The Taz HaYadua: Limitations Within Rabbinic Jurisprudence

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Introduction

The question of the Rabbis' authority to institute new laws is an age-old one. Rambam and Ramban, in *Sefer HaMitzvos*,[1] discuss at length the nature of this concept in the first *Shoresh*. The premise of the above-mentioned question assumes that the Rabbis adding to the Torah might be an overstep, an איסור of בל תוסיף, and the literature tries to explain how Rabbinic decrees fall within the already existing Torah framework. However, the other side of this question, focusing on בל תגרע, is equally significant. To what extent and how can the Rabbis actually limit the Torah's laws? This question may seem theoretical, but it manifests itself in practice, as Jews have refrained from shaking the *lulav* or blowing the *shofar* for thousands of years when their respective holidays occur on Shabbos.

While hints of this issue have been raised by the Rishonim, the literature on this topic exploded after the publication of the comments of Rabbi Dovid HaLevi Segal found in his renowned commentary on the *Shulchan Aruch*, *Turei Zahav* (abbreviated as Taz). He formulated and codified his theory on this issue. In short, Taz argues that the Rabbis are unable to create a Rabbinic decree if it contradicts an explicit Torah directive. Delving deeper into Taz's theory of Rabbinic jurisprudence, one may wonder where in the Torah or Rabbinic literature did Taz find hints of this idea, and more specifically, what are the exact parameters of this concept. This essay explores the sources of Taz's thesis and pinpoints what qualifies as an "explicit" Torah directive. We also consider which type of Rabbinic decrees conflict with Torah Law and if this concept applies to Jewish monetary laws, in addition to religious laws.

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1 See *Shoresh Aleph* in *Sefer HaMitzvos L'Rambam.*

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Source of Taz

Taz's thesis regarding the limits of Rabbinic jurisprudence can be found in his commentary on the *Shulchan Aruch*, specifically in *Yoreh Deah* (117:1). This discussion is based on a Mishnah in the seventh chapter of *Shvi'is*. The *Shulchan Aruch* rules that any food item which the Torah prohibits for consumption (e.g., נבילה או טריפה) cannot be sold even though there may not seem to be a formal Torah prohibition against benefiting from that item. Rashba suggests that this ruling is merely a Rabbinic prohibition. The Rabbis were concerned that if people became accustomed to selling these prohibited food items, they might eventually come to consume them. Taz questions this understanding on two grounds. First, he notes the Gemara[2] suggests that there is a Biblical prohibition to sell prohibited items. The Talmud, while investigating if the prohibition to eat also includes the prohibition to benefit, comments that the prohibition to sell items which cannot be eaten stems from the tension between two opposing texts in the Torah, one indicating permission to benefit (לכם) and one which prohibits (יהא). To resolve this conflict, the Talmud rules that one can generally benefit from the item but not sell it. It seems that the prohibition of selling items which one cannot eat indeed stems from a Torah prohibition.

Furthermore, Taz refers to *Tosafos* in *Succah* (39a) who compare an explicit Biblical exception to the prohibition of selling prohibited items when selling them to non-Jews to the prohibition of selling forbidden items. This comparison and exception indicate that the prohibition is, in fact, of a Biblical nature.[3]

From these questions, Taz develops his thesis. While it is true that the nature of the prohibition against selling prohibited items is Rabbinic in origin, as Rashba argued, the Rabbis are not able to prohibit an activity or item when that exact activity or item is explicitly permitted by Torah Law. In the case of selling prohibited items, the Torah explicitly allows Jews to

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2 *Pesachim* 23a.

3 This question can be answered without resorting to Taz's *chiddush*. First, *Tosafos* may in fact disagree with Rashba and assume a more literal understanding of the איסור to sell נבילות וטריפות, as *Pesachim* 23a assumes there is an איסור לכתחילה to sell these items, as the Torah writes יהא, they should remain as is, not sold. Taz is relying on a gloss of the *Tosafos* (גליון התוספות) which writes that *Tosafos* in fact assumes that there is an איסור דרבנן to sell נבילות וטריפות, and the פסוק is merely an אסמכתא. Furthermore, Rabbi Akiva Eiger in his comments to *Succah* 39a explains that there are many Rishonim who ostensibly indicate that this prohibition is Biblical. Even Rashba is quoted in his responsa (1:301) to assume that this prohibition is in fact of Biblical nature. This question requires further investigation.

sell their נבילה וטריפה to a non-Jew. Therefore, the Rabbis are not permitted to impose a stringency prohibiting that very activity, as it contradicts an explicit permission granted by the Torah.

This thesis, argues Taz, is not merely hinted at by the Rishonim; it is grounded in a Talmudic rule. In *Sanhedrin* 46a, the Gemara quotes Rabbi Eliezer ben Yaakov who asserts that a Jewish court, responsible not only for jurisprudence in monetary matters but also for communal and religious affairs, can impose corporal punishment even for offenses not mentioned in the Torah. The Gemara introduces a cryptic criterion for this permission, ולא לעבור על דברי תורה.

At first glance, this qualification may seem unnecessary, as there would not be an inclination to think that a Jewish court can actually change the laws of the Torah. Given this question, Taz suggests that the Gemara is in fact alluding to his thesis. The real concern is not regarding changing the Torah itself, but with a Jewish court potentially prohibiting acts explicitly allowed by the Torah. The Rabbis are granted significant authority to institute decrees, but this power is qualified by not prohibiting what the Torah explicitly permits.

Incidentally, Taz appears to equate the actions of a Jewish court, which usually handles monetary cases, with those of the Rabbis acting as leaders of the Jewish people, especially in their capacity to enact decrees. This assumption is pointed out by earlier commentaries. It is worth noting that the *Nemukei Yosef*, commenting on *Sanhedrin* 52b, specifies that this unique authority of the court is limited to the *Sanhedrin HaGadol*, effectively the supreme court and legislative branch of the Jewish nation, a body somewhat akin to the Rabbis who acted as leaders after the destruction of the Temple. Additionally, the *Mordechai* in *Bava Basra*,[4] quoted by Rema in *Choshen Mishpat*,[5] presents an opinion that this concept applies not only to Rabbis on a tribunal but also to community leaders.

Assuming this comparison holds, Taz introduces a perplexing understanding of the qualification ולא לעבור על דברי תורה. These words are only the first part of the larger statement found in the Gemara. The complete statement in the Gemara concludes with אלא כדי לעשות סייג לתורה. Interestingly, Rishonim commenting on this Gemara understand the first clause as a foil, or negative image, of the second clause. Rashi, for example, interprets these two clauses as a qualification for Rabbinic intent. The court should not implement capital punishment for actions not explicitly mandated by the Torah with the *intent* to violate the Torah in its entirety;

4 *Siman* 480.

5 2:1.

rather, it should be carried out with the *intent* to uphold the rest of the Torah. Alternatively, Rambam[6] understands this qualification to temporally limit the Rabbis' power in executing extra-Torah corporal punishment, noting that they should establish temporary edicts (הוראות שעה),[7] but not codify an extra-Torah ruling for future generations. Given these commentaries, one may wonder how Taz understood the second clause of *Sanhedrin* in light of his interpretation of the first clause, as these two parts appear to be interlinked.

Taz, however, seems to understand these two clauses in *Sanhedrin* in a different light, and his interpretation of the Gemara can be more clearly found in his comments in *Orach Chaim*. The law dictates that one may not blow the *shofar* on Rosh Hashanah when it falls on Shabbos.[8] The Gemara is concerned with the possibility of someone carrying the *shofar* on Shabbos from their private residence to the public domain to learn how to blow the *shofar*, a Biblical prohibition. Taz raises a question. If the Rabbis are prohibiting the fulfillment of Biblical commandments to prevent potential Biblical violations, then, theoretically, no one should ever blow the *shofar* in *any* year, regardless of whether it is Shabbos, because there is a prohibition against playing musical instruments on Shabbos and Yom Tov[9] for fear that one might repair these instruments on those days, constituting a Biblical violation of completing vessels.

Interestingly, this exact question is also raised by Bach, Rabbi Yoel Sirkes, Taz's father-in-law. Bach[10] presents a similar question to Taz but places emphasis on the mechanism by which the Rabbis can institute a decree to prohibit the fulfillment of a Biblical commandment. He formulates his question by wondering why the Rabbis did not issue a comprehensive decree to forbid blowing the *shofar* at all times, given the concept that the Rabbis can passively uproot Torah Law,[11] just as they prohibited blowing the *shofar* on Shabbos (presumably also because the Rabbis can uproot Torah Law through *passivity*).

Bach explains the difference between these two decrees and how they affect the Torah law of blowing a *shofar*. The Rabbinic decree not to blow the *shofar* on Shabbos does not directly conflict with one's ability to fulfill

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6 *Hilchos Sanhedrin* 24:4.

7 See Rabbeinu Chananel, *Sanhedrin* 46a, who writes the examples found in the Gemara were "safeguards, according to the needs of the time." Cf. הלכות ממרים ב:ד where Rambam equates the idea of הוראת שעה with כדי לעשות סייג לתורה more explicitly.

8 See *Rosh Hashanah* 29b.

9 See *Beitzah* 30a.

10 *Orach Chaim* 588:3.

11 See *Yevamos* 90b.

the Torah commandment. Even though one may practically need to carry the *shofar* outside to the public domain to fully fulfill the commandment (even deemed a "*hechsher mitzvah*," as discussed earlier in Bach there), it is theoretically not required, as the commandment is to *blow* the *shofar*, not to carry it *per se*. Therefore, the Rabbis can issue a decree to refrain from blowing the *shofar* on Rosh Hashanah when it falls on Shabbos because, while this is considered a negation of Torah Law in practice, that negation is merely a manifestation of an ancillary concern related to the practical aspects of fulfilling the commandment and not due to the commandment itself. In contrast, if the Rabbis were to prohibit the act of blowing the *shofar* altogether, thus affecting the specific method by which the commandment is fulfilled, this would constitute a *complete* nullification of the commandment. In this case, even if such a prohibition were passive, it would not be permitted.

For Bach, the Rabbis can cause a passive cancellation of Torah Law, but they cannot institute a law that would lead to a *total* upheaval of a Torah Law. According to Bach, the criterion for "total upheaval" appears to be whether the decree affects the core and essence of the commandment *per se* or only its practical fulfillment, even though both decrees effectively prevent one from fulfilling the commandment.

Taz,[12] however, differs from his father-in-law's assumption regarding what constitutes upheaval. He argues that the difference between these two decrees does not depend on whether they disrupt the core of the commandment but on whether the Rabbis uproot the practical (on a temporal plane) ability to ever fulfill a given commandment. If there is a decree not to blow the *shofar* on Shabbos, one can still fulfill this commandment the following year when Rosh Hashanah falls on a weekday. However, a decree to prohibit blowing the *shofar* entirely, on any Rosh Hashanah, would be considered a complete upheaval. For Taz, while he agrees with the core thesis of his father-in-law that the Rabbis are unable to make decrees, even to be passive, when it comes to a complete uprooting of a matter from the Torah, he differs on the definition of what constitutes a total upheaval. For Taz, the criteria are determined solely based on considerations of one's practical ability to ever fulfill the mitzvah in the future.[13]

Based on his definition of what constitutes a complete upheaval of Torah, Taz suggests that this aligns precisely with the complete statement found in *Sanhedrin* (46a). According to Taz, the Rabbis can enact decrees

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12 *Orach Chaim* 588:5.

13 See Ritva, *Rosh Hashanah* 32b (עמוד שז במוה"ק), who makes a similar distinction as Taz.

to establish certain safeguards, as seen in their prohibition of *shofar* blowing on Shabbos to prevent a violation of a Torah prohibition. However, the key condition is that these decrees must not result in "עובר על דברי תורה", specifically, they must not cause a "complete upheaval." Taz appears to be alluding to the same concept he previously discussed in his thesis regarding Rabbinic decrees conflicting with explicit Torah commandments.

The comparison is not immediately clear. In an earlier context, Taz used the idea of לא לעבור על דברי תורה to explain that the Rabbis cannot enact edicts that prohibit explicitly allowed Torah directives. In this context, however, Taz understands that לא לעבור על דברי תורה emphasizes the prohibition of completely uprooting the fulfillment of Torah Law. Furthermore, Taz in the above commentary later employs this concept to explain why the Rabbis did not institute a prohibition on performing a *bris milah* on Shabbos for fear of carrying the child in a public domain. He explains this is because the Torah specifies that a child be circumcised on the eighth day, implying even on Shabbos.[14] The Rabbis would not want to completely uproot that law. However, Taz's implicit comparison to the case of the *shofar* seems incongruous. The reason the Rabbis did not prohibit *shofar* blowing every Rosh Hashanah (for fear of instrument repair) was that such a decree would result in a *total* nullification of the fulfillment of *shofar* blowing. In contrast, in the case of *bris milah*, not being able to perform a *bris* on Shabbos does not completely nullify the ability to fulfill a *bris milah* on the eighth day, as other children born during the week can still be circumcised on the eighth day.

The answer to these questions appears to be the essential point of Taz's thesis and a more comprehensive explanation of the concern behind לא לעבור על דברי תורה. According to Taz, as elaborated by his father-in-law, the primary concern is the עקירת דבר מן התורה לגמרי, the complete uprooting of a matter from the Torah. However, it seems that there are multiple ways to entirely uproot Torah Law. One way is by rendering one practically unable to ever fulfill a positive Torah commandment, as described in Taz's response regarding the *shofar*. Another way to accomplish this feat is for the Rabbis to make inaccessible an option specifically allowed by the Torah. Even though the decree may only passively nullify that aspect of the commandment, such as the inability to sell נבילות to non-Jews or the inability to perform a circumcision on a baby born on Shabbos, since the Torah tells the individual that he has an option, this practical inability to execute that option is itself an עקירת דבר מן התורה

14 See *Shabbos* 132a.

לגמרי and is prohibited under the Gemara's prohibition of שלא לעבור על דברי תורה. In both situations, the common denominator is that there exists an עקירת דבר מן התורה, where one cannot exercise an option the Torah allows. Chazal are prohibited from enacting such decrees even when the decree only demands one to passively forgo the option.

The key issue that both Taz (and Bach) need to explain is: from where did this concept come? From the Gemara, there does not seem to be a qualification regarding the ability for the Rabbis to nullify Torah law. A potential answer can be located in *Yevamos* 90b. In this passage, the Gemara introduces the concept that the Rabbis can enact decrees that uproot the Torah, provided these decrees call for only a passive upheaval, similar to the case where the Rabbis instituted not to blow the *shofar* on Shabbos. Subsequently, the Gemara raises the issue of active Rabbinic upheaval of Torah Law. The Gemara points out that a prophet can instruct the Jewish people to violate a Torah commandment on a temporary basis, or הוראת שעה. The Gemara suggests that this source implies that the same principle should apply to the Rabbis' authority to institute decrees.

A question arises among the Rishonim regarding the qualification of the הוראת שעה as it seems to be directed at the prophet, suggesting that even the prophet cannot establish a long-lasting decree that uproots the Torah. This line of reasoning should extend to the Rabbis as well, and yet one finds Rabbinic edicts lasting for millennia. Ramban offers a solution to this issue. He suggests that even though the Rabbis are indeed enacting long-term decrees, these decrees are effectively considered הוראות שעה because they are established as a safeguard for the needs of the generation, designated as מיגדר מילתא.[15] Thus, even though Rabbinic decrees may last a long time, they are still conditioned with some theoretical limitation, as communal safeguards, and not unchanging edicts.

It is possible that this thought process aligns with that of Taz (and Bach). To institute a decree that would uproot an aspect of explicit eternal

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[15] This assumption is found at the end of that Gemara. It is important to note that Rashi understands that מיגדר מילתא means an act to save Jewish religion, as Eliyahu (there) was violating Torah Law to protect people from violating עבודה זרה. This should not extend to תקנות חז"ל which are not meant to protect the Jewish nation from religious upheaval, but from specific future concerns. However, it seems clear that Taz will understand like Ramban, as Taz compares (see above) the ability for חז"ל to make תקנות in general to the ability for a Jewish court to apply extra-Torah Law because of מיגדר מילתא. The assumption of Taz's comparison would require one to also assume there is an aspect of מיגדר מילתא in all תקנות חז"ל as well.

and unchanging Torah Law might contradict the foundational principle underlying any תקנת חז"ל, that of הוראת שעה. Establishing a decree that perpetually undermines Torah Law might be seen as a diminishment of Torah Law, thereby potentially violating the prohibition of לא תגרע.[16]

As an aside, it is important to note that there is another approach to Taz which focuses on more pragmatic considerations than the previous approach. Rambam notes that the Rabbis' ability to institute enactments is limited by the enactment's acceptance by the Jewish community.[17] If the people do not accept the practice, the Rabbis' institution is then nullified. The *Be'er Yaakov* (*Yoreh Deah* 117) argues Taz's thesis is rooted in this pragmatic concept. If the Rabbis would enact a law against an explicit Torah source, the people would simply not follow the decree. According to this formulation, Taz's thesis is not a fundamental limitation on the Rabbis, but rather an effective, practical check on the Rabbis' ability to institute their decrees. This approach, while logical, does not seem to correlate to Taz's language, which indicates that his thesis stems from a fundamental issue of עוקר דבר מן התורה לגמרי, especially given the fact that he

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16 Note that Bach understands the inability to make decrees which are עוקר דבר מן התורה לגמרי are לא יעלה מן הדעת, which may indicate the ability to enact such decrees as unfeasible. See Levush there are as well. See Ritva, *Yevamos* 90b D"H תא שמע. Also, it is noteworthy to highlight that according to this understanding, Taz may understand the issue of לעבור על דברי תורה to be in line with Rambam's understanding of this Gemara.

It is worth noting, according to this interpretation, that even though the Rabbis possess the authority to modify Torah Law, they must always ensure that some aspect of the original Torah commandment is preserved. This idea is explored at length in *Kovetz Shiurim Kuntres Divrei Soferim, Perek* 3, which introduces the commentary of Rashba (*Rosh Hashanah* 16b). Rashba's perspective supports the notion that the Rabbis can introduce additional requirements to Torah commandments without transgressing the prohibition of בל תוסיף, just as they can restrict the fulfillment of a commandment, as seen in the case of *shofar* on Shabbos, without violating בל תגרע, provided there is a valid need. However, *Turei Even* raises the question of whether the Rabbis' authority to passively uproot Torah commandments also extends to the prohibition of בל תוסיף. In response, the *Kovetz Shiurim*, as well as the *Divrei Yechezkel, siman* 17:5, deduce that Rashba's perspective suggests that while the Rabbis can restrict the ability to fulfill a Torah commandment passively, they do not possess the authority to uproot the prohibition of בל תגרע. This discussion leads to an interesting practical application as to the question whether one fulfills a mitzvah where one blows a *shofar* on Rosh Hashanah that falls on Shabbos.

17 See *Hilchos Mamrim* (2:5).

does not mention the Jewish community's acceptance of the given decree in his writings on this topic.

מפורש מן התורה

According to Taz, the concept of עקירת דבר מן התורה לגמרי occurs in a specific scenario, where a Rabbinic decree conflicts with an explicit Torah directive. Upon closer analysis, it becomes apparent that these two components exhibit various gradations, leading to a gray area when determining what genuinely constitutes a conflict. The first factor we need to consider is the nature and significance of what qualifies as a מקרא מפורש מן התורה.

Pri Megadim, in his introduction to his comments on the *Shulchan Aruch,*[18] raises a question about the definition of an "explicit Torah source." While the simplest definition implies a clear Torah verse that explicitly commands or forbids a specific action, there are nuances within Halachah where explicit Torah verses are intertwined with non-explicit oral traditions. For example, it is unclear whether laws derived from "*Halachah LeMoshe MiSinai*" or based on the "13 hermeneutical principles" fall within the scope of Taz's theory.

This question delves into a broader issue of what is the halachic significance of laws that are explicitly mentioned in the Torah. The Rishonim provide hints about these distinctions. *Ran* (*Nedarim* 8a) suggests that while one cannot make a vow against a Torah law, this rule specifically applies to those Torah laws that are explicitly mentioned in the written Torah.

Rambam also addresses this distinction, classifying certain Torah laws as דברי סופרים, words of the scribes. For example, in the realm of marriage, Rambam[19] categorizes *kiddushin* given with money as דברי סופרים, even though it is clearly a Biblical form of marriage, and those within this union who commit adultery would face the death penalty.

Rambam explains that many laws fall under the category of Torah prohibitions and commandments but may have different sources. If a law's source is explicit, it is genuinely considered מן התורה. However, if

18 פתיחה כוללת א:טו.

19 *Hilchos Ishus* 4:8

the source is derived from the י"ג מידות[20] or הלכה למשה מסיני, it is categorized as דברי סופרים.[21] Although the practical distinctions between these categories may not always be entirely clear, one could argue that for Taz, this difference is significant. Perhaps if the source is not as explicit, it results in a lesser degree of "conflict," which, in turn, mitigates the diminishment of Torah Law.

Some Rishonim do, in fact, consider the distinction between explicit Torah sources and implicit ones when discussing the Rabbis' ability to enact their decrees. The *Raavad*, in his gloss on the *Rif* (21a), suggests that the reason the Rabbis prohibited *shofar* blowing on Shabbos in general but did not prohibit it in the *Beis HaMikdash* when Rosh Hashanah fell on Shabbos lies in the Torah's explicit reference to *shofar* blowing (זכרון תרועה) in the context of offerings in the Mikdash (והקרבתם אשה), while *shofar* blown outside of the Beis HaMikdash is derived through interpretation.

Meiri, commenting on *Succah* 42b, seems to adopt a similar line of thought. The law is that one may take the *lulav* on the first day of Succos in the Temple even if Succos falls on Shabbos, and there is no concern of carrying because one is Biblically obligated to take the *lulav* on that day.[22] Meiri explains that while there is a Biblical obligation to shake the *lulav* all seven days in the Beis HaMikdash, the Rabbis allowed the *lulav* to be taken on Shabbos if it falls on the first day of Succos. While this may seem incongruous, Meiri explains that the source of taking the *lulav* all seven days on Succos stems from the obligation to "be joyous," but it never explicitly mentions that one must take the *lulav*. This omission allows the Rabbis some room to establish their decree. Both these sources seem to suggest that the מפורש בקרא of Taz should be a literal concept, that which is written in the Torah. However, it is not entirely clear whether this follows the exact reasoning of Taz, i.e., that the Rabbis cannot make decrees that conflict with explicit Torah verses, or if they simply *chose* not to enact decrees that contradict explicit Torah sources.

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20 See Rashi *Kesuvos* 3a who seems to suggest at least a גזירה שוה is considered explicit in the Torah. See also Rashi *Shabbos* 97a who indicates similarly.

21 See also Maharal in תפארת ישראל פרק כז who explains that דברי סופרים are laws which are deemed by חז"ל as appropriate and fitting to do, but they are not direct גזירות מה', original decrees. This latter category only applies to laws explicit in the Torah. Also, see *Sotah* 16b which indicates that derivations from the 13 hermeneutical principles is called דברי סופרים.

22 See *Succah* 43a.

Pri Megadim,[23] however, suggests that Taz understands that an explicit source includes not only the literal, explicit laws of the written Torah but also derivations of the Torah law. This becomes evident in Taz's explanation for why there is no decree against circumcising babies on Shabbos, lest one carries the child outside. According to Taz, the Torah states that a boy is circumcised on the eighth day, and the Rabbis derive from the extra word וביום that one can circumcise an eight-day-old child even on Shabbos. Therefore, the Rabbis would not make a decree that contradicts what the Torah explicitly allows. This suggests that even derivations, specifically when they are רבתה בפירוש (abundantly clear), should be included in Taz's thesis.

Rabbi Dovid Cohen, in his work *HaTaz HaYadua*, introduces another category of Torah-level law.[24] He alludes to Rambam's introduction to the Mishnah, where Rambam distinguishes two forms of Torah Law as פירוש המקובל מסיני and הלכה למשה מסיני, laws known from an oral tradition which are not essentially derived from the 13 hermeneutical principles.[25] Rabbi Cohen suggests that these two categories of Torah Law are included in מפורש בקרא, as they are rooted in the oral tradition. With this assumption, Rabbi Cohen raises a question about whether the derivation of the circumcision law is indeed מפורש בקרא, as *Shabbos* 132a seems to debate the source of this derivation, indicating that this source is not entirely clear.

However, it is also not clear if this source is, in fact, a דרשה, as perhaps everyone knew the פירוש המקובל מסיני that one should perform circumcision even on Shabbos, and the debate was merely about the allusion to the ruling in the Torah. Perhaps even per Rabbi Dovid Cohen's argument, this too would qualify it as מפורש בקרא as it is a bona fide oral tradition. Alternatively, one can suggest that Taz may find this דרשה exceptional. Upon careful reading of Taz, one notices that he refers to this derivation not merely as a דרשה, but one that is רבתה בפירוש. This suggests that this particular derivation may not be like any other דרשה, but instead, a law which is more explicit.[26]

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[23] See above פתיחה כוללת ibid.

[24] See p. 12.

[25] The פירוש המקובל has one of the 13 hermeneutical principles attached to it to allude to its understanding in the text of the Torah, but the הלכה למשה מסיני does not have any פסוק attached to it. Both are undisputed in Rabbinic tradition.

[26] Another possible interpretation is that Taz's position on circumcision (מילה) does not necessarily reflect the full extent of his thesis. It is worth noting that Taz mentions that the Rabbis did not ***want*** to establish a decree in light of the

In light of his thesis, Rabbi Dovid Cohen suggests that including the oral tradition, rather than relying solely on the 13 hermeneutical principles, as מפורש בקרא may explain several laws that ostensibly contradict Taz's theory. The Gemara *Rosh Hashanah*[27] notes that the Rabbis prohibited witnesses from violating Shabbos to testify for the New Moon. According to Torah law, however, violation of Shabbos should be permitted in this context because the Torah states that the new month should be established במועדו, and the Rabbis derive from this word that one is technically allowed to violate Shabbos to enable the courts to establish the new month. Rav Dovid Cohen explains that while this rabbinic enactment ostensibly goes against Taz's thesis as the Torah presented a permissive directive, it is noteworthy that this derivation is not actually based on an oral tradition. This is indicated by *Pesachim* 66a, where the *Bnei Beseira,* the leaders of the generation before the Temple's destruction, were not aware that it is permissible to violate Shabbos for establishing the new month. Following Rav Cohen's thesis, the Rabbinic enactment limiting the extension of this derivation would be acceptable.

A similar point is gleaned from the comments of the *Yeshuos Yaakov* (*siman* 18) from a different law. The Gemara[28] notes that one can wear wool *tzitzis* on a linen garment, even though it would typically be a violation of *kelayim* (mixing different fibers). The Rabbis[29] enacted a decree not to wear this type of *tzitzis*-garment combination, lest one wear this garment at night when there is no obligation to wear *tzitzis*, and violating *kelayim*. At first glance, this Rabbinic decree appears to contradict the Biblical exception permitting one to wear *tzitzis* of *kelayim*. Following the thought process of Rabbi Cohen,[30] however, there is no dilemma as this Biblical exception is, in fact, not based on explicit oral tradition but rather on a דרשה, and thus not considered מפורש בקרא.

Outside Rabbi Dovid Cohen's categorization, there is another potential discrepancy within the category of מפורש בקרא, as some *Acharonim*

דרשה. This language could imply that Taz's ultimate thesis only applies when there is an explicit text in the Torah that permits an activity. In such cases, the Rabbis might be ***unable*** to establish a decree stricter than what the Torah explicitly permits. However, for activities that are not explicitly permitted but are still allowed on a Torah level, the Rabbis could technically enact decrees. Nevertheless, Taz suggests that the Rabbis chose not to do so out of caution. Later, I found this point noted in *Encyclopedia Talmudit* (25, יש כח n.45).

27 *Rosh Hashanah* 22a.

28 *Yevamos* 4a.

29 *Shabbos* 25b.

30 *HaTaz HaYadua*, p. 12.

have suggested. One potential piece of evidence supporting Taz's position is found in *Tosafos* in *Bava Metziah* 70b.[31] In this passage, the Gemara explains that King Solomon states[32] that מרבה הונו בנשך ובמרבית לחונך דלים יקבצנו, suggesting that one should not give loans with interest even to non-Jews. However, the Gemara there raises a question, pointing out that the Torah's prohibition of לא תשיך only applies to loans with interest given to fellow Jews and not to non-Jews. *Tosafos* address this question by suggesting that the prohibition of מרבה הונו is a rabbinic enactment that is more stringent than the Torah's permission. According to their explanation, while this prohibition is indeed of Rabbinic origin, the Rabbis refrained from enacting a restrictive decree that would contradict the Torah's permission for Jews to charge interest when lending to non-Jews. This interpretation aligns with the reasoning presented by Taz.

However, Rabbi Akiva Eiger (*Succah* 39a) offers a different perspective. He suggests that *Tosafos'* reference is not to any explicit *directive* found in the Torah but specifically to Biblical *commandments*. These Biblical commandments carry a stronger impetus and obligation to fulfill, more so than mere options or permissions that the Torah grants, and only in that context a Rabbinic decree suggesting a more stringent posture would come in conflict with the Biblical commandment.

While we have established that explicit Torah directives or commandments are viewed as posing a more significant "conflict" with stricter rabbinic decrees, a fundamental question arises: Why should this distinction matter, given that whether or not a directive is explicit, there is Biblical permission to engage in a particular activity? The answer to this question may be found in another concept related to the Rabbis' authority to enact decrees, regarding imitating the practices or customs of non-Jews. The Rabbis established an explicit exception to this prohibition to those close to the government even though such imitation would typically constitute a Biblical violation[33] of the injunction ובחוקותיהם לא תלכו ("you shall not follow their statutes"). In this context, Taz offers a comment, stating that while the Rabbis generally lack the power to uproot Torah Law, in this case, where the Torah did not provide explicit guidance on how to execute this prohibition, it effectively granted the Rabbis the authority to qualify the halachos as they deemed appropriate. This comment echoes to Taz's

31 ד"ה תשיך.

32 *Mishlei* 28:8.

33 *VaYikra* 18:3.

thesis mentioned earlier. In the absence of explicit guidance from the Torah, the Rabbis are entrusted with interpreting and applying the law as they see fit.[34]

Continuing along this line of thought, the אהבת חסד (*siman* 31) explains that when the Torah does not explicitly provide guidance, but instead leaves the law to be derived by the Rabbis, this also constitutes a form of מסרן הכתוב לחכמים. This implies that the Rabbis are not only responsible for deriving the law but also for enacting Rabbinic stringencies that may override the derivation in certain cases. However, if the Torah explicitly indicates a permissive act, then the Rabbis are not allowed to override that permissive directive.

Ahavas Chessed's explanation of the need for מפורש בקרא provides an opportunity to further clarify the distinction presented by Rabbi Dovid Cohen between Torah law which was derived from Oral Tradition and that which was derived using the 13 hermeneutical principles. Maharal[35] explains that anything explicitly written in the Torah is considered a strict Divine decree, beyond human comprehension. On the other hand, laws derived מדברי סופרים, using various principles of derivation, while still integral to the broader body of Torah, are grounded in their appropriateness in application.

Perhaps the same authority that allows the Rabbis to derive new laws from the Torah using the י"ג מידות, emphasizing their appropriateness, is analogous to the power enabling the Rabbis to enact decrees that are more stringent than the Torah. In both cases, the Rabbis rely (to an extent) on their judgment,[36] guided by what they perceive as suitable and appropriate. Thus, if the Rabbis want to enact a decree stricter than their own derived law as they find it appropriate to do so given the context, there is less of a confrontation between Biblical and Rabbinic Law as the entire

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34 A similar example is found in the writings of Ran on *Yoma*. In this context, Ran suggests that although all five prohibitions (*innuyim*) on Yom Kippur are Biblical violations, only the prohibitions of eating and drinking are explicitly mentioned in the Torah. As a result, these two areas of the law are observed with little to no exceptions. However, the other three *innuyim*, which are derived from a דרשה (interpretation), are also considered מסרן הכתוב לחכמים. This means that the Torah entrusts the sages with the responsibility of determining within each category which specific actions constitute acts of pleasure and which do not. This allows for some degree of leniency in the observance of these prohibitions.

35 *Tiferes Yisrael,* chapter 27.

36 This assumes the Rabbis use their understanding to create דרשות. See Rambam's Introduction to the Mishnah.

basis for the derived law is also based on what should be deemed appropriate. However, objective, Divine Law, as found in the Written and Oral Traditions of the Torah, directly instructed by Hashem, is not subject to what is considered "appropriate." These laws represent Hashem's will, and they cannot be practically altered by Rabbinic decrees in the name of what is deemed fitting or appropriate.[37]

תקנות דרבנן

The authority of the Rabbis to establish decrees is rooted in the Torah, particularly in the verse from *Vayikra* 18:30, which states, וּשְׁמַרְתֶּם אֶת מִשְׁמַרְתִּי (You shall keep My charge). The Gemara[38] interprets this verse as an indication that the Rabbis should create safeguards for Hashem's Torah, which He Himself watches over. While the Rabbis are granted this power, there are varying degrees of rabbinic enactments, and these gradations can have implications for the application of Taz's thesis.

As previously mentioned, many Rabbinic enactments may raise concerns about conflicting with Torah Law. To address this potential conflict and the potential diminishment of Torah Law, one approach has been to argue that Torah Law may not be as explicit and may be more open to practical adjustments through Rabbinic decree. However, another approach seeks to elevate the status of rabbinic decrees to be on par or at least closer to Torah Law, minimizing the conflict between Torah and Rabbinic law.

Sometimes, the Rabbis enact a decree with an אסמכתא, a reference to that decree in the Torah. There is a dispute among the Rishonim regarding the purpose of an אסמכתא. Some argue that it serves as a mnemonic device to remind one of the rabbinic law.[39] However, *Ritva* (*Rosh Hashanah* 16a) vehemently disagrees with this view and suggests that the אסמכתא is, in fact, an implication that Hashem embedded within the Written Torah for the Rabbis to apply and implement as they see fit. In other words, Hashem entrusted (מסרן) the Rabbis with the responsibility to derive Rabbinic Law from Torah Law when they deem it necessary.

This understanding of*Ritva* is reminiscent of the previously mentioned notion of מסרן הכתוב לחכמים, but in this context, it pertains strictly

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37 In light of this interpretation, it raises the question of whether a similar issue, reminiscent of Taz's concerns, would arise if a דרשה derived from the י"ג מידות were to contradict an explicit Torah source.

38 *Yevamos* 21a.

39 See *Rambam,* Introduction to the Mishnah.

to Rabbinic laws and not Biblical ones. According to *Ritva*, a Rabbinic enactment with an אסמכתא may be more similar to Torah Law than an ordinary Rabbinic enactment without a reference from the Torah. Following this line of thought, many Acharonim[40] suggest that a Rabbinic enactment with an אסמכתא, when confronted with a Torah Law, may not effectively diminish Torah Law, as it is implied that the Torah itself, on some level, intends for the Rabbis, מסרן הכתוב, to enact that decree.

With this assumption in mind, Rabbi Dovid Cohen[41] suggests the source of this idea can be found in *Kesuvos* 52b. The Gemara discusses the institution of כתובת בנן דכרין. On a Torah level, a husband always inherits his wife. Given this rule, parents of daughters were hesitant to provide large dowries for their daughters. If a married woman with children dies before her husband, and the husband later marries another woman and has children from this second marriage, upon the death of the husband, the original dowry given by the first wife's father would need to be divided among all the children, not just the grandchildren of the first wife's father. To address this concern and encourage fathers to provide larger dowries for their daughters, the Rabbis instituted כתובת בנן דכרין, ensuring that the original dowry money from the father-in-law would only go to the male children from the first wife.

The Gemara questions this institution, as it seems to assume that daughters (the wife) could receive some inheritance from the original father, which would later be transferred to the grandchildren. The Torah, however, explicitly states that one cannot bequeath an inheritance to a daughter. The Gemara answers that we find in the Torah that the prophet Yirmiyah encouraged the Jewish people to find husbands for their daughters and marry them off. Therefore, any enactment that helps facilitate this goal is included in this Torah value. While not explicit, it appears that the conclusion of this Gemara is that since this Rabbinic institution enables the fulfillment of a Torah value, as expressed in the words of the prophet, which is arguably similar to an אסמכתא, it is exempt from the general Biblical imperative that only males can inherit and not in conflict with the Torah law.[42]

Another example illustrating how אסמכתא can mitigate potential conflicts between Torah Law and Rabbinic Law can be found in the laws of festivals. On Yom Tov, one can prepare food and perform food-related *melachah* for the festival meal on the festival itself. Rambam,[43] however,

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40 See *Taz HaYadua,* p. 30.

41 Ibid., p. 17.

42 See later as Taz understands this Gemara differently than Rabbi Dovid Cohen.

43 *Hilchos Yom Tov* 1:5–7.

assumes that the Rabbis prohibited any preparatory *melachah* for food consumption, such as planting and harvesting, because allowing these activities would disrupt one's ability to enjoy the festival. The question arises as to how the Rabbis have the authority to enact a decree limiting this permissive directive, given that the Torah allows one to perform *melachah* for the purpose of consuming food without such restrictions. Rabbi Dovid Cohen, using the proposition mentioned above,[44] suggests that this rabbinic enactment is not affected by Taz's thesis, as the source of this rabbinic limitation is derived from an אסמכתא. The Torah equates permission to perform *melachah* on Yom Tov with the requirement to watch matzah, which starts from kneading the dough and onward. The Rabbis,[45] extrapolating from this juxtaposition, ruled that the Torah seems to limit the ability to perform *melachah* on Yom Tov parallel to when one must watch the matzah at the time of kneading, thus effectively prohibiting *melachos* performed before that point. While the prohibition is essentially rabbinic in nature, since it is attached to the text of the Torah, it is an אסמכתא and thus exempt from Taz's qualifications.

This concept of אסמכתא can also be understood to limit the overall thesis of Taz. Rabbi Akiva Eiger (*Succah* 39a) suggests that a real conflict between Torah law and Rabbinic Law per Taz *only* occurs when the Rabbis intend to use the Torah as a scaffold for the rabbinic enactment in the form of an אסמכתא. Rabbi Akiva Eiger posits that this was the underlying assumption behind *Tosafos'* question in *Bava Metziah* 70b regarding the Rabbis' ability to prohibit giving loans with interest to non-Jews. The Rabbis were enacting this decree against the backdrop of the Torah Literature found in King Solomon's writings in *Mishlei*, an אסמכתא, and therefore questioned how the Rabbis can go against the explicit Torah permission.

While this perspective has been discussed by various Acharonim, it is important to note that Taz himself appears to reject any assumption that an אסמכתא can be exempt from his thesis. When discussing the prohibition against selling נבילות וטריפות, Taz suggested that while *Rashba* assumes this is only a rabbinic prohibition, it also has a reference to a Torah prohibition, יהא, as expressed in *Pesachim* (23a). Taz concludes that while *Rashba* is correct in essence, the Gemara incorporated the Torah source as an אסמכתא. Following this conclusion, Taz then explained that *Tosafos* in *Succah*'s comparison of אסמכתא prohibition against the היתר מפורש בקרא to sell נבילות וטריפות to non-Jews indicates support for his general thesis.

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44 Ibid., p. 79.

45 *Yerushalmi Beitzah* 1:10.

It seems that Taz still seriously considered applying his thesis even when the Rabbinic prohibition was founded on an אסמכתא.[46]

Some Acharonim suggest that there is another type of rabbinic decree which might potentially override a Torah directive, even according to Taz. The *Mishpat Cohen* (p. 317) points out that *Yevamos* 90b notes that for enactments made למיגדר מילתא, to protect the Jewish nation's religious life, a prophet can establish a rule that can contradict the Torah, as manifested in the story of Eliyahu HaNavi offering *korbanos* outside the Beis HaMikdash to confront the idol worshippers. Using this rule, one could argue that the Rabbis should also be able to override the Torah's laws for the sake of protecting religious life even when they contradict the Torah law. The *Mishpat Cohen* notes, however, that we find Taz expressing his thesis even with this consideration in mind. As discussed regarding אין ב"ד מכין ועונשים when it is לעבור על דברי תורה, against the explicit Torah directive, despite the fact that the entire basis to permit the courts to apply extra-Torah law stems from the concept of למיגדר מילתא.

The logic to be even more stringent for the Rabbis than the prophet seems counterintuitive as *Yevamos* 90b seems to compare them. However, a potential explanation can be found by highlighting Ramban's comment in *Yevamos*, arguing that all תקנות דרבנן are essentially למיגדר מילתא and effectively only הוראות שעה, as modeled after the prophet's ability to enact laws. Given this equation, perhaps Taz understood that even if there is a genuine need to institute a rabbinic decree, the Rabbis should be limited in the same way as the prophet (not more stringent), only being able to enact their rabbinic laws within a framework similar to a הוראת שעה. In the context of rabbinic enactments, this would entail that the rabbinic laws do not completely contradict an explicit Torah directive, even when these laws are למיגדר מילתא.

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[46] A similar point can be found in the writings of the מנחת חינוך מצוה שכג:ב, who writes that in *Chagigah* 18a, there is an assumption presented that the guidelines of the Torah suggest that one cannot perform *melachah* on חול המועד. While ostensibly this prohibition is Biblical in nature, *Tosafos* there assumes that this prohibition is merely rabbinic with an אסמכתא attached to it. With this understanding, explains the מנחת חינוך, the Gemara's intention to incorporate the Torah's guidelines in the context of a rabbinic prohibition fits in tandem with Taz's thesis. The Rabbis would not prohibit *melachah* during חול המועד if the Torah explicitly allows it. This, too, suggests that Taz's thesis applies even when there is an אסמכתא.

Until now, we have been discussing ways in which Rabbinic enactments can be made to become more akin to Torah Law through the concept of אסמכתא, allowing for a potential carve-out exception to Taz's thesis. There is another possible way in which one can find an exception to this rule, but this time by structuring the enactment to be less formal than a rabbinic decree. *Teshuvos Chassam Sofer* (ו:נב) was asked how Taz's thesis would stand in light of the חרם דרבינו גרשום, which placed a *cherem* on those who marry two wives. The Torah explicitly allows for polygamy, as it gives examples of one man marrying two wives in פרשת כי תצא. What right did רבינו גרשום have to prohibit that which is explicit in the Torah? The חתם סופר answers that רבינו גרשום did not formulate a formal rabbinic institution but specifically a חרם. Ramban explains that a חרם is not an enactment, but a private curse and oath made by the leader of the Jewish community which extends to the rest of the community not to do a certain action. The same way one may take an oath to prohibit oneself from something the Torah permits, a community leader can make a חרם to prohibit the community from performing something the Torah permits. Chassam Sofer's explanation suggests that the issue of creating enactments which counter Torah law is specifically institutionalizing a system of conduct against the Torah's directives, as found with Rabbinic enactments. However, private conduct or even publicly enforced conduct, which stems from an individual, is not an attack on the system and thus not borderline לא תגרע.[47]

Spirit of the Law

Taz's formula for defining the parameters of Rabbinic power is, for the most part, limited to technical abilities to enact decrees in the face of explicit Torah directives. However, it appears that this formula takes on a softer form, emphasizing more of the value system and spirit of the Torah rather than just the explicit words or laws of the Torah.

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[47] It is interesting to note that the entire concept of *nedarim* has been discouraged by the Rabbis for the precise reason implied by Taz. *Nedarim* 22a compares one who takes an oath to one who builds a private altar, a Biblical violation. Ran comments that the Rabbi's comparison of oath-taking to building illegal private altars is deliberate. One who offers on a private altar instead of in the Beis HaMikdash effectively wants to create his own, personalized Torah Law. The oath-taker as well is creating his own form of Torah Law when he prohibits something which the Torah does not. While oath-taking would certainly not be a violation of בל תגרע or בל תוסיף, it seems to intrude upon the Torah's realm of conduct, a miniature manifestation of Taz's thesis.

There are strict guidelines regarding a Jew's ability to eat at a non-Jew's wedding. The goal of this prohibition seems to be a safeguard against assimilation into an idolatrous culture. Rambam, in *Hilchos Avodah Zarah* (9:15), suggests the source for this safeguard is found in the Torah's warning in *Parashas Ki Sisa,*[48] "...and you shall eat from his slaughter, and you shall choose from his daughters for your sons. His daughters will stray after their gods, and they will lead your sons astray after these gods."

In reaction to this halachah, Rabbi Yehoshua Pollack Katz, known as the *Drishah*,[49] inquires whether one can be lenient in these laws due to the concept of איבה, causing undue hatred negatively affecting the Jewish people. This concept is applied in another area of Torah Law regarding other interactions with non-Jews.[50] One can accept a gift from a non-Jew on the day of his festivals out of concern for איבה, even though it might appear that the Jew is affirming the non-Jew's religion. Similarly, Rema notes that nowadays we can rely on איבה, at least in part, to do business with non-Jews on their holidays. The *Drishah* wonders if the same leniency can be applied to the wedding issue. To this question, Taz[51] responds that attending the wedding of a non-Jew is prohibited for a different reason than interactions during non-Jewish festivals, and the discrepancy precludes one from applying the leniency of איבה to the former case. The origin of the laws regarding non-Jewish weddings is based on the concern of intermarriage and assimilation and the point of the Torah's laws is effectively to create איבה. Allowing these activities out of concern for איבה would enable and even facilitate the very reason the Torah gave to prohibit these actions. It would be unthinkable to apply a leniency that undermines the entire goal of the law!

Taz adds another point. Even when the halachah does apply איבה (undue hatred) to certain contexts, certain parameters must be met. First, the goal of the mitzvah should not be related to enabling איבה. For example, when Rema[52] allowed business with non-Jews on their holidays, the entire concern was that the business dealings would encourage non-Jews to affirm their idolatrous deities, not creating distance between Jews and non-Jews. Second, איבה should not be all-encompassing; it should only be applied in limited cases. When applying איבה to the context of non-Jewish weddings, doing so on a broad scale could likely undermine the Torah's concern.

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48 *Shemos* 34:15.
49 *Yoreh Deah* 152:1.
50 See *Yoreh Deah* 148.
51 *Yoreh Deah* 152:1.
52 *Yoreh Deah* 148:12.

Taz seems to be formulating a similar point to that of his thesis mentioned earlier, but in this context, in softer terms. While there might not be explicit text directing Jews to create distance from non-Jews, one can glean from the context of the Torah what it intends. Suggesting concepts that would undermine those values or the Divine will would be unacceptable. Furthermore, even if the law is not directly associated with the reason to be lenient, if that reasoning for leniency were to become all-pervasive, effectively undoing the application of the law, it would also be inappropriate. While it is not clear if this issue is directly related to בל תגרע, the fact that Taz sees a conflict occurring between the *Retzon HaTorah* and another Torah concept hints to the essential point of his main thesis that there should be no עקירת דבר מן התורה לגמרי even with respect to the values of the Torah.

דיני ממונות

While most of Taz's comments focus on religious laws, it is worth exploring if his thesis might also apply to rabbinic institutions related to monetary cases. Generally, it appears that the Rabbis have more leeway to institute monetary laws than prohibitions and religious laws. There are no qualifications of למיגדר מילתא or שב ואל תעשה. The *Keren Orah*, in *Yevamos* 90b, suggests the source for this distinction lies in the basis for the Rabbis' expanded powers in monetary matters. *Yevamos* 89a notes that in *Yehoshua* (19:51) there is a comparison between the rights of a father to bequeath property with the communal leader's ability to allocate land in Israel. From this equation, the Gemara derives the concept that, in each generation, the Rabbis can declare property ownerless and even transfer it to others,[53] similar to a father bequeathing his assets to his heirs. However, this raises the question of whether Taz's thesis applies to these cases. Can the Rabbis enact monetary institutions that contradict Torah law?

In another comment in *Even HaEzer* (113:1), Taz implicitly alludes to this question.[54] The discussion there revolves around the institution of עישור נכסים. If a father dies before marrying off all his daughters, the Rabbis instituted that one-tenth of his assets must be allocated to the daughters for their dowries. *Kesubos* (50b–51a) presents two conversations regarding this topic. The first was discussed earlier. As mentioned earlier, the Gemara wonders how this institution can exist because it effectively

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53 See Rashba *Gittin* 36b who makes this point explicitly.

54 Note that Rabbi Moshe Sofer (אבן העזר א-קמז) suggests an alternate approach to the below-mentioned Gemara, indicating that he disagrees with Taz's approach to resolve this issue.

gives daughters inheritance rights, against the Torah's conception of an only-male inheritance system. Incidentally, Taz appears to reject the suggestion that the answer lies in an אסמכתא carve-out. Instead, he makes reference to his thesis and nevertheless asks how the Gemara can conclude that the Rabbis are authorized to institute their decree because they are following a Torah value, when there is still conflict between Torah and Rabbinic Law?

Kesubos 52b–53a presents another conversation concerning עישור נכסים. Rabbi Papa was marrying off his daughter and planning to visit his future *mechutan* to draft the *kesubah*. Yehudah Bar Merimar accompanied him but stopped at the threshold of the future *mechutan*'s house. Yehudah explained that his hesitation from entering was out of concern lest his mere presence would pressure the *mechutan* into giving a larger dowry, thus depleting the estate designated for the heirs (which ultimately happened.) Later, Yehudah told the *mechutan* that if he were in the *mechutan's* position, he would not pay such a large dowry. Taz questions the entire story, as it appears that Yehudah was challenging the institution of עישור נכסים, an ostensibly established institution. In response, Taz reinterprets the entire Gemara, developing a fundamental approach to rabbinic institutions, particularly those involving monetary matters.

Taz explains: The Gemara's initial question has nothing to do with the inability of Chazal to enact decrees against the Torah. Rather, the Gemara seems to presume there is a fundamental discrepancy between the institution of עישור נכסים and male-only inheritance. While not explaining explicitly, Taz references the fact that there is no religious prohibition against reallocating some of the deceased's assets from his inheritors, as the Torah only prohibits total divestment. The Gemara's question pertains to the Rabbis' intent rather than authority. Taz suggests that, as a rule, the Rabbis will only institute a decree if it results in a "positive" outcome (whatever that definition is). The Gemara's question revolves around this principle. If the Torah specifies that only males inherit, the law suggests that the Torah does not see any positive value in granting daughters an inheritance. If so, why would the Rabbis allocate an inheritance to daughters if there is no benefit in doing so?

Again, notice that Taz does not inquire about the authority that grants the Rabbis the power to institute this edict, especially if it contradicts the explicit directives of the Torah. While not fully explaining the reason to differentiate between religious and monetary law, it seems that in Taz's view, when it comes to monetary matters, the Rabbis will never fundamentally conflict with the Torah's directives. The mechanism which the Rabbis employ in these cases is הפקר ב"ד הפקר, which effectively sidesteps

the issue of inheritance, avoiding an outright conflict. With this in mind, Taz's concern in this context perforce is different. As the Torah's laws predict and define success, the Gemara questions where the Rabbis found a source in the Torah that their institution of עישור נכסים would lead to a meaningful and positive impact.

Following Taz's conception of the Gemara's question, the Gemara answers that there is a value, or in the words of Taz a רצון התורה, found in the Torah to encourage daughters to get married, and this value motivated the Rabbis to institute עישור נכסים. Given that the Torah value is not formal law, one can give as much as one wants to his daughter as a dowry while he is alive; after all, it is his money. However, the fact that the Rabbis proscribed a fixed amount helps alleviate or balance the potential conflict between Torah values in this specific circumstance, specifically that of marrying off one's daughter and leaving inheritance for one's male heirs. If the father does not give the daughter a dowry while he is alive, it is appropriate to follow the Rabbis who decided that the Torah value of marrying off one's daughter is more appropriate than the value of male inheritance, up to one tenth of one's assets. However, in cases where: (1) one feels pressured to provide a dowry and thus leaves its collection until after one's death when the estate is being divided (*similar* to formal inheritance), *and* (2) provides more than a tenth of his assets, *outside* of the Rabbinic sanction, as in the case with Yehudah, the value of maintaining male inheritance becomes more important than the other Torah value. This was Yehudah's hesitation. While Yehudah was fine with having one give up to עישור נכסים upon one's death, he did not approve of this divestment when one goes beyond the Rabbinic limits and gives more than one tenth.

Arguably, Taz's comments here are another example of a "soft" extension of his thesis. In monetary rabbinic institutions, there are no formal conflicts or potential violation of לא תגרע as these enactments essentially circumvent the Torah law. However, in some cases there is a conflict in Torah values. Similar to its usage of מסרן הכתוב לחכמים, the Torah seems to give the Rabbis the right to choose when to apply its value in a given context. However, if any individual wants to apply *his* personal conception of *Retzon HaTorah* beyond what the Rabbis proscribe while diminishing another *Retzon HaTorah*, this would be inappropriate.

This new issue of "רצון התורה" raised by Taz touches upon the issue of הערמה in general. Taz does not document any genuine complaints of

using הערמות in monetary laws.[55] Whether it is the usage of the היתר עיסקא or מכירת חמץ, Taz is surprisingly silent on the matter,[56] not indicating that it would conflict with רצון התורה or a Torah value. While not absolutely clear, one can suggest that at least for monetary matters, Taz would allow these practices. The same would apply if one follows the Rabbis and gives exactly עישור נכסים upon one's death. Taz indicates that one is not violating any רצון התורה of inheritance rights (the only concern is going beyond that) because the person is following the system. Similarly, if one were to use an already recognized legal structure, like a sale of *chametz* or joint-venture of a seemingly obvious loan, there is no technical subterfuge as (1) there is no direct conflict to Torah Law and (2) one is simply following a system within halachah which the Torah already allowed.[57]

Conclusion

The extent of the Rabbi's authority to enact decrees is a complex and debated question. There have been various interpretations on this matter. One theory, formulated by Taz, seeks to address this constitutional dilemma. Drawing inspiration from the teachings of his father-in-law, Bach,

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55 This point is mostly accurate. Taz is mostly silent regarding the use of הערמה in subterfuges like מכירת חמץ or שטר שבת. However, Taz mentions the issue in the context of היתר עיסקא in יורה דעה סימן קסז. However, even in this conversation, he does not consider his thesis, rather only factoring in הערמה of Biblical prohibitions of interest (loans) in contrast to rabbinic prohibitions of interest (sales). Rabbi Broyde suggests that Taz may in essence not think הערמה is a problem given, as discussed above, that הערמה is functioning within a system that the Torah already accepted. However, the issue of interest, especially for loans, contains another consideration, an interpersonal issue. Historically, loans were only given to the poor who needed the money to survive while they were waiting for their crops to grow. Effectively, it was charity in the guise of a loan. Giving those loans with interest would in effect impoverish this already poor individual. Using a הערמה for this transaction would be deemed inconsistent with the רצון התורה and thus prohibited. Sales, however, which are not affecting the impoverished *per se*, would not be incongruent with the רצון ה' in this sense and thus not prohibited due to הערמה. See J. David Bleich, *Contemporary Halakhic Problems,* Volume 4, Chapter 4 (1995) for more on this insight.

56 Bach seems to accept several הערמות in his writings. In one place, Bach notes without protest that the custom today is to use a היתר עיסקא. Additionally, he writes that one can declare ownerless, even *lechatchilah,* one's animal to avoid the prohibition of שביתת בהמתו on Shabbos.

57 See הערות הגרי"ש אלישיב on his comments of שבת סה. See also the Responsa of *Rivash* (*siman* 276) who seems to make a similar point regarding a parallel limitation on the Rabbis of אין כח ביד חכמים לעקור דבר מן התורה בקום ועשה.

Taz proposes that the Rabbis do not possess the authority to override explicit Biblical directives. This theory may be rooted in the distinctive nature of rabbinic institutions, which are essentially "הוראות שעה" or temporary rulings. Though not strictly time-bound, they are constrained from forever overriding the parameters defined by the Torah. This perspective has implications ranging from the permissibility of blowing the *shofar* on Shabbos to issues of extra-judicial jurisprudence.

Determining what qualifies as an "explicit Biblical directive" and what falls under the category of "Rabbinic enactment" within Taz's framework have been subjects of considerable discussion. Factors include if there is a derivation using the 13 hermeneutical principles or an oral tradition to determine the Biblical law, rabbinic decrees using אסמכתא or חרם. All create variant combinations which may affect the outcome. However, outside of this strict formula, Taz's thesis extends beyond the literal interpretation of the law and touches on situations where the values of the Torah, or the "*Retzon HaTorah*," become paramount. Even in these more abstract contexts, the Rabbis possess the authority to define limits, but they are also constrained from exceeding certain boundaries. This approach and extension sheds light on the concept of "הערמה" in Halachah, particularly within the realm of monetary matters in Torah Law, where Taz's silence on the matter denotes an acceptance of such practices.

In pragmatic terms, factors such as the Jewish community's acceptance of an enactment and the changing postures of the Rabbinic community have played an impact on limiting the extent of a rabbinic enactment. However, Taz's thesis is part of an attempt to fundamentally limit the Rabbi's power of enactment to the parameters of their Constitution, the Torah. This thought process is revolutionary since it is one of the earliest attempts known in the Talmudic and Rabbinic literature where someone has tried to map out not only the parameters of Divine Law and Rabbinic Law, but also the places where Divine Law actually intends to give some of its jurisprudential power to man to utilize.

The significance of Taz's thesis, aside from its essential qualification of Rabbinic power, is also that it is all-pervasive. Every single time one studies rabbinic texts and its enactments, one must compare it against Taz's formula. Taz's theory, however, is not as all-encompassing as originally conceived. As mentioned, Taz himself seems to indicate his formula is embedded with a very large carve-out for commercial law. This may suggest that Halachah sees commercial law to be made up of a thinner constitution than ritual law, thus enabling more leeway for the Rabbis to construct enactments related to commerce and relationships between man and his fellow. ☙