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LOCAL

THE SIGNIFICANCE OF MINHAG IN EARLY TALMUDIC LITERATURE

by

SAMUEL G. BROUDE

Submitted in partial fulfillment
of the requirements for the Degree of
Master of Arts in Hebrew Letters and
Ordination

Hebrew Union College-
Jewish Institute of Religion
Cincinnati, Ohio
February, 1960
5720

Referee:
Professor Alexander Guttmann

DIGEST

This thesis attempts to deal with the relationship between Minhag and Halacha. One period, primarily the Tannaitic, is dealt with; and one aspect of Minhag, namely, Minhag hamakom (local usage) is treated. The main idea here is that local usage is an aspect of halacha, and in this general framework, we see local usage functioning as a basis for, and at times a definition of, terms of the halacha. There are instances in which the local usage is equivalent to the halacha.

No attempt is made to trace the origin or development of minhag; rather we make a presentation of cases by way of defining the manner in which local usage operates in its halachic setting. We see this in two main areas: Ritual Practice and Civil Practice.

In the former area, local usage is seen as actually determining the halacha, whether in marriage customs or in the stipulations in the Ketuba. With regard to working on the eve of Passover, or on the Ninth of Ab, we find local custom determining what is to be done. The usage of a particular community becomes halachically binding upon the residents of that community. In the case of kindling lamps for Yom Kippur, local usage is found to be a "fence" around the law, since its main purpose is to prevent intimacy between husband and wife on Yom Kippur. In liturgical practice, local usage was permitted to determine the proper practice; and the precedent of authoritative individuals was at times invoked to validate said usage. At times, local usage operates within the area of a larger minhag, being its application in a particular place.

In Civil Practice, local usage serves to define the terms of agreement between two parties; it functions as an unwritten agreement. We see how local usage defines the obligations of the tenant-farmer to the owner; what kind of crops could be grown, even how they were to be marketed. Local usage is used to define the rights and obligations of partners or neighbors in property. We rely on local usage in commercial practices as to what is proper in selling cattle, in weighing out merchandise, in mixing of fruits or diluting wine. Finally, we see the role of usage in determining the rights of workers and conditions of employment. In all of these areas, local usage, where it is prevalent, is the halacha for that place. It is only in the absence of a definite local practice that specific halachot are needed. Local usage, therefore, partakes of the essence of halacha and is applied within a general halachic framework.

Samuel G. Broude

To the memory of my dear father, ז"ל

this thesis is fondly dedicated.

פרי צדיק עץ חיים ....

....ואין עץ חיים אלא תורה.

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INTRODUCTION

What is Minhag?

If we refer to the definition given us by Dr. Greenstone in the Jewish Encyclopedia,[1] we find that Minhag is "an old and general usage, or a religious practice, not based on any particular biblical passage, and which has, through the force of long observance, become as sacred and binding as laws instituted by the proper authorities." The historic function of Minhag has been aptly and correctly characterized by Freehof, who, in seeking to explain the ability of Judaism to adjust itself to past crises, portrays the power of Minhag in its relation to law as follows: "How did Judaism succeed in making the necessary revolutionary readjustments in the crises of the past?....All law has two instruments of change, legislation and interpretation. But...Judaism lost the ability to make a new beginning with new legislation....In general, Jewish law was confined to "judge-made law," to the interpretation of older statutes, (which)...can be stretched just so far....Therefore, it could not have been Jewish law alone...which has tided Judaism over the catastrophic breaking of old forms of practice in past crises of Jewish religious history. There must have been a creative power which could originate new practices in place of the old. Such a creative power, imaginative and original, was the Minhag, the custom of the people.... The Minhag created by the masses was the raw material which the law took up and shifted, rearranged, justified and embodied as the legal practice. The law itself did not create. The people created and the law organized.."[2]

While it is recognized that Minhag is part of the vast area of Halacha, its relation to Halacha is complex. Weiss feels that Halacha

is the basis for Minhag[3] but Tchernowitz argues that they constitute two separate sources of legal practice, which frequently are at odds with each other.[4] That the Rabbis recognized the validity of Minhag in determining how the halacha should go is made quite clear by several instances: in discussing the proper benediction for drinking water, where there is a dispute in the Mishnah, Rava advises "Go and observe how the people act."[5] This thought is paralleled in the Yerushalmi, where we are told that "any halacha which vacillates in the court, and you don't know its nature, (find the solution) by going out and seeing what the populace is doing, and do likewise."[6] As far as the power of Minhag is concerned, the Rabbis went even further. They said that a law does not become established until it has become a minhag.[7] Tchernowitz understands this as meaning that minhag has its source, its foundation, in the consensus gentium - that through minhag, the people's assent is expressed until it becomes halacha.[8]

What are some of the criteria for an acceptable Minhag? R. Isaac b. Sheshet defines a minhag as "something that occurs and is practiced many times; but something that is done only once or twice cannot be called a minhag."[9] In addition, the custom must be recognized as stemming from legal necessity rather than being merely something done out of force of habit.[10] Furthermore, the custom cannot be founded on error or misunderstanding.[11]

What are the limitations of the power of Minhag? The classic case cited to indicate the over-riding power of Minhag is Jer. Yebamoth XII:1, where we are told that "minhag nullifies the halacha."[12] However, this statement must be understood in terms of its actual intent

rather than being taken literally. As Dr. Guttmann has shown,[13] what this passage intends to convey is the idea that no legislation has the right to nullify even the simplest minhag. Furthermore, simply because a particular custom is more stringent than the appropriate halacha does not mean that its intention is to nullify or override the halacha.[14]

Minhag is thus seen as part of the unfolding of the halachic process. As the people express their legal necessities through usage and custom, the law becomes more clearly and firmly established. But minhag does not operate outside the halacha. At times it defines the law, at other times it is equivalent to the law; it may be the forerunner of the law, but it is always within the framework of halacha. Of course, it may be understood that after the destruction of the Temple, with the Jewish people living in many parts of the world, various local observances developed. By the time of the Middle Ages, there was tremendous diversity of practice, so that when Caro made his Code, he was not only arranging the halacha, but clarifying the minhag, to which it was necessary for Isserles to add the Ashkenazic customs, as Caro had dealt with the Sephardic. Maimonides had already recognized the great halachic force of minhag.[15] Not only was custom and precedent important in ritual observances, but equally significant in civil practice. This will be seen from the division of this paper into two major parts: ritual and civil.

Since Minhag is such an all-encompassing subject, and since it stretches in time from customs known but not recorded even in biblical times all the way up to our own days, it was found necessary to limit the scope of any attempted treatment of the subject. As Freehof points

out,[16] "Minhagim arose all over the world. They were the creative part of Jewish law. It would be a fascinating study to go through the notes of Isserles to the Shulchan Aruch and the Tur and to list all the instances in which he says: 'This is our custom' or 'This is not our custom', or 'It is our custom to do thus and thus'. It would be revealed that a large bulk of Jewish law was derived spontaneously, creatively and anonymously from the life of the people of Israel. This minhag was more basic to the development of Jewish law than the law itself has ever acknowledged."[16]

It is thus not our purpose in this thesis to trace the development of minhag or to attempt to determine the origin of any particular minhagim. Rather, we have tried to understand the role of minhag in its relation to halacha. Because of the vastness of the subject, it was found necessary to concentrate on the early Talmudic Period, encompassing the Tannaitic halachic writings for the most part. Even here, to attempt to include all of the observances of the period would be beyond the scope of this thesis. It was therefore determined to investigate one highly important phase of minhag, namely, local usage, and to see how it affects halacha in its many applications. Thus, it is the purpose of this thesis to present a systematic treatment of local usage in the early talmudic period. In so doing, we find that in the area of ritual observance, local usage becomes the community "norm," imposing itself as strongly as any halacha on all those in the community. We find the great principle enunciated by Rabban Simeon b. Gamaliel, that "everything follows local usage." In civil law, too, we see local usage defining the terms of the agreement between land-owner and tenant-farmer, or between partners in property, or again between employer and employee.

Where there is no specific local usage, it was necessary for the Sages to stipulate specific laws; otherwise, local usage was the law for that place. So that it is not only of the essence of halacha, but local usage very frequently is the halacha. This is the main burden of this thesis.

I would like to acknowledge with sincere gratitude the guidance of my teacher, Dr. Guttmann. I would like to thank my children for their patience; and no words can adequately express my indebtedness to my wife for her invaluable aid.

Notes to Introduction

1. Julius Greenstone, "Custom," in Jewish Encyclopedia.

2. Solomon B. Freehof, Reform Jewish Practice, p. 6 of Introduction.

3. Weiss, Dor Dor VeDorshav, Part II, Ch. 8.

4. Tchernowitz, Toledoth HaHalacha, Vol. I, p. 145.

5. Berachot 45a. אמר ליה רבא בר רב חנן לאביי ... הלכתא מאי, אמר ליה פוק חזי מאי עמא דבר.

6. Jer. Peah 7:5 כל הלכה שהיא רופפת בבית דין ואין את יודע מה טיבה צא וראה מה הציבור נוהג ונהוג.

7. Massechet Soferim XIV:18
שאין הלכה נקבעת עד שיהא מנהג....

8. Tchernowitz, op. cit., loc. cit.

9. R. Isaac B. Sheshet #475, quoted in S. A. Hoshen Mishpat #331; cf. also Tchernowitz, op. cit., p. 147.

10. Tchernowitz, op. cit., p. 148.

11. Ibid., based on Soferim XIV:18.

12. אם יבוא אליהו ויאמר שאין חולצין במנעל שומעין לו שאין חולצין בסנדל אין שומעין לו שהרי הרבים נהגו להיות חולצין בסנדל והמנהג מבטל את ההלכה.

13. Alexander Guttmann, "On the Question of the Relationship between Minhag and Halacha in the Talmudic Period," Bitzaron, Iyar, Sivan-Tammuz, 5706 (1946).

14. Ibid.

15. Hilchoth M'chirah 26:7.

16. Freehof, "Reform Judaism and the Halacha," CCAR Yearbook, Vol. LVI, 1946, p. 13.

I. Local Usage in Marriage Customs

With regard to marriage customs, there is a very clear distinction of "local usage" as between the provinces of Judea and Galilee. Apparently, the Judean practice was to have the bridegroom and bride come together privately prior to the marriage ceremony. This local custom affected the halachic position of the groom, as it deprived him of the right to come to court with the claim of having married a non-virgin, since his previous privacy with his future bride provided sufficient opportunity for intercourse. This is brought out very clearly in M. Ketuboth I:5 -

האוכל אצל חמיו ביהודה שלא בעדים אינו יכול
לטעון טענת בתולים מפני שמתייחד עמה

> A man[1] who eats at his father-in-law in Judea without witnesses cannot make a virginity claim,[2] since he is alone with her.[3]

This practice is elaborated in the related Tosephta passage, Tosephta Ketuboth I:4 -

אמר ר' יהודה ביהודה בראשונה היו מייחדין את החתן ואת
הכלה שעה אחת כדי שיהא לבו גס בה ובגליל לא נהגו כן
ביהודה היו מפשפשין את החתן ואת הכלה שעה אחת קודם
שיכנס לחופה ובגליל לא נהגו כן ביהודה היו מעמידין שני שושבינין
אחד משל בית חתן ואחד משל בית כלה אף על פי כן לא היו
מעמידין אלא לנשואין ובגליל לא נהגו כן ביהודה היו שני שושבינין
ישינים במקום שחתן וכלה ישנין ובגליל לא נהגו כן כל שאינו נוהג
כמנהג הזה אין יכול לטעון טענת בתולים כנסה הראשון לשום נשו

אע״פ שלא נסתרה אם יש עדים שנתייחדה עמו כדי בעילה
אין השני יכול לטעון טענת בתולים לפיכך אין כתובתה עליו
אלא מנה טוענת בתולים כל שלשים יום דברי ר׳ מאיר ר׳ יוסי
אומר נסתרה מיד לא נסתרה אפילו לאחר שלשים יום

Said R. Judah: Formerly, in Judea, they would bring the bride and groom together privately for an hour in order to increase his desire, but in Galilee they did not practice thusly. In Judea, they would examine the bride and groom an hour before entering the marriage chamber, but in Galilee they did not practice thus. In Judea, they would set up two 'groomsmen,' one from the groom's side and one from the bride's (Nevertheless, they were set up only for the marriage) but in Galilee they did not follow this practice. In Judea, two groomsmen would sleep in the same locale as the groom and bride, but in Galilee they did not follow this practice.[3a] Whoever does not act in accordance with this custom cannot enter a claim of virginity.[4] If the first man took her home for the sake of marriage, even though she did not seclude herself (with him), if there are witnesses that she was alone with him long enough to have had intercourse, then the second man cannot claim 'virginity,' and therefore her Ketubah is only a maneh. One may claim 'virginity' for 30 days (following marriage), according to R. Meir. R. Jose says, If she secluded herself with him, then he must claim immediately; if she did not seclude herself with him, then he may claim even after 30 days.

Several conclusions may be made from the Tosephta. Firstly, the very strong statement that "whoever does not act in accordance with this custom cannot enter a claim of 'virginity'." In other words, the local custom is so strong that it has become halachically binding. It seriously affects the legal position of the couple, with practical implications in terms of the amount of the marriage settlement. We see here, then, an instance of the halacha being determined by the particular local practice. If the local custom is changed or defied, the result is a weakening of the position of the subject.

A second conclusion to be drawn is that the use of the word "formerly" shows that a change must have taken place in local custom, perhaps because of the greater influence of one province over the other or because the passage of time made the halacha more conclusive and more absolute in its application (see Note 3[a], where even in Galilee there had been some disparity in practice.)

Thus, we can see how local usage influenced the halacha, and how, in time, local usage was merged into what then became the prevailing halacha generally.

II. Local custom with respect to the Ketubah

Although the halacha with regard to the amount of the marriage settlement is quite specific, there are instances in which "local usage" is sufficiently strong as to change the application of the halacha or to define it. Thus we have the following, in M. Ketuboth VI:4 -

If she agreed to bring him cash, one silver sela becomes equivalent to six dinars.[5] The bridegroom accepts the responsibility of providing ten dinars for the "basket" (i.e., for purchasing spices, perfumes, etc.) for each maneh (of the bride). Rabban Simeon b. Gamaliel says: It is all according to local custom.

The statement of R. Simeon b. Gamaliel is highly significant. But we must understand its import in its context in this Mishnah. Does R. Simeon add to the statement of the Rabbis, or does he contradict it? R. Nissim (see Note 6) feels that R. Simeon is agreeing with the Rabbis, but adding the proviso that in a place where there is a local custom, it should be followed. Maimonides, however, understands R. Simeon as opposing the Rabbis, and agrees with him that "Local custom is a great principle, and we apply the law according to it, provided that the particular custom be spread throughout the province."[7]

According to Maimonides' understanding of R. Simeon, local usage is always the determining factor in applying the halacha, so that, in effect, it determines the halacha. This implies that the Sages sought to apply the halacha in spite of local usage. To this, Maimonides is opposed and enunciates the "great principle" stated above.

Maimonides' interpretation is supported by the following related Tosephta passage, Ketuboth VI:6 -

מה שכתב לה אם לאו גורע מכנגדן חמשה דינרים
לכל שקל ושקל פסקה להכניס לו אלף דינר בכתובתה
וכתב לה שדה[שוה] בשנים עשר מנה אם רשמה קיימת
נוטלת מה שכתב לה ואם לאו לא יפחות ממאתים לבתולה
ומנה לאלמנה.

If she agreed to bring him ready money, selas become equivalent to six dinars. The bridegroom accepts the responsibility of providing ten dinars for a 'basket' of spices. Said R. Jose: Thus is the law - in a place where the custom was not to lessen the appraised goods nor to add to the cash, one does not depart from local usage. If she agreed to bring him 500 dinars of silver, and he wrote in her Ketuba 1000 dinars, if she made her own stipulation (as to the value) she takes what he wrote for her; if not, he deducts five dinars for every shekel (var. rdg.: three dinars for each sela). If she agreed to bring him 1000 dinars and he wrote in a field ('goods') worth 12 maneh, if she made her own stipulation (of the value) she takes the amount that he wrote for her; if not, he should not give her less than 200 zuz for a virgin, or a maneh for a widow.

R. Jose's statement is thus similar to R. Simeon, but the former is more explicit than is the latter. R. Jose tells us that even when local usage is in direct contradiction to the law, it supercedes the halacha, that is, local usage determines the halacha: "This is the law ... one does not depart from local usage." We see, then, that

local usage was invoked to determine the halacha. Ultimately, the extent of application of a particular halacha would depend upon the uniformity or diversity of practice.

Another instance of local usage affecting the halacha is found in Tosephta Ketuboth VI: 5[8] -

פסקה להכניס לו שני סלעים נעשות ששה דינרים ומה שהחתן
פוסק פחות חומש חוץ ממאתים לבתולה ומנה לאלמנה פסקה
להכניס לו זהב הרי זהב ככלים ודינרי זהב הרי הן ככספים
אמר רבן שמעון בן גמליאל כן הדבר מקום שנהגו שלא לפרוט
דינרי זהב מניחן כמות שהן והזהב הרי הוא ככלים הכניסה
לו בין שום ובין כספים ונתן עיניו לגרשה היא לא תאמר
תן לי שומי וכן הוא לא יאמר לה טלי כספיך אלא נוטלת
מה שכתוב לה בכתובתה.

If she agreed to bring him two selas, they are made equivalent to six dinars (each). What the bridegroom agrees on (i.e., in goods), he deducts (therefrom) one-fifth, except with regard to the 200 of the virgin and the maneh of the widow.[9]

If she agreed to bring him gold, the gold is similar to chattels (and he then deducts 1/5); but golden dinars are like cash (he thus adds 50%).

Said R. Simeon b. Gamaliel: The matter is thus -

In a place where the custom was not to exchange golden dinars,(i.e., into prutas) he leaves them as they are, and the gold is thus considered as chattel.[10] Whether she brought in goods or ready cash, if he determined to divorce

her, she may not say, 'give me my goods,' nor may he say to her, 'take back your cash,' but she takes what was written for her in her Ketubah.[11]

R. Simeon is consistent with his position regarding local usage in insisting that even with respect to golden dinars, if local custom keeps the husband from using them as ready cash, then they are considered to be goods, and the law of goods applies (i.e., deducting one-fifth). But if local custom permits him to convert them, then the law of ready cash applies. Here we see local custom determining whether gold is to be considered "goods" or "cash". Here, then it is not a matter of the Minhag ha-makom determining the halacha, but defining its application through a definition of terms.

Another case that has bearing on the amount of the Ketubah is Tosephta Ketuboth IV;13 -

פרש ר' יוסי הגלילי מקום שכותבין כתובה מלוה
גובין אותה מלוה ואין גובין את הכתובה מקום
שכופלין את הכתובה אינו גובה אלא מחצה.

R. Jose the Galilean explained: In a locality where (it is the custom) to write a Ketubah against indebtedness, then only the amount of indebtedness may be collected, and not the amount in the Ketubah. In a place where it is customary to double the (amount of) the Ketubah, only one-half may be collected.

The Gaon[12] understands that R. Jose is explaining the "language of the unlearned." According to Rashi,[13] the unlearned would frequently disregard the decree of the Sages. We can see from the above that

various customs existed as to the amount written into the Ketubah. Apparently, in some places it was customary to double the amount of the dowry[14] by way of honoring the bride. Obviously, such a custom could not be considered binding halachically, since it was clearly opposed to the intent of the halacha. In the case of a Ketubah written in lieu of payment of a debt, then the custom of doubling the amount would certainly penalize the debtor and hence was not to be followed as halacha. We may deduce from this, however, that where local custom defined or delimited the halachah, it could be considered as binding.

We have evidence of distinct differences in the writing of the Ketubah as regards the custom in Galilee and Judea in M. Ketuboth IV;12 -

את תהא יתבא בביתי ומיתזנא מנכסי כל ימי מיגר ארמלותיך
בביתי חייב שהוא תנאי בית דין. כך היו אנשי ירושלים כותבין.
אנשי גליל היו כותבין כאנשי ירושלים. אנשי יהודה היו כותבין עד
שירצו היורשין ליתן ליך כתובתיך. לפיכך אם רצו היורשין
נותנין לה כתובתה ופוטרין אותה.

(If he wrote) 'You shall reside in my house and be supported from my possessions for the duration of your widowhood in my house,' he is obligated, since this is a condition of the court. Thus would the people of Jerusalem write; the people of Galilee wrote in the same way as did the Jerusalemites. (But) the Judeans would write '...until the heirs are willing to give you your Ketubah (marriage settlement).' Therefore, if the heirs so desired, they could give her (the amount of) her Ketubah and let her go.

It would appear from this Mishnah that the people of Jerusalem had their own practice, but tended to follow Galilean custom. The Judeans, on the other hand, followed a custom which was definitely opposed to that of Jerusalem and Galilee. According to the latter, the heirs could not dispossess the widow, as long as she did not remarry or claim her settlement. In other words, the halachic consequence of local usage in this case was that in Galilee, it was the widow's prerogative as to how long she remained, whereas the Judeans permitted the heirs to decide. Bertinoro indicates[15] that the halacha followed the Galilean practice, which is understandable, considering that the Rabbis were constantly alert to protecting the rights of the widow and divorcee[16].

Not only did R. Simeon b. Gamaliel apply his principle of following local usage to the amount of the Ketubah, but also to the type of document that is written. This is evident in M. Baba Bathra X:1 -

> In an unfolded document, its witnesses ' (signatures) are on the front (at the bottom of the page); in a folded document, the witnesses' (signatures) are in back (of each fold). An unfolded document in which the witnesses signed in back, and a folded document in which the witnesses signed on the front are both invalid. R. Hanina b. Gamaliel says: A folded document in which the witnesses signed on

the front is valid, since it can be made into an unfolded document. R. Simeon b. Gamaliel says: It is all according to local custom.[17]

Bertinoro[18] interprets the difference between R. Simeon and the Tana of the first part as applying to a place where it is customary to write both types of documents. In that case, "If one were instructed to write a folded document and wrote it unfolded, or vice versa, the 'first Tana' considers it invalid, since the individual's instructions weren't followed. R. Simeon feels that since local usage involves both types, it doesn't matter to him and should therefore be valid. And the law followed the Tana of the first part."

We see from this Mishnah that it was customary to write several types of legal documents. We may deduce that according to all parties, if there were only one local practice prevailing, the halacha follows that practice. It is only in the case of several conflicting practices in the same place that there is a dispute. The fact that R. Simeon's view is not upheld is due probably to the fact that the specific instructions were not followed and not to the fact that one practice was used rather than another. Again, we observe the strength of local practice in determining the validity of the halachah.[19]

NOTES - CHAPTER I.

1. Engaged to be married.

2. i.e., that his bride was not a virgin at time of marriage.

3. Since it was the custom in Judea to encourage intimacy, he might have had intercourse with her. Bertinoro states that in Judea, the practice was to permit the future groom to be alone with his intended, during the engagement festivities at her father's house, in order to increase his desire for her.

3a. Althought it was already states that they did not set up groomsmen in Galilee, there were apparently some places in which the practice was followed. Nevertheless, even in those places, they didn't sleep in the same locale as the couple: Minhat Bikkurim in Alfassi, Tosephta Ketuboth I:6.

4. Similarly in Jer. Ketuboth 1:1, "Rava says that this statement refers to one who practices the Judean custom of intimacy in Galilee. R. Ashi feels that the custom referred to is that of examining the couple.

5. Instead of the usual four, representing a 50% increase in value.

6. Tosaphoth Yom Tov to our Mishnah quotes ר"ן as indicating that statement of ר"מ simply adds to statement of Rabbis - that where there is an established custom, it should be followed.

7. Mishneh Torah Hilchoth Ishut, 23:11, 12.

8. In the Alfassi edition, VI: 2, 3.

9. From which he must not deduct anything.

10. From which he may deduct one-fifth.

11. Thus she cannot claim the full value of her goods, but one-fifth less; and in the case of cash, he must give her 50% more. See the discussion in Minhat Bikkurim to our Tosephta in the Alfassi edition. Cf. Yebamoth 66b; also Ter. Yebamoth 86:4.

12. The Gaon R. Elijah in Alfassi, ad loc., says that R. Jose is explaining the "language of the unlearned" so that "in a place where it was customary to write a Ketubah of indebtedness, then [only] the debt is collected where it was the custom to double the amount."

13. Rashi informs us, in Baba Metzia 104a, that the"unlearned"would write without regard to the decree of the sages. A similar discussion of the "language of the unlearned" is found in Jer. Ketuboth 84.1 and Jer. Yebamoth 16:3.

14. See Minḥat Bikkurim ad loc.

15. Bertinoro to our Mishnah: "The law does not follow the Judean practice. Rather, as long as she remains unmarried and does not demand her Ketubah in court, she is supported from her husband's means and resides in the house in which she lived while her husband was alive, and she may use all of the garments that she used during her husband's lifetime."

16. This would accord also with our previous observation that the Judean practice seemed to become subjugated by the Galilean. The Tannaitic tendency seems to be toward unity of practice; whereas, in later times, when the Jewish community became widely scattered, there was wide diversity of practice.

17. Although this case applies primarily to a divorce document and is thus included here, it has application also to other types of legal documents.

18. To our Mishnah.

19. c.f., the parallel passage in the Tosephta, Baba Bathra XI:1, where R. Simeon is not quoted, but which discusses the validity of the two types of document mentioned in our Mishnah.

II. Local Custom With Regard to Festival Practices

I. Working on the Eve of Passover.

The force of local custom operating within the halacha is seen very clearly in M. Pesahim IV:1 -

מקום שנהגו לעשות מלאכה בערבי פסחים עד חצות עושין,
מקום שנהגו שלא לעשות, אין עושין. ממקום שאין עושין
למקום שעושין, וממקום שעושין למקום שאין עושין,
נותנין עליו חומרי מקום שיצא משם וחומרי מקום שנכנס שם.
אל ישנה אדם מפני המחלוקת.

In a place where it was customary to do work until mid-way on the eve of Passover, one may do so.[1] In a place where it was not customary to work, one may not. If one goes from a place where they do work to a place where they do not, or from a place where they do not work to a place where they do, we apply to him the stringencies of the place which he left[2] and the stringencies of the place to which he went.[3] But let no man change (from the local practice) because (it leads to) conflict.[4]

We have here a clear indication of two distinct practices, one to work and one not to work. These local practices are so strong that they attain the force of halacha in the area in which they apply. Thus the halacha of not working on the eve of Passover gives way to local custom at least until mid-day -- after mid-day, the halacha applies everywhere. Furthermore, we are given the reason for permitting local custom to determine the halacha for that place: a person who departs from local practice can cause conflict by confusing the local inhabitants as to what the

practice should be. He must yield, therefore, to the community minhag.

The matter is further clarified in M. Pesahim IV:5.

וחכמים אומרים, ביהודה היו עושין מלאכה בערבי פסחים עד חצות
ובגליל לא היו עושין כל-עיקר. הלילה, ב"ש אוסרין, וב"ה
מתירין עד הנץ החמה.

> The Sages say, in Judea they would work on the eve of Passover until mid-day, but in Galilee they did not work at all.[5] As to the night (between 13-14 Nissan) the School of Shammai prohibit (working), whereas the School of Hillel permit (working) until sunrise.[6]

Apparently, the distinction in local custom was between Judea and Galilee. The Judeans permitted local practice to operate within the general halacha, whereas the Galileans insisted on strict application of the halacha, perhaps by way of keeping a "fence" around the Law. For, if one could work until mid-day, one might forget himself and work even beyond, thus neglecting attending to the needs of Passover. Bertinoro (see the notes) interprets the view of the Sages as being a distinction in halachic practice between Judea and Galilee, but even if this were so, it must have been as a result of Judean custom that it assumed the force of halacha.

Even in Galilee, where the practice was not to work, there is clarification needed -- if the work were necessary for the Festival, it was permitted even in Galilee. Our next Mishnah (M. Pesahim IV:6) says:

רבי מאיר אומר כל מלאכה שהתחיל בה קודם לארבעה עשר
גומרה בארבעה עשר. אבל לא יתחיל בה בתחלה בארבעה עשר.
אף על פי שיכול לגומרה. וחכמים אומרים שלש אומניות עושין
מלאכה בערבי פסחים עד חצות ואלו הן החייטים הספרים
והכובסין. רבי יהודה אומר אף הרצענים.

R. Meir says, any work which one began prior to the 14th he may complete on the 14th.[7] But one should not begin it in the first instance on the 14th even though he is able to complete it (on the 14th). (But) the Sages say, three tradesmen can work on the eve of Passover 'til midday, namely, tailors, barbers, and launderers. R. Judah says, even shoemakers.[8]

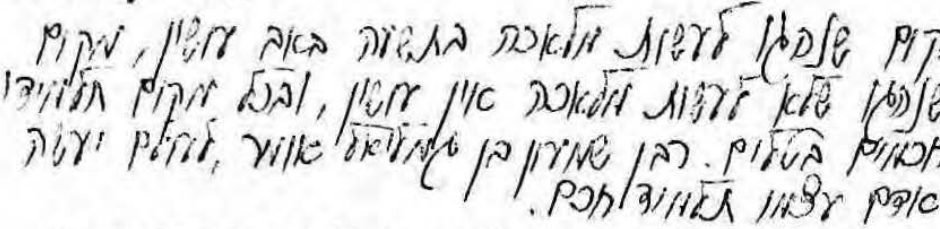
We see then, that local custom applies to unnecessary work in determining whether it may or may not be done. It is interesting to note that a further exception is made for tailors, barbers, and launderers. The reasons for this are explicitly given in Tos. Pesaḥim II:18 -

Where it was customary to do work on that which was attached to the ground, until mid-day (on the eve of Passover), one may do so; where such was not the custom, one may not do so. As of what time is work prohibited on the 14th?[9] R. Eliezer b. Jacob says, as of daylight on the 14th. R. Judah says, as of sunrise. Said R. Eliezer b. Jacob, where do we find (a day) in which it is partially prohibited to work and partially permitted?[10] R. Judah answered: this very day (the 14th of Nissan) is its own evidence, since for part of the day it is forbidden to eat <u>hametz</u>, and for part it is permitted. The Sages say, even in a place where it is said that one does not work until mid-day on the eve of Passover (nevertheless) three tradesmen) do work: the tailors, barbers, and launderers. Tailors (are permitted) since we find that the unlearned person mends as usual during the (intermediate days of) the Festival.[11] Barbers, since the Nazirite[12] and the leper[13] and one who had received a blow on the head[14] cut their hair during the Festival. Launderers, since those who come from the coast or from a foreign land launder. R. Jose son of R. Judah says, even the shoemakers (may work), since those who come up for the Festivals fix their shoes and sandals during the Festival.[15] (If there is) heaped-up foliage in the midst (of his yard) he may remove it to the sides; (if it is) in the cattle-shed in the yard, one may take it out to the dung-hill.

Thus the law that applies to these tradesmen is determined by the practice of some of the people. This involves the principle of "observing the practice of the people" before fixing the halacha. The law, then, is a result of custom, not prior to it. This Tosephta passage is important also for pointing out that there existed differences in local usage in connection with farm-work. In addition, the local custom of not working on the 14th is defined as applying beginning with sunrise. This would follow the Hillelites (see Note 6).

II. Working on the Ninth of Ab

M. Pesahim IV:5



In a place where it was customary to work on the Ninth of Ab, one may do so; in a place where it was the custom not to work, one may not do so; but in every locality, (disciples of the Sages) do not work.[16] Rabban Simeon b. Gamaliel says, a man should always conduct himself as a (disciple) scholar.

It appears from this Mishnah firstly, that there were varying customs with respect to working on the Ninth of Ab; secondly, that scholars were excluded from following local custom in this instance. Indeed, others were encouraged to follow their example in being more stringent, even though local custom permitted more leniency. And this is spoken by R. Simeon b. Gamaliel, who, on other occasions,

enunciated the principle of following local custom! (see above p 4). We may deduce, however, that this stringency for scholars applies particularly to the Ninth of Ab, rather than in general, from the fact that we do not find this statement in other cases involving local custom. Moreover, the Shulḥan Aruch retains R. Simeon's view.[17] (Isserles indicates that the prohibition on the Ninth of Ab was merely until mid-day, and applied to matters that involved some delay.[18]

Perhaps the statement of R. Simeon is indicative of the fact that on the Ninth of Ab, since it is one's duty to mourn the desturction of the Temple, one should cease from work in spite of local usage, whereas on the eve of Passover, since it is a matter of preparation for the Festival, there is still time even after mid-day.

III. Kindling Lamps for Yom Kippur.

We find a variation in custom as far as kindling lamps for Yom Kippur is concerned. The entire matter is permitted to hinge on local usage, which, in effect, defines the halacha. However, even local usage has its limitations, for it is not permitted to interfere with certain practical needs of the people. Thus, we find, in M. Pesaḥim IV:4

מקום שנהגו לאכול צלי בלילי פסחים אוכלין, מקום שנהגו
שלא לאכול אין אוכלין. מקום שנהגו להדליק את הנר
בלילי יום הכפורים מדליקין, מקום שנהגו שלא להדליק
אין מדליקין. ומדליקין בבתי כנסיות ובבתי מדרשות, ובמבואות
האפלים, ועל גבי החולים.

In a place where it was customary to eat roast on the nights of Passover, one may eat (roast); in a place where

> the custom was not to eat (roast), one may not[19].
> In a place where it was customary to kindle the lamp for the night of Yom Kippur, one may do so;[20] where the custom was not to kindle, one may not do so.[21]
> But one may kindle (lamps) in synagogues, houses of study,[22] dark alleys, and next to sick persons.

The minhag here serves as a "fence" around the Law, since the reason for prohibiting or permitting the light is due to the desire on the part of the Sages to prevent the possibility of intercourse on Yom Kippur. This is brought out explicitly in the parallel Tosephta passage, Tos. Pesahim II:17 -

מקום שנהגו להדליק בלילי יום הכפורים מדליקין מקום
שנהגו שלא להדליק אין מדליקין ר' שמעון בן אלעזר אומר
מדליקין בפונדקאות ובבית המים אלו שאומר מדליקין
ואלו שאומר אין מדליקין אלו ואלו לא אומר אלא מפני העבירה.

> In a place where it was customary to kindle (lamps) on the nights of Yom Kippur, one does so; in a place where the custom was not to kindle, one does not kindle. R. Simeon b. Elazar says, one kindles in inns and washrooms.[23] Those who say one kindles and those who say one does not kindle, both say so only because of the (possibility of) transgression.[24]

We see that the custom applied wherever husband and wife would be alone together. However, in a public place, or in a darkened area, or for a sick person - that is, wherever practical exigency required the use of light, the local practice could be overlooked. Thus, the

minhag hamakom points up the halacha in an entirely different area, that of sexual relations on Yom Kippur.

IV. Recitation of the Hallel and Reading the Megillah

We find a variation in local custom with regard to the recitation of the Hallel and its attendant blessings. M. Sukkah III:11a says -

מקום שנהגו לכפול, יכפול; לפשוט, יפשוט; לברך אחריו, יברך;
הכל כמנהג המדינה.

> Where it was customary to repeat, one repeats;[25] to recite simply, one recites simply (i.e., without repetition); to say the blessing afterward, one does so[26] -- it is all according to local usage.

Although the nature of the Hallel is apparently understood, the manner of its recitation is left to local usage. Not only does the place of recitation affect the proper manner, but individuals seem to have had a strong influence on the proper practice. The Tosephta[27] tells us that R. Elazar b. Prata would say the words once, whereas Rabbi repeated them. On the other hand, a later Talmudic report[28] says that "R. Elazar b. Prata added things -- what did he add? Said Abaye, 'he doubled the verses from twenty-one on'."

Where it was Rabbi who doubled the verses or R. Elazar b. Prata is not of major import here -- what is significant is the fact that authoritative individuals, by their own minhag, could be cited as the bases for the validity of a particular practice. We may deduce from this the fact

that local usage, at least in liturgical practice, frequently followed the precedent of individual rabbis.

We may conclude also that the more important blessing was that prior to the Hallel, since the blessing afterward was left to local custom. A similar situation is found with respect to the blessings around the reading of the Megillah on Purim, as indicated in M. Megillah IV:1a -

הקורא את המגילה עומד ויושב; קראה אחד, קראוה
שנים, יצאו. מקום שנהגו לברך יברך, ושלא לברך לא יברך.

> If one reads the Megillah (scroll of Esther, on Purim) standing or seated; whether one read it or two, they have fulfilled their obligation. Where it was customary to recite the benediction (afterward),[29] one does so; (where it was the custom) not to bless (afterward), one does not.

The fact that local custom was permitted to determine the recitation of the blessing afterward shows that there was still a state of flux surrounding it. In fact, the ritualistic character of liturgical practice would naturally lead to many and differing local community customs, and it was in just such a diversified situation that the principle of <u>minhag ha-makom</u> could give validity to local usage and prevent possible chaos as a result of attempting to impose a single universal practice.

V. Mourner's Benedictions

In regard to mourner's benedictions, we have an example of local custom functioning within the area of a general custom (rather than within the confines of an halacha). According to Minhat Bikkurim, "it was customary to recite blessings in the house of a mourner ... and there are varying local customs. Some include all the blessings in one, some divide them into two or three ... and as appears from the discussion in Ketuboth 8b, the entire matter hinges on (local) practice."[30] Thus we have the statements in Tos. Berachot III:23,24 -

מקום שנהגו לומר ברכת אבלים שלש אומרים שלש שתים
אומרים שתים אחת אומרים אחת.
מקום שנהגו לומר ברכת אבלים שלש כולל את הראשונה
בתחית המתים וחותם בה מחיה המתים. שניה בתנחומי
אבלים וחותם בה מנחם עמו ועירו. שלישית בגמילות
חסדים ואינו צריך חותם...

> In a place where it was customary to recite mourner's blessing in three (parts), one says three; in two, one says two; in one, one says one.[31]
>
> Where it was customary to say the mourner's blessing in three (parts), he includes the first one in <u>T'hiyat Ha-Metim</u>,[32] and seals it with "who gives life to the dead." The second is (included in) <u>tanhumei avelim</u>,[33] and he seals it with "who consoles His people and His city." The third is in <u>G'miluth Hasadim</u> and needs no seal.[34]

It is felt by Samuel Daiches[35] that these blessings were recited by guests visiting the mourners, and for unknown reasons, fell into disuse.[36] It is entirely possible that Tos. Berachot III:23 gives us

the reason. Since it was customary in some places to include all of the benedictions in one, the tendency to simplicity may have become widespread, so that in time, the benedictions disappeared from use and were replaced by some simple words of comfort. For our main purpose, however, we have evidence here of Minhag hamakom serving to diversify, and perhaps to simplify, a more general minhag.

NOTES TO CHAPTER II

1. Until mid-day, the minhag applies; after mid-day, it is entirely prohibited: Minḥat Bikkurim ad loc; cf. also Korban Ha-Edah to Jer. Pesaḥim IV:1

2. If he intended to return: Bertinoro ad loc.

3. If he did not intend to return, he follows the local custom, whether it be more stringent or more lenient (Bertinoro).

4. If he follows a different practice, it could disturb the townspeople.

5. The Sages believe that working on the eve of Passover is not a matter that is dependent on "custom" -- but that in Judea it was permitted, and in Galilee it was absolutely forbidden, but not by strength of the Minhag: Bertinoro ad loc.

6. This is applied to the Galileans, who did not work during the daytime: the Shammaites consider that it is similar to other Festivals, where work is prohibited, since the night is considered the same as the day. The Hillelites consider the night as similar to the situation of a fast day, where one may not eat in the day-time, but may eat at night.

7. Provided it were necessary for the Festival -- even where it was customary not to work. But if it were not necessary for the festival, then where they worked, he may do so; where they didn't, he may not complete it even if he started prior to the 14th: Bertinoro to our Mishnah.

8. But the halacha follows the sages, since shoemakers might make new shoes as well as fix old ones: Bertinoro. But cf. Shulhan Aruch Orah Hayyim 468:5, where Isserles says "...these three may begin and work until mid-day even where it is not customary, and others who begin necessary work before daytime may work until mid-day, and this is the practice." The statement of the Sages comes to permit these to work, not to exclude others from finishing: Tosaphoth Yom Tiv to our Mishnah, quoting R. Asher and R.

9. Referring to the Galileans, who did not work until mid-day from point of law; or, to a place where the minhag was utilized as a "fence" - Minḥat Bikkurim.

10. i.e., where do we find a distinction made between "sunrise" and "daylight"?

11. cf. M. Mold Katan 3:1-since we find some leniency with regard to the intermediate days, we "go all the way" in being lenient on the eve of Passover: Minḥat Bikkurim. See also Pesaḥim 55b (top) and Rashi ad loc.

12. His vow was over on the Festival.

13. Whose days of uncleanness ended on the Festival.

14. Which healed during the intermediate days.

15. So that these things are necessary for preparation for the Festival, and therefore are permitted - see the discussion in Mold Katan 13a
"Something necessary for the Festival was permitted by the Rabbis; that which was unnecessary for the Festivals was not permitted by the Rabbis."

16. In order not to be distracted from mourning: Bertinoro.

17. S.A. Oraḥ Ḥayyim 554:22.

18. Ibid.

19. As he appears as one who eats the Passover meals out-of-doors. Tosaphoth Yom Tov ad. loc.

20. Since it is forbidden to have intercourse on Yom Kippur, the light will prevent it, since intercourse was prohibited by light: Bertinoro ad loc.

21. Lest the light cause him to see his wife and be aroused.

22. Or in any place where husband and wife are not alone.

23. He holds that one who became polluted may cleanse himself on Yom Kippur, even where the custom was not to kindle: Minḥat Bikkurim in Alfassi, Tos. ad loc. (Pesaḥim III;11)

24. See Notes 20 and 21 to M. Pesaḥim IV:4.

25. It was customary to repeat verses 21-29 of Psalm 118 in the Hallel. Bertinoro ad loc attributes this to the fact that all the other verses in this Psalm are repeated elsewhere in Scripture. Therefore, it was customary to repeat these also.

26. The blessing before is a commandment and not dependent upon local custom: Sukkah 39a.

27. Tos. Pesaḥim X:9.

28. Sukkah 39a.

29. But prior to the reading, one is everywhere obligated to recite three benedictions: "to read the Megillah"; "Who performed miracles"; and "Sheheḥyanu" - both for the evening and daytime readings.

30. Minḥat Bikkurim to our Tosephta, in Alfassi edition.

31. Ibid.

32. The God, who is great in the abundance of His greatness, mighty and strong in the multitude of awe-inspiring deeds, who reviveth the dead with His word, who does great things that are unsearchable and wondrous works without number. Blessed art Thou, O Lord, who revivest the dead.": Ketuboth 8b.

33. "Our brethren, who are worn out, who are crushed by this bereavement, set your heart to consider this: This it is (that) stands forever, it is a path from the six days of creation. Many have drunk, many will drink; as the drinking of the first ones, so will be that of the last ones. Our brethren, the Lord of consolation comfort you. Blessed be He who comforteth the mourners." Ketuboth 8b.

34. "Our brethren, bestowers of lovingkindness, sons of bestowers of lovingkindness, who hold fast to the covenant of Abraham our father -- our brethren, may the Lord of recompense pay you your reward. Blessed art Thou who payest the recompense.": Ketuboth 8b. It is of interest to note that the Talmud adds the seal, whereas the Tosephta does not require it.

35. Soncino Talmud, Ketuboth, pp. 41, 42 - in the notes.

36. Ibid: " ברכת נחמה would thus mean the blessing of the mourners said in the open space behind the house of the mourner. When ten or more friends came to comfort the mourner, there was no room --- and the mourners sat in the open space behind the house and the guests assembled there, and the benedictions ברכת אבלים were recited....
The ברכת נחמה fell, apparently, early into disuse, so that in post-Talmudic times its real character was not known any more. It is difficult to see why these benedictions disappeared from use. They are beautiful in thought and language...."

CHAPTER III

LOCAL USAGE IN REAL ESTATE PRACTICE

I. Agricultural Practices -

Leasing a field: Tenant-farming

We find that local usage plays a very important role in the area of agricultural practices. However, the position of local usage in this area of civil law is quite different than in the domain of ritual law. Whereas in ritual law the individual was expected to conform to the halacha as modified by the local practice of the community, civil law involves a contractual agreement between individuals, said agreement being at times written and at other times verbal. It is essentially in respect to a non-written agreement that local usage comes to define the terms of the agreement. Since, however, we are dealing here not with custom as determined by consent of the community, in which all participate, but with individual arrangements, then the power of local usage will determine in large measure the mutual obligations of the contracting parties.

Thus we find in M. Baba Mezia IX:1:

המקבל שדה מחבירו, מקום שנהגו לקצור וקצר, לעקר ועקר,
לחרוש ואחרי יחרוש, הכל כמנהג המדינה.

If one leases a field from another,[1] where it was customary to cut (the crops), he should cut; (where it was the custom) to uproot (the crops), he should uproot; to plow afterward, he should plow.[2] It is all according to local usage.[3]

We see from this Mishnah that local usage is permitted to determine the obligations of the tenant-farmer to the owner. This applies, however,

only where following local usage makes sense to both parties. Tosephoth Yom Tov[4] expresses this very clearly in his interpretation of the principle of local usage as applied to this case: "It is necessary that (conformity to local usage) makes sense (to both parties)....If it makes no sense, then he is permitted to depart from local usage."[5] This case shows that local usage could be invoked to specify the tenant's obligations. However, what if there were no local custom? In the absence of a specific agreement between the two parties, the following could be expected of the tenant-farmer: Tos. Baba Mezia IX: 14 -

המקבל שדה מחברו קוצר ומעמר ודש וזורה. המודדין והחופרין
הסנטר והאנקולמוס באין ונוטלין מן האמצע הבייר והבלן והספר
והספן בזמן שבאין מתוך בעל הבית נוטלין מתוך בעל הבית
מתוך אריס נוטלין מתוך אריס ואין משנין ממנהג המדינה.

One who leases a field from his fellow cuts (the crop), puts it in sheaves, stamps on it and winnows it. The measurer, digger, guardsman and town-clerk come and take (their pay) from the common fund. The well-master, the bather, the barber, and the scourer, when they come to collect from the individual owner, collect only from the owner's share; (when they come to collect) from the lessee, they may collect only from the lessee's share. But one does not depart from local usage.

This case can be understood best in connection with Jer. Baba Mezia IX:1, with which it is almost identical: -

גמ' המקבל שדה מחבירו הרי זה קוצר ומעמר ודש וזורה ובורר
החופר והטייל והסנטר שומרי העיר האיקונומוס נוטלין שכרן מן

הבאור הביר והבלן והספר בזמן שבאין מנת האריס
נוטלין מנת האריס מנת בעה"ב נוטלין מנת
בעה"ב אין משנין מ מנהג המדינה.

> One who leases a field from his fellow must reap, put in sheaves, trample, winnow, and sort out. The digger, measurer, guardsman, town watchmen, and town-clerk take their pay from the common find.[6] The well-master, bather, barber -- when they come to collect from the lessee, they take only from the lessee's share; (when they come to collect) from the owner, they collect only from the owner's share.[7] One does not depart from local usage.[8]

These cases would be discussing a situation in which there was no clear local practice prevailing. It is therefore necessary to spell out what is expected of the tenant-farmer when he leases a farm. However, where there is a definite local custom, and lacking any other agreement, the local custom should be followed.[9] How, then, do we account for the statement at the end of both these cases, that "one should not depart from local usage"? This statement, according to all the commentators, applies only to the latter part of the Mishnah (see the notes).

We see, then, that local custom was utilized by way of specifying the minimum arrangement to be applied to a general situation. It becomes the halachic norm to be applied where it is prevalent. Lacking a definite local custom, the halacha had to be specified.

This is further clarified in M. Baba Mezia IX: 11 -

המקבל שדה מחבירו מקום שנהגו להושיב שומר למחצה לשליש ולרביע יושיב ואין משנין ממנהג המדינה.

> One who leases a field from another - where it was the custom to appoint a watchman for half, for one-third, or for one-fourth (of the crop),[10] one should so appoint; but one may not depart from local usage.[11]

It is expressly explained by Mizpeh Sh'muel (see the notes) that where there is a definite local custom, it should be followed; otherwise, we follow the halachic statements of the Sages as to the relationship between owner and tenant. Such a statement is found in M. Baba Mezia IX:9 -

המקבל שדה מחבירו לשנים מועטות, לא יזרענה פשתן ואין לו בקורת שקמה. קבלה הימנו לשבע שנים, שנה הראשונה יזרענה פשתן ויש לו בקורת שקמה.[12]

> One who leased a field from another for a few years he may not sow it with flax,[13] nor may he have the wood of the sycamore.[14] If he leased it from him for seven years, (then) the first year he may sow flax and he may have the wood of the sycamore.[15]

While this Mishnah makes no mention of local usage, the parallel passage in the Tosephta (Tos. Baba Mezia IX:31), introduces the idea of local usage in determining the year in which flax may be sown.

המקבל שדה מחבירו שנים מועטות אין לו בקורות שקמה לפיכך הזמורות והקנים שלו. קיבלה הימנו שבע שנים מקום שנהגו לזרוע פשתן אפילו חמש שנים זורעה שנה שנייה פשתן ויש לו בקורות שקמה.

> One who leases a field from another for a few years, is not entitled to the sycamore wood. Therefore, the (dead) branches and the reeds are his. If he leased it from him

> for seven years, then where it was customary to sow flax even for five years, he may sow flax the second year. And he is entitled to the sycamore wood

Since the passages seem to be contradictory, our conclusion must be that the Mishnah is discussing a situation in which there is no particular local custom, or where the custom is not to sow flax. The sowing of flax would thus be a departure from the usual crops, and is therefore confined to the first year. The Tosephta, on the other hand, is discussing a situation in which local usage includes the sowing of flax. Therefore the flax may be sown even in the second year, as it would be no radical departure from what the owner would normally expect when he gets his field back.[16] These two passages, then, are not in conflict. Rather, the Tosephta comes to complement and extend the Mishnah, by showing how local usage would change the usual halacha that would apply to such a situation. Local usage, then, is the halacha where it is prevalent. This principle is borne out further by Tosephta Baba Mezia IX: 18 -

המקבל שדה מחבירו ליטע מקום שנהגו להיות נוטע א׳
ארבע נוטע א׳ ארבע א׳ חמש חמש א׳ שש שש א׳ שבע שבע
ואין משנין ממנהג המדינה.

> One who leases a field from his fellow in order to plant (trees?) - where it was customary to plant one every four, he plants one in four; [if the custom was] one in five, (he plants) one in five; one in six, one in six; one in seven, one in seven. But one does not depart from local usage.

Here again we see that <u>Minhag Hamakom</u>, where it is prevalent, determines what the owner may properly expect of the tenant. In the absence of a general halacha, the local custom becomes the basis for the agreement between the two parties. And we assume that it certainly matters to the owner how his field is planted. For if it did not matter to him, he may make this known to the tenant. Otherwise, it is the tenant's responsibility to conform to the local practice, which, in effect, is the halachah for that place.

Another instance of local usage determining the responsibilities of the tenant is found in Tos. Baba Mezia IX:20 -

המקבל שדה תאנים מחבירו מקום שנהגו לקצות. קוצה. עושה
אותן קציעות סריגרות תנה אותן גרוגרות. דבילה עושה אותן
דבילה אין משנין ממנהג המדינה.

> One who leases a field of fig-trees from his fellow - Where it was customary to pack them (the figs), he packs them, to dry them out, he dries them out, to make them into cakes of pressed figs, he does so. But one does not depart from local usage.

Here we see that it is not enough for the tenant merely to grow figs and give the appropriate share to the owner; but where local usage so decrees, he must process them in a particular way. This is the expectation of the owner, and it is actually the basis on which the field is leased out in the first place, local usage being as binding as any written contractual agreement could be. Local usage, in other words, is of the nature of an unwritten contract between two parties. This unwritten agreement extends even to the type of produce that may be used for payment of the rental. Thus Tos. Baba Mezia IX:10 -

המקבל שדה מחבירו מקום שנהגו ליתן פולין בשעורים נותן
פולין בשעורים שעורין כפליים בחיטין נותנין כפליים בחיטין...

> One who leases a field from another - where it was customary to give beans for barley, he may give beans rather than barley. (If the) barley (brought forth) twice as much as wheat, he gives him twice as much barley (instead of) wheat.

We rely on local usage, therefore, to indicate the kind of produce that may be used for payment. In this case, local usage seems to benefit the tenant, as it permits him to decide which crops he will grow. On the other hand, it keeps the owner from losing anything thereby, since the local practice provides for an equivalent payment in another type of crop. Local usage thus protects the interest of both parties.

Another example of local usage serving to determine the nature of the conditions of tenancy is found in Tos. Baba Mezia IX:4 -

השוכר שדה מחבירו והיו בה אילנות. מקום שנהגו להשכיר
אילנות עם השדות. הרי הן של שוכר בפני עצמן הרי הן של משכיר.

> One who rents a field from another, and it contained trees - where it was customary to rent out the trees together with the fields, then the trees are the lessee's; (where it was customary to rent them) separately, they (the trees) belong to the lessor.

The difference between having the benefit of the fruit of the trees or not having said benefit is to be determined by local usage. In the one case, local usage will benefit the tenant; in the other, it is the owner who benefits. But in neither case is this an arbitrary situation --

local usage is as strong as a contractual agreement and is understood to be binding on both parties. The force of local usage is such that it is used to determine even the manner in which produce is to be marketed: Tos. Baba Mezia IX:21 -

המקבל שדה ירק מחבירו מקום שנהגו למכור בשוק ימכור בשוק
בשדה מוכר בשדה לכך אין משנין ממנהג המדינה.

> One who leases a vegetable field from another -- where it was customary to sell (the produce) in the market, he should sell in the market; (where the custom was to sell the produce) in the field, he sells (it) in the field; one does not depart from local usage.[17]

One would think that as long as the other conditions of growing the crops and paying for them are met, the tenant could market them in any way that suited him; but this passage tells us that local usage was so strong that it could hold the tenant responsible even for the way in which he sold the produce. In other words, it has the force of halacha.

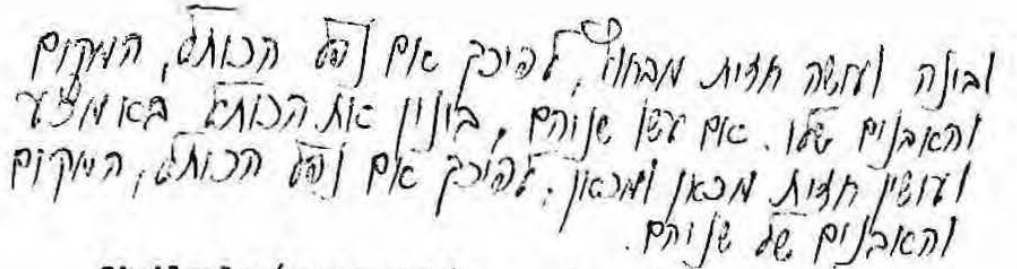
II. Property Rights and Obligations

Local usage has the force of halacha with respect to the rights and obligations of partners (in property) or neighbors. That is, once there has been agreement between the two parties in terms of what they wish to build, it is local usage that actually determines the nature of that which is built. As a case in point, let us look at M. Baba Bathra I:1 -

השותפין שרצו לעשות מחיצה בחצר בונין את הכתל באמצע
מקום שנהגו לבנות גויל, גזית, כפיסין, לבנים, בונים, הכל כמנהג

> Two partners who wished to make a partition in a courtyard build the wall in the middle.[18] Where it was customary to build of untrimmed stone, each one provides three handbreadths (of space and material). In (the case of) hewn stone, each one provides for two-and-one-half handbreadths. In (the case of) half-bricks, each one provides two handbreadths; in (the case of) bricks, each one provides a handbreadth-and-a-half. Therefore, if the wall fell in, the space and stones belong to both.

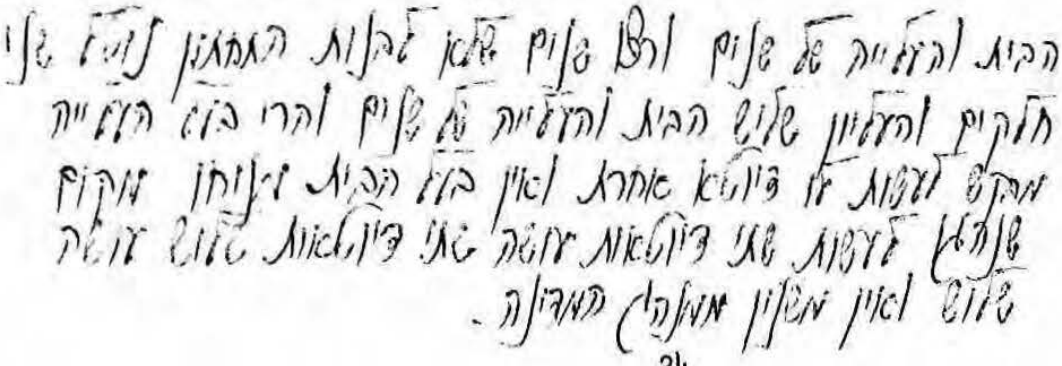
We see in this case a strong affinity between minhag and halacha. Once the halacha indicates what should be built, it is manhag ha-makom which tells us the nature of the thing to be built (in this case, a partition). Again, once the nature of the partition is known, then halacha takes over and spells out the obligations of each party in the situation. So that halacha and minhag form a kind of partnership, working together to determine the specific obligations in the situation. Minhag ha-makom is at times so strong that it becomes the halacha in the situation. As evidence of this, we have M. Baba Bathra I:2 -



Similarly (as regards) a garden, where it was the custom to fence in (between holdings), one is obligated to do so.[20] But in a valley, where the custom was not to fence in, one is not obliged to do so;[21] but if he wished to, he remains within his own (part) and builds (a fence) and makes a marker on the outside (of the fence);[22] therefore, if the wall fell, the space and stones are his. If they did so (build a fence) by mutual consent, then they build the wall in the middle and place a marker on both sides;[23] therefore, if the wall fell, the space and stones belong to both.

Here we see that local usage is equivalent to halacha, since the obligations of the owners are left up to the particular local usage. Even more, local usage is permitted to define the legal status of the property in question, so that the average garden has the status of a place where it is considered customary to fence in, whereas the average valley has the status of a place considered not customary to fence in (see the Notes). We see, then, that local usage at times attains the nature of general halachic status in determining obligations of the owners toward their property.

Another function of local usage is to help define the legal relationship between joint owners of a building which fell down. The division of the materials is halachically defined in M. Baba Metzia X:1, and Tosephta Baba Mezia XI:1, where local usage is not involved. But what if they decided to rebuild, and the owner of the upper story wishes to make changes or additions? This is where local usage enters and says that the question is determined by local practice. In other words, local usage is the law in such a case. This is brought out clearly and explicitly in Tos. Baba Mezia XI:2 -



If the lower and upper stories[24] belonged to two owners, and both agreed not to (re-)build, then the lower party takes two-thirds (of the land) and the upper party one-third. If the lower and upper stories were owned by two parties, and the owner of the upper story wishes to make an additional compartment, whereas the owner of the lower story does not wish him to do so,[25] then where it was the custom to build two compartments, he may do so; (if the custom were) three, he may build three. But one does not depart from local usage.

We see, then, that either owner may compel the other to abide by the local practice; thus, local usage has the equivalent force of halacha. In general, then, it may be said that in regard to property rights and obligations, local usage has the status of halacha.

FOOTNOTES - CHAPTER III

1. As tenant who shares produce or pays specified rent in kind.
2. Both owner and tenant have a right to insist on conformity to local usage - see Tosaphoth Yom Tov ad loc.
3. Which must be followed unless there was explicit agreement beforehand as to an arrangement other than local practice.
4. To our Mishnah.
5. Ibid.
6. All of these are paid from the common fund derived from each tenant's share of the rental.
7. Each of these must collect from each individual, not from the common fund...."and it is all according to local usage": P'nei Moshe to Jer. B. Mezia IX:1.
8. This applies to the latter section of this Mishnah: Mizpeh Sh'muel in Alfassi, Tos. B. Mezia IX:14.
9. See Mizpeh Sh'muel to Tos. B. Mezia IX:11, Alfassi edition.
10. In order to insure the payment of the pre-arranged percentage to the owner. Cf. Jer. Baba Mezia 8:1.
11. Mizpah Sh'muel ad loc.
12. Fewer than seven.
13. The flax weakens the soil, and its roots remain in the soil for seven years: Bertinoro ad. loc.
14. The branches of the sycamore were cut for use as beams in building; they would grow back within seven years.
15. Since there is sufficient time for the soil and the trees to recuperate.
16. Tur #325.
17. It is the responsibility of the tenant to sell (the produce) according to the prevailing practice: Minhat Bikkurim ad loc.
18. The case speaks of a situation in which there is less than four cubits of courtyard for each, thus requiring the consent of both parties; where there is more space, one can insist on partition.

19. The reason such strong materials are used, even though there is only discomfort of exposure involved, is to prevent the wall from falling and necessitating legal procedures: Tosephoth Yom Tov ad loc quoting Nimuke Toseph.

20. The average garden is considered a place where it is customary to fence in, and therefore one who buys property there is obliged to fence it in: Bertinoro ad loc.

21. The average valley is considered a place where it is not customary to fence in.

22. Toward his neighbor's property, indicating that he alone made the fence.

23. Showing that both participated in building the wall.

24. Which fell down.

25. The owner of the lower story has it in his power to prevent the upper owner from building anything not in accord with prevailing practice: Hasde David ad loc.

CHAPTER IV

LOCAL USAGE IN COMMERCIAL PRACTICE

As was the case in the area of real estate, so, too, in commercial dealings, we find local usage assuming the proportions of halacha. Since a commercial transaction involves a basic understanding between two parties as to the terms of a sale, or involves an underlying assumption as to the nature of the goods being bought or sold, it is essential that both parties be governed by a mutual understanding. This understanding may be defined by specific halachot, or by the local practice of the community. In this connedtion, Maimonides tells us (1) that the various halachot apply to situations where there is no known custom ..."But where it is the custom to consider certain sales binding, then we so consider them, and we rely on usage." Furthermore, he says that "this is an important principle in all matters of business - that we follow the language of people in that place and also their usage..."[2]

Thus we find this principle being applied in various areas of commercial law, where local usage is tantamount to the halacha for that place:

I. Sale of Cattle

We find that local usage determines whether or not small cattle may be sold to heathen: M. Pesahim IV: 3[3]

מקום שנהגו למכור בהמה דקה לעובדי גלולים מוכרין, מקום שנהגו שלא למכור אין מוכרין, ובכל מקום אין מוכרין להם בהמה גסה, עגלים וסייחים שלמין ושבורין. רבי יהודה מתיר בשבורה. בן בתירה מתיר בסוס.

Where it was customary to sell small cattle[4] to a heathen, one may do so; where it was the custom not to sell, one may not.[5] But in any place, one may not sell them large cattle, calves, or foals, (whether) wholesome or maimed.[6] R. Judah permits (in the case of) a maimed (animal); Ben Bethera permits (in the case of) a horse.[7]

While this case may seem to be related to ritual practice, since the reason for not selling to heathen is because of the possible violation of the Sabbath, nevertheless, it does concern a commercial transaction; and it is in the area of such a transaction that local usage either permits or prohibits. Thus the power of local usage is thoroughly halachic in character and in effect. The power of local usage may be evidenced further by comparing M. Baba Bathra V:5 and Tos. Baba Bathra IV:8 -

המוכר ראש בהמה דקה לחבירו לא מכר את הרגלים. מכר את הרגלים לא מכר את הראש. מכר את הכבד לא מכר את הקרביים. מכר את הקרביים לא מכר את הכבד. אבל בדקה מכר את הראש מכר את הרגלים, מכר את הרגלים לא מכר את הראש. מכר את הקרביים מכר את הכבד. מכר את הכבד לא מכר את הקרביים.

One who sells the head of a large animal has not sold the feet.[8] If he sold the feet, he has not sold the head. If he sold the lungs he has not sold the liver. If he sold the liver, he has not sold the lungs. But (in the case of) a small (animal), if he sold the head, he has sold the feet; if he sold the feet, he has not sold the head. If he sold the lungs, he has sold the liver; if he sold the liver, he has not sold the lungs.

המוכר את הראש בבהמה דקה לא מכר את הלחי אם היה טבח כהן
הרי זה מכור. המוכר את הראש בבהמה גסה לא מכר את
הרגלים מקום שנהגו למכור הרי אילו מכורות.

If one sells the head of a small animal, he has not sold the jaw;[9] (but) if (the purchaser) was meat-dresser (to a) priest, then it is sold.[10] One who sells the head of a large animal has not sold the legs. Where it was customary to sell (them) then these are (considered) sold.

The main difference in the manner in which these cases are stated is that the Tosephta adds the consideration of local practice, whereas the Mishnah makes no mention of same. However, this does not imply that the Mishnah here does not recognize local usage, but is simply stating the halacha where there is no known local practice. Indeed, the Shulchan Aruch makes this amply clear when it states that "these laws (of the Mishnah) apply only where there is no known custom; but where there is a definite practice, everything follow the minhag."[11] This is in keeping with the interpretation of the Tosephot Yom Tov, who explains that it is not only in this case that we follow local usage, but wherever there is a specific local practice, it is followed (as though it were the halacha for that place).[12]

II. Local Usage in Mercantile Practices

The Sages were careful to protect the interests of customers when making purchases, at the same time not overlooking the interests of the merchant himself. But they wanted to be sure that the merchant should do nothing to take advantage of his customers, nor to deceive them in any way. In some instances, local usage was sufficient to insure this. Where it

was not, it was necessary to have specific halachot to cover the situation. But we can see that both halacha and minhag hamakom have an equivalent function, i.e., to protect the interest of the parties involved, without injury to either. Since it was the merchant who, for themost part, was in a position to take advantage of the customer, we find that most of the laws concern the seller. Thus, we have M. Baba Bathra V:11 -

> Rabban Simeon b. Gamaliel said, all this applies to liquid measures, but (in the case of) dry measures, it is not necessary.[13] And he (the merchant) must overweigh the scales by one handbreadth.[14] If he balanced (the scales) evenly,[15] then he gives him (the customer) overweight: one-tenth for wet measures and one-twentieth for dry measures.[16] Where it was customary to measure with small (measures), one should not measure with large,[17] (where it was the custom to use) large, one should not measure with small,[18] (where the custom was) to level off (the measure), one should not heap up;[19] (where the custom was) to heap up, one should not level off.[20]

We see from this Mishnah that the customer is given the benefit of every possible doubt. The cleaning of the weights periodically, and the giving of a small amount of overweight all work to protect the cus-

tomer. But the manner of giving the overweight must be in accordance with local practice. Further, even the manner of weighing out the merchandise must follow local custom - so that all customers will be treated alike. Also, this serves to prevent the merchant from taking advantage of a customer by a different method of weighing. The force of local usage is brought out by the fact that if one sees the merchant weighing out in a certain way, he may assume that this is the practice, and therefore the correct, legal procedure. We see, therefore, that local usage is the halacha.

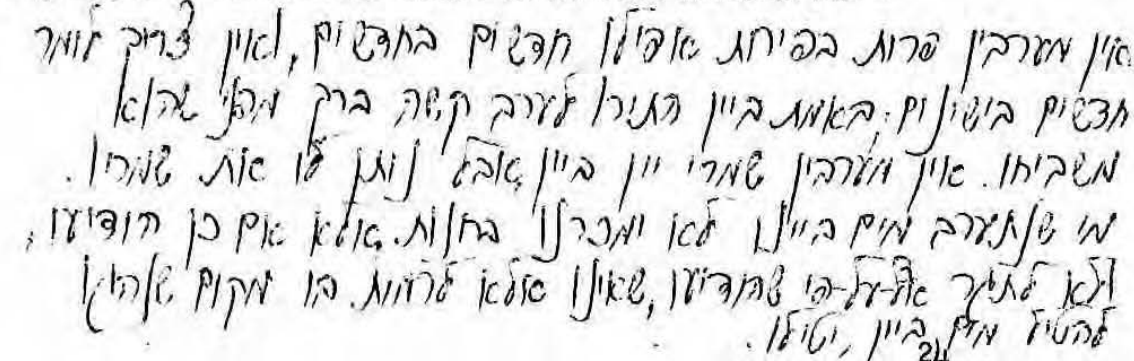
This procedure is borne out by the parallel Tosephta passage, Tos. Baba Bathra V:3 -

מקום שנהגו להשפיע משפיע לו כל צורכו עד (שלא) נתמלאו
אחורי המידה ושולי המידה להכריע מכריע לו כל צורכו מקום
שנהגו שלא להשפיע ושלא להכריע נותן לו גירומין אחד
מעשרה בלח ואחד מעשרים ביבש.

> Where it was customary to give overmeasure, he gives him (the customer) as much as is required, as long as the back and bottom of the measure are (not) filled;[21] (where it was customary) to give overweight, he gives him the required amount.[22] ...Where the custom was neither to overfill nor to overweigh, he gives him overweight (in the amount) of one-tenth in liquids and one-twentieth in dry (goods).[23]

Here again, we see that both the halacha and the Minhag hamakom are used to insure the customer's receiving of the minimum amount of overweight due him. Where there is a particular local usage, it is to be followed. Lacking such, the halacha stipulates the amount. In either case, local usage and halacha are interchangeable, the former having the force of the latter and serving the same purpose. This confirms our previous observation that where there is a definite local custom, it should be followed; otherwise, we follow the stipulation of the Sages.

Another instance of the role of local usage in helping to avoid injury to a customer is found in M. Baba Mezia IV:11 -



One should not mix fruits with (other) fruits,[24] even new with new, and needless to say, new with old. Actually, (in the case of) wine, it is permitted to mix strong with mild,[25] as this improves it. One may not mix the lees of the wine (of one barrel) with the wine (of another barrel),[26] but he may give him (i.e., the purchaser) the lees (of its wine). One whose wine was mixed with water should not sell it in the store,[27] unless he told him (the purchaser), and not to a merchant even if he did tell him, for it will (only be used) to deceive. Where it was the custom to put water in the wine, one may do so.[28]

Once again, we see that the Sages did their utmost to protect the interests of the customer by keeping the merchant from any actions that would tend to deceive the buyer. However, if the merchant tells the customer the true nature of the merchandise, or if local usage is such that the customer is sure to anticipate the true nature of the merchandise, then the transaction is on an ethical basis. Local usage thus serves the purpose of defining the basic assumptions of both buyer and seller, which is the same function of the various <u>halachot</u>. In other words, local usage has the force of halacha in that it represents an unspoken agreement between two parties as to the nature of the article in question.

The parallel Tosephta passage bears out these conclusions: Tos. Baba Mezia III:27 -

...ואין מערבין שמרי יין ביין אבל נותנין לו את שמריו כיצד
היה שופה יין לחמרין נותנין לו שמרי אותו יין אבל לא
שמרי יין אחר. אף על פי שאמרו נותנין לו שמרין נותן של היום היום
ושל מחר למחר אבל לא של היום למחר ולא של מחר להיום
לא יערבם חנוני וימכרם בחנותו אלא אם כן הודיע ולא
ירביע חנוני בתוך חנותו יין ושמן מפני שגונב דעת הבריות
מקום שנהגו להטיל מים לחמצה לשליש ולרביע יטילו ואין
משנין ממנהג המדינה.

...And one should not mix the lees of one (barrel of) wine with the wine, but one gives him (the customer) his lees. How (does it operate)? If he strained the thick wine to (thin) wine, he gives him the lees of that wine, but not the lees of other wine. Although (the Sages) said that one gives

him his lees, (it means) he gives him today's (lees) today,[29] and tomorrow's (lees) tomorrow; but not today's tomorrow, nor tomorrow's at some future time. The merchant should not mix them and sell them in the store unless he notifies (the customers).[30] Now the merchant should not spread wine and oil in his store, as (this is considered) deceiving people.[31] Where it was the custom to pour water (into the wine) (in the amount of) one-half, one-third, or one-fourth, one may do so. But one does not depart from local usage.

The essential idea here is that one should not mislead his customers. And just as some of the specific <u>halachot</u> define for us what is considered misleading, so, too, does local custom. Even more, local custom takes precedence, as it indicates what the customer may rightfully expect in the transaction, being the usual practice for that place. But its power derived not from the fact that it negates the halacha, but from the fact that where it is prevalent, it <u>is</u> the halacha.

III. Local Usage in Determining Rights and Privileges of Labor

Local usage was an important factor in determining the conditions of employment where such were not stipulated (in some instances, even where they were); and in determining the extent to which extraneous materials could become the property of the worker. An example of the latter case is found in M. Baba Kama X:10 -

מוכין שהכובס מוציא, הרי אלו שלו, והסורק מוציא, הרי אלו של
בעל הבית. הכובס נוטל שלשה חוטין והן שלו. יותר מכן הרי אלו של בעל הבית.

Shreds of thread which the launderer takes out (of the wash-tub) belong to him,[32] but that which the comber takes out belongs to the owner.[33] If the launderer pulls out three threads, they are his; more than this, they belong to the owner...(34)

This would seem to be a simple halachic statement regarding the legal right of the worker to extraneous goods, which, the Mishnah indicates, depends on the extent of the owner's interest in said goods. But actually, this is again a case in which there is no definite local custom, and therefore, we consult the owner's interest to see whether or not the worker may keep the goods. That this is so may be seen from the following Tosephta passages: first, Tos. Baba Kama XI:12 -

אין לוקחין מן הסורק מוכין מפני שאינן שלו מקום שנהגו
להיות שלו הרי אלו שלו.

> ...One should not purchase (thread) from the comber, since they do not belong to him.[35] Where it was the custom for them to belong to him, we consider that they do.[36]

We see from this case that where it was the custom for the worker to have the right to keep the extraneous goods, they are properly his. That is, where there was an established local practice, we follow it. We see this also in another Tosephta passage, Tos. Baba Kama XI:18 -

השוכר את הפועל לקוץ עמו בהיצין ולזמור עמו בזמורות
מקום שנהגו להיות שלו הרי אלו שלו לבעל הבית הרי
אלו של בעל הבית ואין משנין ממנהג המדינה.

> One who engages a worker to help him trim shrubs, or to help him prune vine-shoots, then where it was customary (for the trimmings) to belong to him (the worker), they so belong; (where it was customary) to belong to the owner, they so belong. But one does not depart from local usage.[37]

This case brings out very clearly the fact that it is local usage which determines the worker's rights in regard to extraneous materials, even where the owner is interested in them (see Note 37). However, where there is no established practice, we consult the owner's interest, as per the Mishnah cited above. We may conclude, then, that local usage is the halachic guide in these matters, and is to be followed wherever it is present.

Another case which brings this out indirectly is M. Baba Kama X:9 -

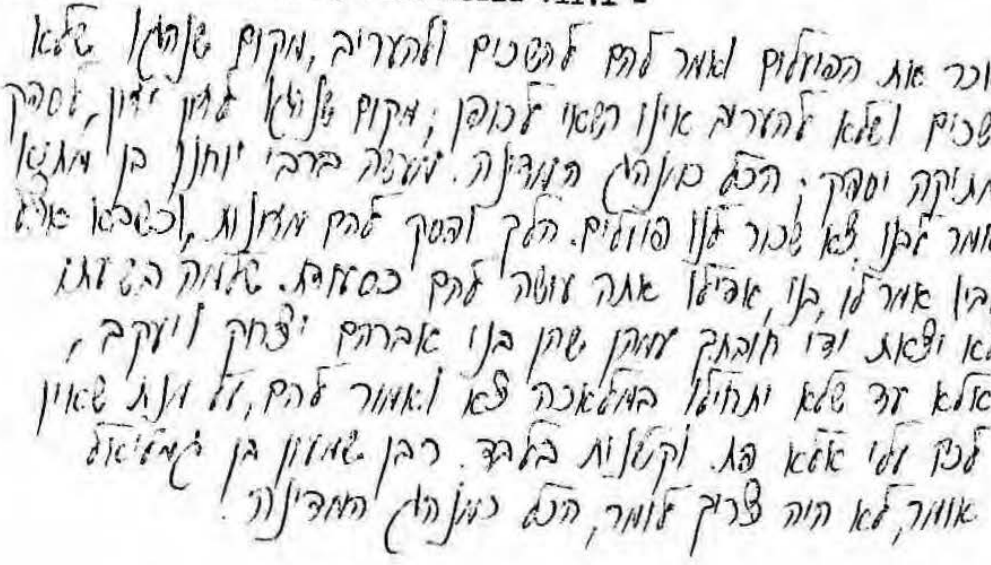
אין לוקחין מן הרועים צמר וחלב, וגדיים, ולא משומרי פירות עצים ופירות, אבל לוקחין מן הנשים כלי צמר ביהודה וכלי פשתן בגליל ועגלים בשרון. וכולן שאמרו להטמין אסור. ולוקחין ביצים ותרנגולים בכל מקום.

> One may not purchase wool, milk, or goats from shepherds;[38] nor wood or fruit from watchmen of fruit-trees. But one may purchase woolen garments from women in Judea, or flaxen garments (from women) in Galilee,[39] or calves (from women) in Sharon.[40] But if any of them say that it (the purchase) should be hidden then it is prohibited. (However), eggs or poultry may be purchased anywhere.[41]

We see from this case that where the product itself is involved, one must be wary of purchasing from the worker, since he has no right to such products by virtue of his labor. However, in a place where local custom would indicate that they may rightfully belong to the worker, then we have no ground for suspecting thievery on their part. Incidentally, this case reveals the fact that there were different customs in various parts of the country in regard to the type of work

done by women -- and these customs had specific legal consequences.

An important case dealing with the conditions of employing workers is found in M. Baba Mezia VII:1 -



One who hires workers and tells them (to work) early or late, then wherever it was customary not (to work) early and/or not (to work) late, he may not coerce them;[42] where it was customary to feed them, he should feed them; to provide them with sweet drinks, he should do so. It is all according to local usage.[43] It happened that R. Johanan b. Matya once said to his son, "Go hire some workers for us." He went and arranged to give them food.[44] When he came (back) to his father, he told him, "Son, even if you were to make a feast for them like Solomon in his heyday, you would not discharge your obligation to them, as they are children of Abraham, Isaac and Jacob; but before they begin working, go and tell them: "on condition that I must give you only bread and pulse."[45] Rabban Simeon b. Gamaliel says, "He did not have to say (anything), (since) it all follows local usage.[46]

Here we see that local usage actually defines the conditions of employment. In the absence of a specific agreement between employer and employees, we follow the local minhag, and the employer cannot coerce the workers into doing otherwise.[47] Furthermore, if the employer claims that he engaged the workers on other terms, it is he who must bring proof that he did not violate the local usage.[48] The Shulchan Aruch indicates that even if the employer offers additional compensation, he may not coerce the workers[49] since this was not their understanding from the outset. We even go so far as to say that in the absence of a definite local minhag, if most of the workers came from a town that followed a particular local usage, then the employer is bound to follow the usage of that town.[50] We see, then, that local usage protects the interest of the worker, while at the same time not working against the employer, since the terms of hiring a worker are defined by local usage and thus apply to all. Local usage thus serves the purpose of defining the legal terms of an unspoken agreement between employer and employee, said terms being as valid and binding as any written agreement.

FOOTNOTES - CHAPTER IV

1. Mishneh Torah, Hilchoth M'Chirah, 26:7.

2. Ibid., 26:8... "but where there is no known usage....we follow the specific expression of the Sages in these chapters." See also ibid. 27:11..."Do not put out of sight the important principle in these matters, namely, local usage...."

3. The same Mishna is quoted in Abodah Zarah I;6.

4. Sheep, goats, deer.

5. It was feared that heathen would work the animals on the Sabbath.

6. Even a maimed animal might be used for certain kinds of work.

7. The Rabbis agree only if it is to be used for riding; otherwise, they are opposed.

8. "In the case of a large animal, it is customary to sell these (parts) separately. Therefore, it (the feet) is not considered sold, whereas, in the case of a small animal, it is usual to sell the feet with the head, as they are not so valuable. So also as regards (selling) the liver and intestines...but not the other way around, since the more valuable is not sold with the less valuable, and is thus not considered added (to the sale): Nemuke Joseph quoted by Tosephot Yom Tov ad loc.

9. Whic is usually given to the priest.

10. Since it is usually his anyway, the seller probably included it in the sale: Minhat Bikkurim ad loc - and cf. Hullin 132a.

11. S. A. Hoshen Mishpat 220:15

12. Tosephot Yom Tov to M. Baba Bathra V:5 - this commentator speculates that the Tosephta author may have been aware of a specific minhag only in this area. However, he states, the same applies to other laws (i.e., that local usage is to be followed).

13. The previous Mishnah speaks of cleaning the weights and measures. In dry measures, nothing clings to the sides.

14. If it is at least one later: Bertinoro ad loc. - cf. Baba Bathra 88b.

15. Where it was not the custom to overseigh: Bertinoro

16. Actually, 1% of wet and .005 of dry.

17. The purchaser would lose out on the overweight - cf. Baba Bathra 89a.

18. The seller would have to give too much overweight.

19. Even if the purchaser offers to pay more, as one who sees it thinks this is the usual practice: Tosephot Yom Tov ad loc.

20. Even for less money: Bertinoro.

21. Minḥat Bikkurim ad loc feels the correct reading should be "until they are filled."

22. Whatever was customary.

23. This is the minimum amount required.

24. If one sells the fruit of a particular field to another, he should not mix them with the fruit of a different field.

25. R. Asher: it lasts longer.

26. The lees of one barrel spoil a different barrel: Tur #228.

27. i.e., individual sales.

28. This refers only to the time between pressings...and it is expected that this was done: Bertinoro ad loc.

29. But if he kept the lees separate for a day, he cannot mix it even with the barrel from which it came: Minḥat Bikkurim ad loc.

30. Where it was not customary to be mixed.

31. The odor will make customers think the wine is good: Minḥat Bikkurim ad loc. This commentator suggests the possibility of reading אין כך - one should not mix wine with oil, as the oil comes to the top and might be deceptive.
Hasde David feels the idea is to attract customers by indicating how much is on hand, implying that it will sell more cheaply.

32. Since they are presumably of no concern to the owner.

33. Since they have value to the owner, so that he is interested in them.

34. The Tur #358 considers that all belong to the owner.

35. We suspect that he took them from the owner. Cf. Maimonides, Hilchoth G'neva 6:9.

36. They are regarded as rightfully his.

37. We follow the local minhag, rather than the concern of the owner: Minhat Bikkurim ad loc.

38. As it is possible that the goods were stolen from the flocks left in their care.

39. As this is women's work in these places, and they do it with their husband's knowledge: Bertinoro ad loc.

40. As it was the custom in Sharon for women to raise calves: Bertinoro and Tosephot Yom Tov ad loc - cf. also Maimonides, Hilchoth G'neva, Ch. 6.

41. i.e., from anyone - unless told to hide them.

42. This applies if he hires them unconditionally; but if he stipulated the conditions previously, they are bound by them: see the Tosaphoth, Baba Mezia 83a.

43. Bertinoro ad loc indicates that this applies to where the custom is to feed the workers in the morning in the employer's house. If the employer wants them to start working and he will bring them their food, they may rightfully demand to wait in the house and eat before going out to the field.

44. More than the usual amount.

45. Once they would begin working, the special conditions would take effect.

46. i.e., we follow the average amount re pay, food, etc.: Tosephoth Yom Tov ad loc. Cf. Rashi ad loc and Tur #301.

47. Cf. the parallel in J. Baba Mezia VII:1 and the discussion in P'nei Moshe, indicating that we rely on the usage of the city or province, it being understood that he engaged the workers on the basis of the local minhag.

48. cf. Mareh Ha-Panim to J. Baba Mezia VII:1, who quoted Maimonides, Hilchoth Sh'luchin 8:5; and the Mordecai, quoting R. Hai Gaon.

49. S. A. Hoshen Mishpat 331; cf. also Tur, Hoshen Mishpat 331.

50. Ibid., quoting Nimuke Joseph - he adds that in case of conflicting customs between two towns, we follow the usage of the place where the workers were engaged.

CONCLUSION

We have seen how local usage plays an important part in the development and application of the halacha. Both in the area of ritual law and civil law, local usage is looked to for clarification of the halacha. At times, minhag hamakom is the base from which the later law springs. At other times, it defines or limits the application of the law. The principle that "one does not depart from local usage" means that local practice was elevated to the status of halacha. Since the people in a particular locality were accustomed to following a particu- law usage, any departure from same could cause considerable difficulty. Therefore, we are cautioned to follow the community custom, even though it may differ from the practice of the place from which we came. There are even times when the local usage is more stringent than the halacha demands - even in such cases, we are bidden to follow the local usage, so as not to weaken its strength. Minhag, particularly minhag hamakom, served to diversify Jewish religious practice, whereas the tendency of the halacha was to unify and solidify said practice.

We have seen further that there are times when local customs are directly opposed to each other, yet within their respective locale; each becomes the halacha for that place. In time, however, some of these differing local customs were merged into one universal halacha. In some instances, the local custom was by way of keeping a fence around the law, so that the halacha would not be radically altered. There are times when precedent is set by individual practices, which are then taken up

as the general practice. The idea of "observing the practice of the people" indicates that frequently, the law was set with a conscious attempt to follow the general practice. At times, the local minhag is simply a variant application of a more general minhag; but in such a case, even the general minhag is considered the halachic norm within which the variant practices are being observed.

Not only with respect to ritual law was local usage considered the halacha for that place, but also in the area of civil law, where local usage served to define the mutual understanding between two parties involved in an agreement. We have seen how local usage was permitted to determine the obligations of a tenant-farmer to the owner of the land, how it served as a minimum basic agreement as to the leasing conditions, which crops could be sown, how they could be marketed; in short, local usage served as an unwritten contract.

Minhag ha-makom served to define the legal relationship between partners, even to the extent of defining the halachic status of a particular piece of property. In general, it may be said that in the area of civil law, local usage has the status of being the halacha wherever it is prevalent. This general principle was found to apply to commercial practices as well, where the local usage indicated the basic assumptions that a customer made when purchasing goods. As long as a community practice was sufficiently widespread, we could expect that the seller would abide by the demands of the local practice. By insisting that this local practice was equivalent to halacha, the Sages were protecting the rights and expectations of the customers. Understandably, where there was no clear-cut local usage, the Sages had to have specific legislation to

cover the situation. The Halacha and the Minhag hamakom are thus on the same level, i.e., they are respectively the law where they are applied. We saw further that this idea had application in the area of workers' rights and the conditions of employment of workers, where local usage was used to determine the conditions of employment.

Minhag, and in this case especially minhag hamakom, is thus seen as a very important principle in the development and application of halacha. To quote Dr. Freehof once more, "...the emphasis of Judaism on practice is not merely a mood which has been superimposed upon Jewish life by professional lawmakers, but a true appreciation of a mass reaction, a mass creativity." The strength of Minhag may be appreciated by a glance at a simple statement in Baba Metzia 86b:

לעולם אל ישנה אדם מן המנהג שהרי משה עלה
למרום ולא אכל לחם מלאכי השרת ירדו למטה ואכלו לחם.

"Let no man depart from the Minhag, for Moses (himself) went up on high and did not eat bread, (whereas) the ministering angels came down to earth and ate bread...."

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