Rambam. The astounding conceptual organization that underlies *Mishneh Torah* is the source of the spring from which *Brisker* analysis flows.[80] Should one be a student of Brisk, he must have an affinity for the halachic decisions of Rambam—for this is for him להיכן הדין נוטה. In Rav Chaim's age of enlightenment, the two other astounding minds of the era—the Rogachover and Or Someach—also centered their studies and wrote their main works on the Rambam, even answering questions on *halachah* by referencing the *Moreh Nevuchim.*[81] For them as well, the *shittas haRambam* was להיכן הדין נוטה.

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78 See *Avkat Rochel* 32: "The Rambam is the greatest of all *poskim* (legal authorities), and all the communities of *Eretz Yisrael* and the Arab-controlled lands and the West practice according to his word, and accepted him upon themselves as their *Rav*… why try to force them to move away from him." See also *Bais Yosef, Orach Chaim* 3 ונכון ליזהר כדבר הרמב"ם שהוא עמוד ההוראה.

79 "מי הוא זה אשר ערב את לבו לגשת לכוף קהלות שנוהגים כהרמב"ם ז"ל לנהוג כשום אחר הפוסקים ראשונים ואחרונים" (אבקת רחל, שם).

80 Although the Rav, Rav Soloveichik, *zt"l*, is quoted as saying that *"lomdus"* could not be done without *Tosfos*, this refers to the fact that *Tosfos* explicitly opens up to us the fundamentals of how *"lomdus"* works. Once one is proficient with its methodology, the refinement of Brisk is most attuned to Rambam.

81 See Prof. Marc Shapiro's example on p. 32.

Gadol HaDor

As an adherent of the view that superiority in wisdom is the crucial factor in determining *halachah*, the *Sefer HaChinuch* (495) suggests a different source of halachic authority, the *Gadol HaDor*, (כלומר החכם הגדול אשר יהיה בינינו בזמננו). He states that in the absence of *Bais Din HaGadol,* the greatest scholar of the day takes on its authority.[82] He quotes the aphorism "Yiftach in his generation is like Shmuel in his generation." His opinion might be based on the argument[83] that when one scholar is greater than all others we do not have a case of *safek* and logic tells us to follow him. However, his presentation and especially his reference to "Yiftach in his generation" suggest that he believes that the authority invested by the Torah in *Bais Din* was given to the *Gadol HaDor* when these courts do not exist. Thus the *Gadol HaDor* would not necessarily be bound by the greater generations of scholars before him, and be free, as Yiftach, to overturn the decisions of earlier Shmuels.

However, the *Chinuch* brings no evidence to support this contention, and the *Minchas Chinuch* (ibid.) is quick to note that while the principle of "Yiftach in his generation" applies to the Sanhedrin of each age, there is no Talmudic source or logical reason to believe that it applies to an individual scholar. While this position seems to be widely endorsed, in general the *Chinuch* is not a generally accepted Halachic source.[84] It would seem that in contrast to Rambam,[85]

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82 לשמוע לכל ב"ד הגדול "ונוהגת מצוה זו בזמן שבית דין הגדול בירושלים... ובכלל המצוה גם כן לשמוע ולעשות בכל זמן וזמן כמצות השופט, וכמו שדרשו... (ר"ה כה:) ואל השופט אשר יהיה בימים ההם, יפתח בדורו כשמואל בדורו, כלומר מצוה לשמוע בקול וכו' (תצ"ה) ועי' תצו.

83 And his interpretation of *Avodah Zarah* 7a as noted above.

84 We are not even sure of his identity.

85 עי' לעיל וגם פיה"מ בכורות ד:ד - "ושמא יטעך בכל הענינים הללו שכללתי בדברי אלה אותם השמות המפורסמים בארץ ישראל ובבל שקוראין אנשים ראש ישיבה, ואחרים אב בית דין, ומבדילים בין ראש ישיבת גאון יעקב ובין ראש ישיבה של גולה, וכן כותבים לאנשים אשר לא ראו אותם ראש ישיבה או זולת זה מן השמות, לפי שהדברים הללו פטומי שמא בעלמא והרי הן כדרך הכנוין והחניכה, וכבר ראיתי בארץ ישראל אנשים נקראים חברים, ובמקומות אחרים מי שנקרא ראש ישיבה, ואפילו בר בי רב דחד יומא ליתא. ואנחנו לא דברנו בשמות אלא בענינים וכבר

amongst some of the Geonim there was the belief that the abolition of Sanhedrin and the end of the Talmudic period did not mean the end of the reign of their courts, and the *Chinuch* reflects this view.[86] But aside from the fact that his opinion is unique amongst later *Rishonim*, the position of *Gadol HaDor* is really impossible to award. There is no controlling legal authority to determine who is the *Gadol HaDor*. There are really no objective standards for determining this position.[87] Wealth of knowledge of sources is only one factor in determining greatness in Torah. The ability to properly analyze the material is the most crucial feature of greatness in "learning" and there is widely diverse opinion in determining what constitutes greatness in this.

Majority Rule

Another principle suggested for determining *halachah* is that of [88]רוב, majority rule. This is the principle that was operable in *Bais Din,* אחרי רבים להטות ("turn after the majority"), and thus by extension it should apply to all situations where the Rabbis are in disagreement. The language of the Rama[89] based on a *Teshuvas Rashba*[90] is "if it is one

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בארתי לך כי הממונה באופן עניני הוא אשר נבחן ונתנה לו רשות לפי ערך ידיעותיו".

86 אגרת ר' שרירא גאון לענין ישיבות הגאונים "וזאת הצורה הוא במקום הסנהדרין, וראשה הוא במקום משה רבינו." ר' שמואל בן עלי "כי מקום הישיבה הוא כסא התורה, שהוא במקום מש"ר ע"ה בכל זמן וזמן ... וכל מי שחולק עליה הרי הוא חולק על אדון התורה, שהיא מקומה וחולק על משה רבינו ע"ה." (מקובץ אגרות, עי' הרמב"מ והגאונים" ממאיר חבצלת דף כא).

87 You may argue: "Wasn't Rav Moshe Feinstein acknowledged as *Gadol HaDor*?" The answer is, no. No one in the world of Rav Soloveichik would have considered anybody but him as *Gadol HaDor*. The followers of the Satmar Rebbe certainly considered him the *Gadol HaDor*, and *Lubavitchers* certainly followed only their Rebbe. A friend told me how a *chassidishe talmid chacham* told him that "Of course Rav Moshe is a fine *talmid chacham*, but look at Rav Menashe Klein's *sefarim*. How can you compare Rav Moshe to him?"

88 Some *Rishonim* with regard to *Avodah Zarah* 7a say to follow חכמה ומנין.

89 *Choshen Mishpat* 25:2.

90 1:203. See also the *Teshuvas Maharik* 41 quoted by Rama. In fact, Rashba only means to apply it when the parties are equal in knowledge.

against many, we follow the majority in all cases." As noted above, to some extent the Bais Yosef settled upon this in his *Shulchan Aruch*. He says that he follows a majority between Rambam, Rif and Rosh. Such *poskim* as the *Mishnah Berurah* also seem to follow this rule.[91] However, by the very fact that Bais Yosef first had to narrow the field of choice to three primary *Rishonim* he accentuates the difficulty in this approach. Who is to be included in the count? Not all authorities are equal. In the *Bais Din* all members have been selected by formal standards and as members of the court are all equal before the law, but this is not the case where there is no formal court system. The *Minchas Chinuch* (78)[92] contends that the principle of אחרי רבים להטות stated with regard to Sanhedrin only seems reasonable where there is a single deliberative body arguing the case. The *Chazon Ish* cited above is explicit that it does not apply outside of *Bais Din*.[93]

Tosfos (*Bava Kamma* 27b) asks why we determine monetary court cases according to the principle of אחרי רבים להטות to follow majority opinion when there is a rule in ממונות (monetary cases) of אין הלכין בממון אחר הרוב. *Tosfos* answers by distinguishing between the two types of רוב. Their answer[94] is explained by Maharam ibn Chaviv[95] and years later with great precision by Rav Chaim Brisker. The Biblical principle of אחרי רבים להטות is a unique principle that is the root of the Talmudic principle of רובו ככולו (the majority is equivalent to

But see *Chinuch* 78 where he seems to apply it even against more learned authorities. See *Minchas Chinuch* that they would deduce this from the *bas kol* that gave precedence to the majority of Bais Hillel against the מחددי טפי of Bais Shammai.

91 The language of Rashba quoted of "one against many" is really not strictly majority rule. Nor do *poskim* like the *Mishnah Berurah* count *sefarim* and rule upon a strict count (i.e., "It's 23 to 21 so we follow the side with 23 votes.") but they look for a predominant opinion, also weighing the stature of the various authorities ruling on the issue, as we note further on.

92 Concurring with the opinion of the גט פשוט.

93 ידוע כי אין כח רוב אלא במושב ב"ד.

94 **גבי דיינים שאני דחשיב מעוט דידהו כמי שאינו וליכא למימר התם אוקי ממונא בחזקת מריה דהא ב"ד מפקי מיניה.**

95 **מהר"מ אבן חביב (קונטרס הספקות בענין רוב בב"ד) בדיינים הרי המעוט גופו אסור לו לדון כדעתו ומחויב לבטל דעתו לדעת הרוב ולכן אין כאן מעוט לסמוך עליו.**

the whole of an object) used to explain such laws as the sufficiency of cutting the majority rather than the whole diameter of the *simanim* [96] in שחיטה (slaughtering).[97] The decision must always be made by the entire court but the Torah teaches that רוב constitutes the "whole." This concept is only operable within a *Bais Din* where the decision must be that of the whole entity of *Bais Din*.[98] Thus it follows that it does not apply to our mechanism of deciding *psak*[99] outside of *Bais Din*.

It is important to realize also that should we apply the majority rule methodology even in the limited way that Bais Yosef does, we could theoretically run into conceptual problems. By following Rambam and Rosh together on one case and Rambam and Rif on another and Rif and Rosh in a third case, it is possible[100] that there will be internal inconsistencies in the *Shulchan Aruch*. The works of all *Rishonim* are logically internally consistent. By following the two-out-of-three rule, interdependent rulings will inevitably be split between competing views. In analyzing the *Mechaber,* the methodology of broad halachic concepts that we call the *Brisker Derech* cannot be used. While Rama often follows a position closer to that of the Rosh, nevertheless he is largely in agreement with the *Mechaber,* and any conceptual inconsistencies in the *Mechaber* could filter down to the Rama. It thus seems likely that applying the *Brisker Derech* to *halachah* can very well lead to decisions that are at odds with the *Shulchan Aruch*.

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96 Wind and food pipes of the animal.

97 **אלא ודאי פשיטא כיון דאיכא גזה"כ דבעינן כך וכך סנהד' וגם דין דאחרי רבים להטות יש לן א"כ ע"כ דיש להם צירוף וכולם ביחד גומרים את הדין וע"כ אמרינן בהך רובא ככולא וא"כ הרי איכא כבר כל מנין הסנהד', ונמצינו למדין מהך דמהני רובא דסנהד' דחשיב רובא ככולא ומיעוט נתהפך כמו הרוב ונעשה כהרוב (חדושי הגר"ח)**.

98 The principle of אין הולכין בממון אחר הרוב is related to a רובא דליתא קמן and probability and not relevant to the רוב within the voting of *Bais Din*.

99 Rambam clearly makes this association between the principle of רובא דאורייתא and אחרי רבים להטות in the *Sefer HaMitzvos Aseh* 175. It is for this reason that the law stated in *Berachos* 9a יחיד ורבים הלכה כרבים is irrelevant according to Rambam. It only applies within a court.

100 Not absolutely so, since the *Mechaber* did not apply the two-out-of-three rule exclusively and did leave himself leeway to adjust his rulings as he saw fit.

Contemporary *Halachah* Reconsidered

The authority of the *Shulchan Aruch* is taken for granted by most. The *Chida* notes a tradition he heard, of two hundred Rabbanim who accepted the *Shulchan Aruch* as *halachah*.[101] The argument for imposing this acceptance by many on the entire community, however, is not all that clear. In fact, such *poskim* as the Gra and Shach did *pasken* against the *Shulchan Aruch*—consistent with Rambam that individuals were given the right to determine whom they will follow, להיכן הדין נוטה. Even should we present the argument that the collective decision of the scholars is to follow the *Shulchan Aruch*—we have already established that there is no principle of רוב operable outside of *Bais Din* that would bind the minority of dissenters.

The argument continues in some sources,[102] that Israel as a whole is guided by Divine Inspiration (רוח הקודש) which enables them to recognize the correct opinions in Jewish law. Hence the general acceptance of the *Shulchan Aruch* is itself evidence of its correctness. The sources for this belief are vague Talmudic statements that instruct the Rabbis to see how people conduct themselves when they are unsure of *halachah*.[103] While some *Rishonim* learn from these cases that when Rabbis are unsure of the law, they should follow local custom,[104] such a ruling[105] is not based on assumed communal רוח הקודש.

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101 ועי' ברכי יוסף (חו"מ כה:כט) **ועתה אגיד אשר שמעתי מפום רבנן קדישי ששמעו מפי הרב הגדול מופת הדור מהר"ח אבולעפייא ל"להה שקבל מזקני גאוני דור שהסכימו בכלל זה דמרן קרוב למאתים רבנים מדורו וכך הוא אמור כי כל אשר יעשה פסק מרן עבדי כמאתן רבנן אלו דבריו ז"ל**.

102 Such as Rabbi Aryeh Kaplan's "Handbook of Jewish Thought," 12:8.

103 *Berachos* 45a, *Pesachim* 66a, *Yerushalmi Peah* 7:6.

104 *See Teshuvos HaRosh* 56:10, *Teshuvos Meyuchasos LaRamban* 250, *Or Zarua, Avoda Zara* 7:137 אם לאו נביאים הם בני נביאים הם. My own assumption in the case of finding a solution for *korban Pesach* on Shabbos (*Pesachim* 66a), is that amongst the people there was someone who had a tradition as to what had been done the last time this was done.

105 Not necessarily followed by Rambam, whose rules for ספק we are aware of.

There are, perhaps, grounds[106] in the *Rishonim* for saying that collective Israel's will is binding and also for saying that there is some type of רוח הקודש behind the decisions of the *Chachamim,* the people we follow in every age.[107] However, both these claims are foreign to Rambam's thinking. Halachic decisions lie with the scholars, not with the people, and even the scholars are fallible.[108]

It is also important to note that factors other than majority rule were active in the decision-making process of the *Mechaber*. The *Mechaber* tells us that on occasion he used the *Zohar* as a source for a law.[109] An example of this is with regard to wearing *tefillin* on *Chol HaMoed*. The Bais Yosef notes that Rambam required that *tefillin* be worn on *Chol HaMoed* and though there was some dispute on this, "so too was the custom of the world until the days of the latter Rabbis of Spain, when they found in the *Sefer HaZohar* to *Shir HaShirim* that one who puts on *tefillin* on *Chol HaMoed* is as if קוצץ בנטיעות ("cutting the saplings," referring to an act of heresy), and then people stopped wearing them on *Chol HaMoed*."[110] Although it is generally accepted thought that kabbalistic sources must not affect *halachah*,[111] the Bais Yosef, in fact, does allow kabbalistic ideas to have an impact.

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106 I believe that an argument can be made that this is Ramban's opinion, but I have not seen it presented in any comprehensive way.

107 **(ב"ב יב.) "מיום שחרב בית המקדש ניטלה נבואה מן הנביאים וניתנה לחכמים, אטו חכם לאו נביא הוא הכי קאמר אע"פ שניטלה מן הנביאים מן החכמים לא נטלה. אמר אמימר וחכם עדיף מן נביא וכו' ומתאמרא הלכה למשה כותיה. הרמב"ן "דנבואת החכמים שהוא בדרך נבואה לא נטלה אלא יודעים האמת ברוח הקדש שבקרבם".**

108 Even the Sanhedrin is subject to the principle of פר העלם דבר של צבור. Moreover, much of the acceptance of the *Shulchan Aruch* today is only because people believe that its decisions are binding. Were they to know that this is not the case, they would not feel bound by it. As Rambam says in the earlier-mentioned *teshuvah*, in such a case there is no binding authority to what has been followed due to a mistaken assumption.

109 Introduction to *Bais Yosef* - ובקצת מקומות מאמרי הזוהר.

110 See *Kesef Mishneh* to *Hilchos Tefillin* 4:10. Elsewhere in *Bais Yosef* 545 he says that Rambam held that *tefillin* should not be worn on *Chol HaMoed,* a position to which here he brings clear evidence is not possible. See *Orach Chayim* 31:2.

111 See, for example, the *Biur Halachah* to *siman* 34.

More importantly, though Rambam is the primary source in Bais Yosef's determination of *halachah*, he must often first interpret Rambam's intent before he encodes his opinion in *Shulchan Aruch*. At times he ignores Rambam's position, apparently on the assumption that since Rambam does not explicitly make a statement on an issue, his opinion cannot be inferred. This is the case in an issue of very major importance. *Mechaber* (*Orach Chayim* 261:2) and Rama (ibid.) after him *pasken* that בין השמשות (twilight) begins 58 minutes after sunset, the position that originated with *Rabbeinu* Tam (*Tosfos Shabbos* 35a, *s.v. Trei)* and was accepted by most later *Rishonim*. However, it would seem that neither the opinion of Rif nor Rambam is ascertained. The *Maggid Mishnah* (*Hil. Shabbos* 5:4) is referenced by the *Be'er HaGolah* (ibid.) in relation to the proper time to identify as שקיעה, where he merely relates the opinion of *Rabbeinu* Tam—not clarifying what Rambam's position is. The alternate opinion, that places שקיעת החמה, "the setting of the sun," at sunset, is normally associated with the Gra (*Orach Chayim* 261:2). It is, in fact, mentioned earlier in the commentary of the Shach on *Yoreh Deah*.[112] He quotes the Maharam Alashkar (90) who, in turn, quotes Rav Hai Gaon and Rav Sherira Gaon. Maharam Alashkar also quotes Rambam's son as saying his father held this view and notes that anyone who wrote before *Rabbeinu* Tam who used the term שקיעת החמה certainly was referring to sunset. Yet this opinion of the Geonim, Rambam and Rif—that according to his standard principles of *psak* should be *halachah*—gets nary a mention. Only with the spread of the *Mishnah Berurah* was this position returned to prominence.[113]

More common than cases like the above, however, are the cases where the interpretations of major *poskim* are at odds with how proponents of the *Brisker Derech,* who specialize in Rambam's thought, understand Rambam's words. Is it possible that the same obstacles that Rambam faced in interpreting the gemara are present now in the interpretation of *Mishneh Torah*?[114] Rambam in his own day took upon himself the task of reestablishing the *mesorah*. Perhaps in our day as

112 *Yoreh Deah* 266:11.

113 See "The Making of a *Gadol*" by Nosson Kaminetsky.

114 This will be a topic for another day.

well, we should turn to him, as he himself called upon us to do,[115] to connect us to the Torah of the Amoraim. ☙

[115] As we quoted above, he wrote to his student that a day would come when "without doubt, all of Israel will suffice with this *sefer* alone, and other *sefarim* will be put aside" (*Igros HaRambam*, Shilat ed., p. 302).