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AN HISTORICAL STUDY OF K'LALEI HA-P'SAK

ELLEN WEINBERG DREYFUS

Thesis Submitted in Partial Fulfillment of  
Requirements for Ordination

Hebrew Union College-Jewish Institute of Religion  
New York, N. Y.

Date: April 2, 1979

Referee: Professor Michael Chernick

HEBREW UNION COLLEGE - JEWISH INSTITUTE OF RELIGION  
New York School

Report on the Rabbinic Dissertation Submitted by Ellen W. Dreyfus  
in Partial Fulfillment of the Requirements for Ordination

AN HISTORICAL STUDY OF K'LALEI HA-P'SAK

The thesis, An Historical Study of K'lalei Ha-P'sak, is a good and well-organized basic study of a number of rules for deciding the "authoritative" halakah in cases of disputes between talmudic teachers. The thesis identifies these rules, translates them, attempts to find their source in the BT or PT, or to find their source in later literature.

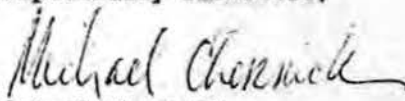
The goal of the thesis was to try to reconstruct a history for these regulations. In order to do this, the author analyzed talmudic reports about these rules when such reports were available. She also gathered biographical information about the authorities whose disputes form the central concern of these rules. In many instances these reports indicated something about the social, political, religious, or academic climate that would cause an argument to be decided in favor of a particular school or person.

The author found that, for the most part, "decision rules" were enunciated about the parties to halakic disputes three or more generations after them. She theorizes that this was because it took three or more generations to see which school or person had been favored in the community or in the academy.

She also found that most "decision rules" about amoraim were presented anonymously, one about R. Aha and Rabina being obviously post-amoraic. She suggests that other anonymous "decision rules" may also be late. In some cases this is documented, e.g., "decision rules" regarding Mar b. R. Ashi are gaonic.

Also, "decision rules" underwent changes as the authority of a school or figure increased from generation to generation. On some occasions "decision rules" about two disputants were different in different locales, also indicating regional sociological/historical factors as causes for particular halakic positions.

Respectfully submitted,

  
Michael Chernick  
Rabbi

April 1979

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## INTRODUCTION

The Talmud records the debates and rulings of the Rabbis. Often, as is expected in debates, there were conflicts of opinion, and the halakhah had to be decided according to one of the opinions presented. This could have been done on a case-by-case basis, or some sort of standard mechanism could have been developed for solving these conflicts. In fact, both of those things happened. Many decisions obviously reflect the particulars of the case rather than the authority of the discussants. However, individual authority was significant enough a determining factor to prompt the development of rules for deciding halakhah based on who stated the opinion. These k'lalei ha-p'sak (כללי פסק) are regulations governing halakhic decision-making in disputes between talmudic authorities.

Many of these k'lalim appear in the Talmud; sometimes attributed to an individual, and sometimes cited anonymously. The simplest form they take is: ו'פליגי  
ו'פליגי - "In a dispute between) R. X and  
 R. Y, the halakhah is according to R. X." Later collections of k'lalim include those which appear verbatim in the Talmud, those which paraphrase talmudic statements, and those which are based on post-Talmudic sources

reflecting regulations not necessarily indicated in the Talmud.

An early collection of k'lalei ha-p'sak is found in Mavo ha-Talmud ( מבוא לתלמוד ), which is attributed to Samuel Ha-Nagid (993 - 1055 or 1056), a scholar and statesman who reached high rank in Muslim Spain. This work is the major source of k'lalim used in this study. Other collections are Seder Tannaim ve-Amoraim<sup>1</sup> and Yad Malachi.<sup>2</sup>

The purpose of this study is to examine the k'lalim, try to determine when they were formulated and by whom, and approach the question of how these particular formulae came into being. Since these regulations influenced later formulations of codes, including Maimonides' code and the Shulkhan Arukh, they have a significance beyond being a simple compilation of rules. If their history can be uncovered, we may have a key to the process by which halakhah becomes binding on the Jewish community.

The methods involved in this study were fairly straightforward. I began with the kizur k'lalei ha-Talmud within Mavo Ha-Talmud, and attempted to find the k'lalim listed there in the Talmud. (Unless otherwise specified, "Talmud" refers to the Babylonian Talmud.) Helpful in this initial process were the glosses entitled Hagahot ha-GRI"B,<sup>3</sup> which indicated the Talmudic source in most cases. Once the source was known, I endeavored to

determine whether, in original context, the statement was intended as a k'lal, or whether it was a particular decision about a particular case with no further implications. I then sought specific authorship or attribution for each k'lal, or to determine conclusively that the k'lal was stated anonymously.

Those k'lalim not specifically stated in the Talmud gave rise to a series of questions about their origins. It is my attempt in this study to find where these k'lalim came from and who was responsible for them. More generally, I attempted to develop a theory of how k'lalim came to be k'lalim.



## CHAPTER I

K'LALIM RELATED TO TANNAITIC MATERIALA. K'lalim Related to Bet Hillel and Bet Shammai

The controversy between Hillel and Shammai, and later between Bet Hillel and Bet Shammai, extends over a long period of time and undergoes a developmental process. As we will see below, there seems to be an initial period of flexibility about the enforcement of the preferred halakhah, which probably reflects the diversity of popular practice and the resultant inability of any court to enforce a monolithic code. We can see how this changes, to the point where a strict ordinance is declared by the bat kol. The following two passages describe this movement from the more flexible to the more rigid.

והא גמרא: לעולם הלכה כבית הלל, והרובה לעולם נבדרי  
 ב"ש-דושה. נבדרי ב"ה-דושה. מקולי ב"ש ומקולי ב"ה -רשע. מחמורי  
 ב"ש ומחמורי ב"ה-עליו הכתוב אומר 'פנסיל בחשך כולך' (קהלת ב). אלא אי כב"ש  
 בקוליהון וכחומריהון אי כב"ה כקליהון וכחומריהון. הא גופא קשיא: ואמר 'לעולם  
 הלכה כב"ה' וחדר אמרת 'הרובה לעולם נבדרי ב"ש דושה'. לא קשיא: כאן-קודם  
 בת קול, כאן-לאחר בת קול.  
 עירובין א:

We learn (in a beraita): the halakhah is always according to Bet Hillel, but one who wishes to act in accordance with the opinion of Bet Shammai may do so. (And one who wishes to act) in accordance with the opinions of Bet Hillel may do so.

(He who follows) the lenient opinions of Bet Shammai and the lenient opinions of Bet Hillel is wicked. (He who follows) the strict opinions of Bet Shammai and the strict opinions of Bet Hillel, is characterized by the verse: "the fool walketh in darkness" (Eccles. 2:14). Rather, one should follow Bet Shammai in their lenient and strict rulings, or Bet Hillel in their lenient and strict rulings. But is this not self-contradictory? (First) you said "the halakhah is always according to Bet Hillel," and then you said, "one who wishes to act in accordance with the opinions of Bet Shammai may do so." There is no contradiction. This applied before the bat kol, and this applied after the bat kol.

Erubin 6b<sup>1</sup>

This beraita reflects a lack of order and central authority in the community. Since there were obviously those who chose to follow Bet Shammai regardless of the statement of the halakhah, the speaker was careful to include their rights as legitimate. The scolding of those who followed only lenient opinions points out that there were in fact those who did so; otherwise there would be no need to scold them. The same applies to those who followed only strict opinions. The beraita ends and the gemara picks up with הא גופא קשיא. This is obviously a later addition, since it attempts to reconcile this flexible approach with the later restrictions. Once there is a decision with sufficient authority to be enforced, there is no longer the option to follow Bet Shammai.

איך אבא אחר שמואל: אלט טיט נחלקו ב"ש וב"ה, האלו אומרים האב  
במיתניו והאלו אומרים האב במיתניו. יצא דבר קול ואמר: אלו ואלו דברי אלהים  
חיים הן והאב ב"ה. וכי מאחר שאלו ואלו דברי אלהים חיים, מפני מה זכו  
ב"ה לקבוע האב במיתניו? מפני שנחלקו ודלובין היו ושונין דבריהן ובברי ב"ש  
ולא דוד אלא שמקדימין דברי ב"ש לדבריהן. -עירובין יג:

R. Abba said in the name of Samuel: For three years Bet Shammai and Bet Hillel conflicted. These said "the halakhah is according to us," and the others said, "the halakhah is according to us." A bat kol went forth and said, "Both of these are the words of the living God, but the halakhah is according to the words of Bet Hillel." Seeing that both of these are the words of the living God, by what merit was the halakhah fixed according to them? Because they were easy going and humble, and they studied their own words and the words of Bet Shammai. Not only that, but they mentioned Bet Shammai's opinions before their own.

Erubin 13b

This passage describes the settlement of the protracted dispute between Bet Hillel and Bet Shammai. It is transmitted here by R. Abba (third generation Palestinian amora) in the name of Samuel (first generation Babylonian amora). The passage is particularly interesting because of what it tells us and what it omits. It tells that there was a dispute of long duration: "three years" may not be a precise figure, but may mean "a number of years." We are told that the two sides argued about their authority to decide the halakhah. The bat kol then settles the argument by acknowledging the legitimacy of both sides, but the authority of only Bet Hillel. At this point the anonymous gemara continues and poses the question of the obvious contradiction in the preceding passage. The answers given, regarding Bet Hillel's character traits, seem highly inappropriate, and do not speak to the depth of the problem.

According to T. J. Berakhot 1:7, 3b, the bat kol incident took place at Yavneh, the period of which began after the destruction of the Temple in 70 C.E. Since our source indicates an extended debate over "a number of years," we can estimate the bat kol decision at c. 90 C.E. We can date Bet Hillel and Bet Shammai as beginning with the sages Hillel and Shammai, who lived at the end of the first century B.C.E. and the beginning of the first century C.E. That leaves a time span of approximately seventy years (or two-three generations) from the death of Hillel (20 C.E.) to the bat kol decision, and another four generations until Samuel (first generation Babylonian amora), to whom the bat kol story is attributed. And, in fact, there is even more distance, since our source quotes R. Abba (third generation Palestinian amora) speaking in the name of Samuel, but does not cite Samuel directly.

All of this leads to the conclusion that although the followers of Bet Hillel ultimately won the competition, it was obviously a long and hard battle, which was only won by the leading authorities when the people were ready to accept Bet Hillel as normative. We know from the beraita above that in the Tannaitic period it was impossible to enforce a monolithic authority supporting Bet Hillel. Somewhere between that open attitude which left the decision to popular movements (not out of choice or sympathy with people's rights or anything of the kind, but because there was no monolithic authority strong

enough to enforce it, as we said above), and the bat kol story, we see a developmental process toward more centrality and willingness to submit to an ordinance.

The bat kol functions in this passage as the arbiter, the final judge. What is the bat kol, and why is it used here? The usual translation is "Heavenly Voice," or literally "daughter of the voice." The other major reference to the bat kol in the Talmud is the "oven of Akhnai" debate between Rabbi Eliezer and the Sages.<sup>2</sup> In that incident, the bat kol is one of several proofs brought by R. Eliezer to convince the Sages that the halakhah should be according to his judgment. When he finally asked for proof from Heaven and "a bat kol cried out 'Why do you dispute R. Eliezer since in all cases the halakhah agrees with him!'" R. Joshua arose and said: 'It is not in heaven.'" (Deut. 30:12) R. Jeremiah explains Joshua's statement thus: "The Torah has already been given from Mount Sinai; we pay no attention to a bat kol, because you have long since written in the Torah at Mount Sinai, 'After the majority must one incline' (Exod. 23:2)."

This passage, aside from setting the scene for R. Eliezer's excommunication, demonstrates the independence of human reasoning. The bat kol is clearly the voice "from Heaven," as opposed to the case at Yavneh in which the bat kol "went forth," but we are not told from where. In R. Eliezer's story the bat kol's decision is rejected emphatically, whereas at Yavneh the bat kol determines



and confirms the authority of Bet Hillel.<sup>3</sup>

It is crucial that in the story of Bet Hillel and Bet Shammai, we are not told the origin of the bat kol (e.g., "from Heaven," or the like). The context merely tells of a protracted debate and its settlement. We may speculate on the significance of the term "bat kol" here. It may indicate a judicial (Bet Din) decision, enforcing Bet Hillel's authority from the top, or conversely, it may indicate a popular acceptance of Bet Hillel, a voice heard in the community which was strong enough to necessitate a definitive statement. (There is also the possibility that it was, in fact, a voice from heaven, but this study is not competent to determine that.)

The k'lal as stated in Mavo Ha-Talmud is:

ב"ט וב"ה הלכה כב"ה, חוץ משלוש דברים שאמרו חכמים לא נדבר  
זה ולא נדבר זה, ושלוש שהלכה כב"ה שח"י.

(In a dispute between) Bet Shammai and Bet Hillel, the halakhah is according to Bet Hillel, except for six cases where the Sages said that it is according to neither, and three cases where the halakhah is according to Bet Shammai.

There is some problem with this statement. The footnote which gives the source of the k'lal, points to Mishnah Eduyot, but notes that there are only three cases there. Those three cases, however, refer to the sages Hillel and Shammai, not Bet Hillel and Bet Shammai. The reference for the cases where the halakhah follows Bet Shammai is Tosafot to Sukkah 3a, where it states:

בסדר רבאמרם בסק בלשון מקומות הלכה בבית שמאי.

In Seder Rav Amram, the decision is that in six cases the halakhah is according to Bet Shammai.

It seems that the numbers three and six were reversed in the references, or Mavo Ha-Talmud had in mind different sources than were provided in the footnotes. In any case, the citation for the information is Gaonic, and not found stated in the Talmud.

We do know that Bet Hillel's authority was accepted, and numerous statements to that effect appear throughout the Talmud. The k'lal was cited regularly, without qualifications or exceptions. For example:

בית שמאי ובית הלל הלכה בבית הלל. - דרוביהם:

(In a dispute between) Bet Shammai and Bet Hillel, the halakhah is according to Bet Hillel.  
Ketubot 60b.

#### B. K'lalim Related to Rabban Gamaliel

Rabban Gamaliel, or Gamaliel II, was nasi in Yavneh from c. 80 to 155 C.E. His major concern was the strengthening of the community at Yavneh following the destruction of the Temple, and the unification of the halakhah. He was a descendant of Hillel, and the bat kol "that was heard at Yavneh"<sup>4</sup> establishing the halakhah according to Bet Hillel, may have been an allusion to his activity. In his effort to unify and centralize authority, he was involved in several major clashes with other sages, most





reconciled and Gamaliel regained his position as nasi (Ber. 28a), the struggle continued after Gamaliel's death.

This passage affords us a view of halakhic decision-making different than the Bet Hillel - Bet Shammai controversy. This is an example of a Bet Din decision; the Sanhedrin holding to a monolithic authority and not allowing an opposing opinion even to be heard. It is almost ironic that it is R. Joshua who is rejected in this way, since he is the one who insisted on the independent right of scholars to decide the halakhah when he declared "It is not in heaven." (Baba Mezia 59b)

#### C. K'lalim. Related to R. Akiva

R. Akiva (c.50-135 C.E.) was part of the third generation of tannaim. He was a contemporary of Gamaliel II and an early pupil of R. Eliezer b. Hyrcanus and R. Joshua b. Hananiah. He was considered as a successor to the office of nasi when Gamaliel was temporarily removed from office,<sup>8</sup> and it was he who was chosen to break the news to R. Eliezer of his excommunication.<sup>9</sup>

ר' יצחק ור' זריקא אמרו: הלכה כר' עקיבא מחבירו. - עירובין מו:

R. Jacob and R. Zerika stated: the halakhah is according to R. Akiva (in a dispute with) his colleague.

Erubin 46b

R. Jacob and R. Zerika were both third generation Palestinian amoraim. Therefore, the time span between

Akiva and their statement about him is about five generations.

The following passage involves a dispute between R. Johanan and Resh Lakish (R. Simeon b. Lakish), both second generation Palestinian amoraim.

מר סביר (בייחוד): הלכה כר' עקיבא מחבירו ולא מרבו.  
 מר סביר (בייחוד): הלכה אפילו מרבו.  
 מר סביר (בייחוד): רבי טרפון רבו דור.  
 ומר סביר (בייחוד): חבירו דור.  
 -בגמרא פד:

R. Johanan: The halakhah is according to R. Akiva (in a dispute with) his colleague, but not with his teacher. Resh Lakish: The halakhah (is according to R. Akiva) even (in a dispute with) his teacher. R. Johanan argued: R. Tarfon was (Akiva's) teacher. Resh Lakish argued: He was his colleague.

Ketubot 74b

R. Johanan clearly favored R. Tarfon's decisions, and therefore argued that Tarfon was Akiva's teacher. Resh Lakish favored Akiva's decisions, and argued that he and Tarfon were colleagues, since it was already understood that Akiva's opinions were accepted in a dispute with any one of his colleagues. The time span between Akiva and R. Johanan and Resh Lakish is about four generations.

D. K'lalim Related to R. Judah b. Ilai, R. Yose b. Halaftha, R. Meir, R. Simeon b. Yohai, and R. Simeon b. Gamaliel II

All of these sages except Simeon b. Gamaliel were students of R. Akiva, part of the fourth generation of tannaim. They were four of the five scholars ordained by Judah b. Bava at the cost of his life,<sup>10</sup> and were active while Simeon b. Gamaliel II was the nasi.

אמר ר' ידקב בר אידי אמר ר' יוחנן: רבי מאיר ור' יבונה הלכה כר' יבונה.  
 ר' יבונה ור' יוסי הלכה כר' יוסי. ואין צריך לומר ר' מאיר ור' יוסי הלכה כר' יוסי.  
 ... אמר רב אסי: אלף אני לומר ר' יוסי ור' שמעון הלכה כר' יוסי. דאמר ר' אבהו  
 אמר ר' יוחנן: ר' יבונה ור' שמעון הלכה כר' יבונה. ... ור' מאיר ור'  
 שמעון מאי? - תיקו. - דייובין מו:

R. Jacob b. Idi said in the name of R. Johanan:  
 (In a dispute between) R. Meir and R. Judah, the  
halakhah is according to R. Judah. (In a dispute  
 between) R. Judah and R. Yose, the halakhah is  
 according to R. Yose. Therefore it is not even  
 necessary to say that (in a dispute between) R. Meir  
 and R. Yose, the halakhah is according to R. Yose.  
 ... Rav Assi said: I have learned that (in a dispute  
 between) R. Yose and R. Simeon the halakhah is  
 according to R. Yose, from that which R. Abba said  
 in the name of R. Johanan: (In a dispute between)  
 R. Judah and R. Simeon the halakhah is according to  
 R. Judah. What is the case (in a dispute between)  
 R. Meir and R. Simeon? The matter could not be  
 decided.

Erubin 46b

This passage seems more like a game of logic than a  
 formulation of legal authority. R. Johanan's students  
 are using deductive reasoning to make decisions unrelated  
 to the halakhah itself. The reasoning can be charted as  
 follows:

R. Meir vs. R. Judah = R. Judah

R. Judah vs. R. Yose = R. Yose

Therefore, R. Meir vs. R. Yose = R. Yose

R. Judah vs. R. Simeon = R. Judah

Therefore, R. Yose vs. R. Simeon = R. Yose

R. Meir vs. R. Simeon = ?

R. Jacob b. Idi spans the second and third generations  
 of Palestinian amoraim. R. Assi and R. Abba are third

generation Palestinian amoraim. They all cite k'lalim attributed to R. Johanan, a second generation Palestinian amora. There is a period of three generations between Yose, Judah, Meir and Simeon, and R. Johanan, and another generation before his k'lalim are transmitted.

A more general statement about R. Yose is made at the same period (third generation Palestine).

ב' ידקב ולי זריקא אמרו: הלכה... כל יוסי אחביריו. - עירובין 46b

R. Jacob and R. Zerika stated: the halakhah is according to R. Yose (in a dispute with) his colleagues.

Erubin 46b

R. Yose is singled out here as an authority even against more than one of his colleagues. Since R. Yose was in some ways less spectacular than his colleagues, it is necessary to examine why his opinions were singled out as authoritative, or more accurately, why those of his colleagues were rejected.

It is crucial to note that the halakhic tradition we have comes from Judah ha-Nasi and his students. Judah ha-Nasi was the son of Simeon b. Gamaliel II, and was therefore influenced by his father's perspective about his colleagues. R. Meir, certainly a brilliant scholar, was appointed hakham when Simeon b. Gamaliel was appointed nasi. Meir exercised considerable influence at Usha and in the assembly at the Valley of Rimmon to intercalate the year<sup>11</sup> where Simeon did not participate. Simeon resented Meir's power and attempted to strengthen the

office of nasi. Meir and Nathan attempted unsuccessfully to dismiss Simeon from office, and Simeon was also unsuccessful in having them removed from the bet ha-midrash.<sup>12</sup> Meir's conflict with his colleagues over leadership seriously affected his authority. It is therefore not surprising that when disputed by his colleagues, Meir's opinion does not become the halakhah. Meir was also an unusual character in that he had numerous contacts with non-Jews, and was the only tanna to retain relations with Elisha b. Avuyah after the latter's apostasy.

Abaye, a fourth generation Babylonian amora, repeats an earlier tradition in the following statement:

ר' מאיר ור' יסודא חלכה כר' יהודה . - בגמרא ס :

(In a dispute between) R. Meir and R. Judah, the halakhah is according to R. Judah.

Ketubot 60b

R. Judah was an important figure, to the extent that scholars of his generation were known as "the generation of Judah b. Ilai."<sup>13</sup> He had some conflicts with R. Meir - he quoted Meir, but did not accept his teachings, nor did he admit Meir's pupils into his bet midrash after Meir's death.<sup>14</sup> Judah's opinion also prevailed over that of Simeon b. Yoḥai.

א"ל ר' זריקא וא"ר ימא ר' ירמיה : ר' יסודא ור' שמעון חלכה  
- כר' יסודא . - בגמרא ס :

R. Zerika said, or some say R. Jeremiah said: (in a dispute between) R. Judah and R. Simeon, the halakhah is according to R. Judah.

Bezah 27a





b. Gamaliel. But even considering that, we still cannot create an accurate picture of everyone acting according to R. Yose in his generation. Just by examining such figures as R. Meir, R. Judah, and R. Simeon, we see that Yose was one of the more mild scholars; he was not the head of an academy, nor did he have notable pupils other than his five sons. His influence was considerable, particularly upon Simeon b. Gamaliel and Judah ha-Nasi, but there is no indication that he was anywhere near as powerful or influential as R. Gamaliel. The anonymous statement in Erubin 41a is obviously trying to strengthen Yose's authority by reflecting back into Yose's generation.

It was mentioned above that according to Erubin 46b, the Rabbis could not decide who would determine the halakhah in a dispute between R. Meir and R. Simeon. The result was "Teku," no decision. However, the k'lal as stated in Mavo Ha-Talmud is as follows:

רבי מאיר ורבי שמעון הלכה כרבי שמעון.

(In a dispute between) R. Meir and R. Simeon, the halakhah is according to R. Simeon.

The source for this is a statement in the Palestinian Talmud:

רבי מאיר ורבי שמעון הלכה כרבי שמעון. - שבועות פ"ח מ"ז

(In a dispute between) R. Meir and R. Simeon, the halakhah is according to R. Simeon.

T. J. Shevi'it 8:7

We are left wondering why the Palestinian Talmud established a k'lal about R. Meir and R. Simeon, but

the Babylonian Talmud was unable to do so. This would certainly support a theory of localized k'lalim. In Palestine (or even in the specific town of whatever unnamed source is responsible for the k'lal) there was reason to make a decision. It may be that popular practice evidenced an obvious favor for R. Simeon's decisions over R. Meir's, or that one particular rabbi favored R. Simeon and influenced others to accept his approach. Conversely, in Babylonia, neither communal nor individual rabbinic opinion was clear enough to make a k'lal.

We have already discussed R. Simeon b. Gamaliel in relation to his colleagues. The following k'lal about him is notable for its specific exclusions.<sup>17</sup>

אמר רבס בר בר חנא אי"ר יוחנן: כל מקום שנהי' שמואל בן  
 גמליאל במשנתו הלכה כמותו חוץ מדנה וזבין וראיה אוחזיה.  
 - ג'טין לא.  
 - סנהדרין לא.

Rabbah b. Bar Hana said in the name of R. Johanan: Every place that R. Simeon b. Gamaliel taught in our Mishnah, the halakhah is according to him; except for (the cases of) surety, Sidon, and latter proof.

Gitin 38a; Sanhedrin 31a

Rabbah b. Bar Hana was a third generation Babylonian amora, speaking in the name of R. Johanan, a second generation Palestinian amora. This k'lal is unusual in that it is the only k'lal we found about a tanna which mentions specific exceptions to that person's halakhic authority. Other k'lalim related to tannaim were much more general and almost seemed like rules of a game rather than legal decisions. But this k'lal is quite specific, to the extent that we are led to wonder whether it is, in fact, a k'lal



at all. It could be seen simply as an observation about Simeon b. Gamaliel's influence, a reflection of the status quo, but not a regulation meant to determine any future halakhic proceedings.

The three specific exceptions indicate some limitation of Simeon b. Gamaliel's authority, and also point to some other means of determining halakhah. The three cases are not significant in and of themselves, but they may represent instances where the populace did not follow the opinion of Simeon b. Gamaliel's opinions, to the extent that even R. Johanan could not legislate to the contrary. Another possibility is that the opposing views (opposing Simeon b. Gamaliel's position) had a strong advocate in these cases, who refused to let Simeon's position be accepted based only on his general authority.

In summary, we can say that the five sages discussed here were, at the very least, controversial figures. This is confirmed by the fact that k'lalim about them generally do not appear until the third amoraic generation, a time span of four generations. We can assume from the rapidity with which k'lalim were formulated about Judah ha-Nasi, for example, (see below, Section E.) that when there is unquestioned authority, the k'lalim quickly reflect it. Here, however, the opposite case can be argued. The fact that it took four generations (and even more, considering the case of R. Meir and R. Simeon) tells us that there was no central authority, that each of the scholars was a strong

character, and that deciding between them was neither automatic nor simple. The time lag may also indicate that the rabbis were waiting to see what the results would be by watching the people. The effect of popular behavior on rabbinic decision-making should not be under-emphasized.

E. K'lalim Related to Rabbi (R. Judah ha-Nasi)

When examining the k'lalim about Rabbi, it becomes immediately apparent that we are dealing with a man of tremendous influence and authority. There are several general k'lalim which state Rabbi's halakhic authority over one or more of his colleagues.

וסבר שמואל: הלכך כרבא מחבירו ולא מחביריו, ובהא אסילין  
מחביריו. - פסחים כג., כתובות כא.

Samuel said: the halakhah is according to Rabbi (in a dispute with) his colleague, but not his colleagues; but in this case, even with his colleagues.

Pesahim 27a, Ketubot 21a

First the general rule is stated, and then the exception indicated. We must assume that the k'lal as stated by Samuel (a first generation Babylonian amora) does not give Rabbi authority when disputed by several colleagues. It should be noted that there is only one generation between Judah ha-Nasi and Samuel, another testimony to Rabbi's pervasive influence in his day.

כי יצקא ולי זריקא אחריו... (הלכה) כרבא מחבירו. - עירובין מו:

R. Jacob and R. Zerika said: ... (the halakhah) is according to Rabbi (in a dispute with) his colleague.

Erubin 46b

This k'lal is repeated by R. Jacob and R. Zerika (third generation Palestinian amoraim) as part of a list in which they also discuss R. Akiva and R. Yose and their comparative authority with their colleagues. The k'lal is mentioned there because it fits a pattern, not because it applies to any specific case at hand.

...א"ע דקיימאן הלכה כרבי מחבירו, הכא... - בתלמוד יא.

... even though we have a tradition that the halakhah is according to Rabbi (in a dispute with) a colleague, in this case (it is not so).

Ketubot 51a

This source is anonymous. It is significant in that the k'lal is mentioned almost incidentally, as something widely known and accepted. The rule is brought in as an introduction to the exception. The author clearly wants us to know that he is aware of the k'lal, and the exception is not decided against Rabbi out of ignorance. We are not able to date this passage.

Again we must note the appearance of a specific exception. The case is unimportant, but clearly here either popular behavior or some other rabbi's influence was enough to override even the authority of Judah ha-Nasi.

אמר רב נחמן אמר רב: הלכה כרבי מחבירו ולא מחביריו. - בבא בתרא קכב:

Rav Nahman said in the name of Rav: the halakhah is according to Rabbi (in a dispute with) his colleague but not with his colleagues.

Baba Batra 124b

רב נחמן דיביה אמר: הלכה כרבי מחבירו ואפילו מחביריו. - בבא בתרא קכב:

Rav Nahman, expressing his own opinion, said:  
 the halakhah is according to Rabbi (in a dispute  
 with) his colleague, and even with his colleagues.  
 Baba Batra 124b

Here we see an example of Rabbi's authority growing with the passage of time. Rav, a first generation Babylonian amora, was a pupil of Rabbi. He expresses the same k'lal as his colleague, Samuel (see above). Rav Nahman, of the third generation of Babylonian amoraim, transmits Rav's opinion, but then states his own. Two generations later he attributed to Rabbi more authority than did Rabbi's own student.

The extent of Rabbi's authority cannot be stressed enough. It was said of him that "not since the days of Moses were learning and high office combined in one person until Rabbi."<sup>18</sup> When he was nasi, there was no av bet din or hakham. He had the support of a bet din, and also considerable popular support, which combined to concentrate tremendous power in his hands. The acceptance of his Mishnah, and the speed with which k'lalim about him were promulgated, testify to that power. As time passed it seems clear that his authority grew within both academic and communal circles. This had effect on the development of a new k'lal accepting his view as normative even against several colleagues.

## CHAPTER II

K'LALIM RELATED TO AMORAIC MATERIALA. K'lalim Related to Rav and Samuel

One of the standard examples of k'lalei ha-p'sak given whenever these k'lalim are discussed, is the case of Rav and Samuel. It is the first amoraic k'lal listed in Mavo Ha-Talmud, where it is prefaced by " . . . האמוראים . . .". The talmudic source of this k'lal, regarding these first generation Babylonian amoraim, is anonymous. The k'lal is cited as a tradition, with no indication as to where it came from or who is citing it.

... דב"ק אמרין דכל דיכא דבבלי' רב ושמואל הוה כתיב כרב  
 דאמוראי וכו' וכו' וכו' . . .  
 -בבלי' אמר:

We have a fixed position that in all conflicts between Rav and Samuel, the halakhah follows Rav in ritual law and Samuel in civil law.

Bekhorot 48b

Rav was thoroughly familiar with the laws of Erez Israel, having been a pupil of Judah ha-Nasi and a member of his bet din. Traditions about Samuel vary: some say he never left Babylonia, while others say he attended the bet midrash of Judah ha-Nasi for a time. Both Rav and Samuel were important scholars and leaders of their time, and led the academies at Sura and Nehardea, respectively. Their "division of labor" between authority in ritual and civil

law is well-founded in the experience and expertise of each. The following passage would indicate that the delineation of particular areas of authority is quite early.

א"ל רב הונא... בקיימא אן ה'כ'ט' כ'ט' בא'סורי בין אקולא  
בין אחומרא. - נ'ב' כ'ב' :

Rav Huna said to them: ...we have a fixed position that the halakhah follows Rav in ritual law, whether (his opinion is) lenient or strict.  
Niddah 24b

Rav Huna was a disciple of Rav, and became head of the Sura academy following the deaths of Rav and Samuel. That he transmitted this k'lal about Rav is an indication of his loyalty to his teacher, and Rav's tremendous influence on those around him.

An interesting development can be seen from the passage above to the following:

רב אשי אמר: ה'כ'ט' כ'ט' בין אקולא בין אחומרא. דריש  
מרימר: ה'כ'ט' כ'ט' בין אקולא בין אחומרא. וה'כ'ט' כ'ט'  
כ'ט' בין אקולא בין אחומרא. - נ'ב' כ'ב' :

Rav Ashi said: the halakhah is according to Rav in (both) his lenient and strict opinions. Maremar taught: the halakhah is according to Rav in his lenient and strict opinions.

Niddah 36a

In the last passage (Niddah 24b) Rav's authority, whether strict or lenient, was acknowledged for ritual law only. This passage is a much more general statement, told to us by Rav Ashi and Maremar, both sixth generation Babylonian amoraim. It seems clear that in the succeeding four generations since Rav Huna's statement, the scope of Rav's legal authority grew, or at least was perceived as such.



There is an amusing passage in Bezah, where Rav Papa postpones making a decision to the following day "because of drunkenness."

בי איתא למחר איך אויכו היטא אטלאי ואמרי לך: רב ור' יוחנן  
חלכם כר' יוחנן. הא אמר רבא: הלכא כוותיה דרב בהני גלגל טן לקולא  
גין לחומא. -בי' 3

When (the inquirer) returned the next day (R. Papa) said to him: If I had answered you when you asked, I would have said, "(In a dispute between Rav and R. Johanan, the halakhah is according to R. Johanan." However, Rava said: the halakhah is according to Rav in these three (cases) (whether his opinion is) lenient or strict.

Bezah 4a, b

Rav Papa was a fifth generation Babylonian amora, and Rava a member of the fourth generation. R. Papa recalls the k'lal about Rav and R. Johanan quite automatically, even when drunk, so it seems to be a well known and commonly accepted k'lal. But by morning he remembered a saying of his teacher, Rava. Rava's statement refers to three cases - a rather odd form for a k'lal, which again leads us to the conclusion that the three cases were determined after the fact by popular behavior, rather than prescriptive ruling made intentionally. The k'lal is also non-specific, so that we do not know whether "these three" are specific cases where Rav disputes R. Johanan (although from the content, that is the most plausible), or are three areas where Rav's authority was accepted.

#### B. K'lalim Related to R. Johanan and Resh Lakish

R. Johanan was the formulator of k'lalim, par excellence. He, a second generation Palestinian amora, was

responsible for numerous k'lalim about tannaim (see Chapter I) and about the legal process (see Chapter III). R. Johanan is said to have studied with Judah ha-Nasi in his youth,<sup>1</sup> and was therefore familiar with tannaitic teachings. This experience may have given him insights into the formulation of the Mishnah, and lends additional weight to his k'lalim.

R. Johanan is not the subject of numerous k'lalim. Perhaps his authority was assumed to the extent that specific regulations were not deemed necessary. The k'lal mentioned (above) by R. Papa,<sup>2</sup> which in context seems to be recited as a well accepted assumption, is not mentioned elsewhere in the Talmud.

We know that R. Johanan and his brother-in-law, Resh Lakish, often expressed opinions on the same issues.<sup>3</sup> We may infer from the following that the halakhah was decided according to R. Johanan the majority of the time, since Resh Lakish's authority is specifically delimited.

הלכה כר' יוחנן בר' זבדא דר' לבי זבדא  
- אמר ר' יוחנן.

The halakhah follows Resh Lakish in these three (cases)...

Yebamot 36a

Again we find the peculiar appearance of "these three (cases)" - which leads us to believe, especially since this statement is anonymous, that sociological phenomena were responsible for this k'lal.

It is interesting to note that R. Johanan is not mentioned at all in Mavo Ha-Talmud. Considering his



significant role in the formulation of k'lalei p'sak, this omission is somewhat strange.

C. K'lalim Related to Rav Huna and Rav Hisda

Although Mavo Ha-Talmud includes the k'lal:

רב חסדא ורב הונא הלכה כרב הונא.

there is no definitive Talmudic statement of conflict between the two. We know that Rav Huna was a second generation Babylonian amora, Rav Hisda was one generation later, and that Hisda was a student of Huna's. The sources tell us that Hisda accepted Huna's authority:

אמר רב יוסף: אפילו ביצא בכותל העז מניה מרב חסדא, כל  
לני דרב הונא ולא אורי רב חסדא אורי הכפרי בשני דרב הונא.  
-עירובין סה:

Rav Yosef said: Even on the question of the permissibility of eating an egg with kutha, which I have been asking him throughout the lifetime of R. Huna, R. Hisda gave me no decision. During R. Huna's life he (Hisda) made legal decisions in Kafri (a place not under Huna's jurisdiction).

Erubin 62b

This passage gives us an indication of the respect R. Hisda had for his teacher. Another k'lal stated in Mavo Ha-Talmud is applicable here:

בכל מקום אין הלכה כחמיד במקום הרה

In every instance, the halakhah is not according to a student against (his) teacher.

We can interpret this literally so that במקום הרה could mean within the teacher's academy or jurisdiction, or taken more figuratively it can refer to any difference of opinion between student and teacher, not limited geographically or temporally.

D. K'lalim Related to Rav Joseph and Rabbah

Joseph ben Hiyya and Rabbah bar Naḥamani were third generation Babylonian amoraim. Rabbah was head of the academy at Pumbedita, and was succeeded upon his death by Joseph. The k'lal about them as stated in Mavo Ha-Talmud is:

יבא ורב יוסף הלכה כרבה חוץ מק' הלכות

(In a dispute between) Rabbah and Rav Joseph, the halakhah is according to Rabbah, except for three halakhot.

This particular statement is not found in the Talmud in the same form. However, we do find separate statements about each of the Rabbis involved, which when fitted together, would yield the k'lal as a conclusion. This source involves a dispute between Rabbah and R. Joseph.

... והא בקיימא אן הלכתא כוותיה ברבא ... - גילין ע"כ:

...We have a fixed position that the halakhah follows Rabbah.

Gitin 74b

The statement is anonymous, but attributes general authority to Rabbah.

Elsewhere we find the following statement:

הלכתא כוותיה ברב יוסף בשדה ענין ומחצה. ה"ב יב: קיד: קמג:

The halakhah follows R. Joseph in (the following cases): field, subject, and half.(4)

Baba Batra 12b, 114b, 143b

In all three places where this statement appears it is anonymous. As we have stated elsewhere, the elucidation of specific cases of a rabbi's authority probably indicates

a reflection of popular practice. The anonymity of these statements may indicate that they are late statements, since it probably took several generations before a popular trend emerged.

E. K'lalim Related to Rav Sheshet and Rav Nahman

Here again the k'lal listed in Mavo Ha-Talmud is not stated verbatim in the Talmud. The k'lal:

רב ששת ורב נחמן הלכה כרב ששת באיסורי וכו' נחמן בדיני.

(In a dispute between) R. Sheshet and R. Nahman, the halakhah follows R. Sheshet in cases of ritual law, and R. Nahman in cases of civil law.

The second half of this k'lal is Talmudic:

והא קיימא לן הלכתא כרב נחמן בדיני. - ביהודה וירושלם.

We have a fixed position that the halakhah is according to Rav Nahman in matters of civil law. Ketubot 13a (5)

The first half is more problematic. In Yad Malachi<sup>6</sup>

we find the following statement:

הלכה כרב ששת באיסורי - לא מצאנו כן בכל התלמוד  
ומצאנו שבוטל מצד הגאונים.

The halakhah is according to R. Sheshet in matters of ritual law -- We did not find this k'lal in all of the Talmud, but we found that it is a statement of the geonim.

This statement shows us that the process of developing k'lalim continues long after the amoraim. As in other cases, it took several generations before the emergence of a popular trend toward R. Sheshet's rulings became apparent, perhaps as late as the geonic period. There may, conversely,

be an indication here that this was a geonic decision which the geonim imposed upon the people.

F. K'lalim Related to Abaye and Rava

Abaye and Rava were fourth generation Babylonian amoraim.

The mention of them in Mavo Ha-Talmud is:

קמאי ובתריי שחולקין הלכה בבבלי מאבוי ורבא ואילין.

The first and the last which dispute - the halakhah is according to the last, from Abaye and Rav onward.

This k'lal uses Abaye and Rava as an illustration of the order of citation. Abaye is always mentioned first, and Rava last, so the illustration holds.

The halakhah generally follows Rava in their debates, but there are exceptions, as enumerated in this k'lal:

הלכה כוותיה דאבוי ביש"ל ק"ג"ס. קדושין נב, ב"מ נב:

The halakhah follows Abaye in (the cases indicated by the mnemonic) Y'AL K'GaM.(7)  
Kiddushin 52a, Baba Mezia 22b

This statement is anonymous. We can argue that the peculiar choice of six cases, unrelated to each other, as those in which Abaye's opinion is followed, indicates the influence of sociology on the development of halakhah. Abaye was fond of saying, "Go outside and see what the people say," and this seems to be what occurred. Since it took time to see what the people would, in fact, do, the k'lal as stated is probably post-amoraic.

G. K'lalim Related to Rav Aḥa and Ravina

בכל סתורם כולה רב אחא אחומרא ורביןא לקולא וסבתא כרביןא לקולא אבר  
מפני תלת דרב אחא לקולא ורביןא אחומרא וסבתא כרב אחא לקולא.  
-כסחים 32:

In the whole Torah Rav Aḥa is stricter and Ravina is more lenient, and the halakhah follows Ravina in his lenient opinions; except for three cases where Rav Aḥa is more lenient and Ravina stricter, and (in those cases) the halakhah follows Rav Aḥa's lenient opinion.

Pesahim 74b

Rav Aḥa spans the sixth and seventh generation of Babylonian amoraim, and Ravina is part of the seventh generation. The k'lal about them is anonymous. Generally, those k'lalim which we have found attributed to a specific rabbi, have shown a time span of two to four generations between a particular teacher and the k'lal about him. According to Sherira Gaon, Ravina and R. Ashi "concluded the teaching" of the Talmud. Ravina's death is generally considered the end of the amoraic period. Therefore, it would be difficult to show that a k'lal about him was amoraic. Further, we have seen that those k'lalim which enumerate specific exceptions generally take longer than straightforward k'lalim.

This k'lal is obviously late, and most likely saboraic or even geonic. It is stated anonymously. We may postulate that other anonymous k'lalim may also be late. There is no conclusive proof to this effect, but there is a good possibility that anonymity is a late characteristic of k'lalim about amoraim.

### CHAPTER III

#### MISCELLANEOUS K'LALIM AND K'LALEI MISHNAH

The k'lalim described in this chapter are regulations about the determination of the "final" halakhah when confronted by various phenomena in the Mishnah.

#### A. Individual Opinion Versus Majority Opinion

The statement דברי יחיד ורבים הלכה כרבים appears numerous times throughout the Talmud. The first mention of a standard solution when one individual is in conflict with the majority appears in the Mishnah, Eduyot 1.5-6.

(ה) ולמה מצבירין דברי היחיד בין המרבין, המויל ואין הלכה אלא כדברי המרבין?  
 שאם יראה בית דין את דברי היחיד ויסתק דליו; שאין בית דין יכול לבטל דברי בית  
 דין חברו עד שיביא גדול ממנו בחכמה ובמנין. היה גדול ממנו בחכמה אבל לא במנין, במנין  
 אבל לא בחכמה - אינו יכול לבטל דבריו, עד שיהיה גדול ממנו בחכמה ובמנין.  
 (ו) אמר רבי יסודב: אם כן למה מצבירין דברי היחיד בין סמכין לבטל? שאם  
 ואמר האדם: כך אני מקבל - ואמר לו: כדברי איש פלוני שמדבר.

5) And why do they record the opinion of the individual against that of the majority, whereas the halakhah may be only according to the opinion of the majority? That if a court approves the opinion of the individual it may rely upon him, since a court cannot annul the opinion of another court unless it exceeds it both in wisdom and in number; if it exceeded it in wisdom but not in number, or in number but not in wisdom, it cannot annul its opinion; but only if it exceeds it both in wisdom and in number.

6) R. Judah said: If so, why do they record the opinion of the individual against that of the



majority when it does not prevail? That if one shall say, 'I have received such a tradition,' another may answer, 'You heard it only as the opinion of such-a-one.'

The Mishnah here offers two reasons why the individual opinion is recorded at all. The first is for the benefit of the bet din, and the second, offered by R. Judah, is in order to identify the opinion as an individual opinion when, at a later date, it is put forward as an halakhic alternative to the "accepted" halakhah. But even here, in this earliest mention of the k'lal (although not in the precise form it was eventually to take), it is assumed as something already understood and accepted that majority rules. The only question is whether the individual opinion should be mentioned when it differs from the majority.

In the Talmud this regulation is cited often and almost automatically. We even have a passage which shows R. Akiba attributing the k'lal to R. Gamaliel.<sup>1</sup> The statement הלכה כרובים יחיד ורבים is found in various contexts,<sup>2</sup> often preceded by the word "פשיטא" ("is it not obvious..."). Sometimes, as in the case of R. Akiba and R. Gamaliel, the k'lal is stated by an identifiable authority but the bulk of the citations are anonymous.

The k'lal seems to be used in two specific ways. The first is to solve the problem at hand - to aid in determining the halakhah by bringing in proof that the law follows the majority opinion. The second has the k'lal stated as the general rule, only to point out that the case under discussion is an exception to the rule.<sup>3</sup>

It is notable that such a seemingly basic rule of halakhic decision-making can be so easily ignored. The first exception we encountered was the k'lal which stated that the halakhah followed Rabbi, even in disputes with more than one colleague (see above, Chapter I, E). In the exceptions noted in these latter cases (see note 3), the k'lal of majority rule is mentioned primarily to show that it is not operative in the particular case.

An important question prompted by this regulation is what constitutes the רוב, the majority? We have no indication from the texts as to the specific, technical meaning of the term. We may be able to assume from the Mishnaic passage that רוב refers to a majority voting in the Sanhedrin. Was this the original intention? Did the term evolve in its meaning so that by the time it is used by amoraim, it has a different significance? It is possible that רוב referred to any individual whose view opposed any group of two or more who disagreed with him. "Majority" could also refer to the populace, suggesting that what the majority of people did became normative halakhah, despite the opposition of either individual rabbis or the minority of the population.

#### B. Lenient Versus Strict Opinions

As we saw from the Bet Hillel - Bet Shammai controversy (see Chapter I, A), the Rabbis recognized that either a lenient or a strict stance could be adopted on a given



issue, and that individual rabbis or schools of thought might be lenient in some areas and strict in others. Regulations developed regarding where the halakhah followed lenient or strict opinions, and which rabbis' opinions were to be followed under which circumstances.

אמר רבה בר רב חנא אמר ר' יוחנן: כל מקום שאמר חז"ל יחיד מקיל ורבין מחמירין הלכה כדברי המהמירין המרובים, חוץ מזה שאמר ר' עקיבא מקיל וחכמים מחמירין הלכה כדברי ר' עקיבא. דאמר שמואל הלכה כדברי המיקל גמול.  
-עירובין נו. אודד קטן כ.

Rabbah b. Bar Hana stated in the name of R. Johanan: Wherever you come across a law about which an individual authority is lenient and the majority is strict, the halakhah is in agreement with the majority which is strict, except in this case where the halakhah is in agreement with R. Akiba, though he is lenient and the sages are strict. This is because of Samuel's rule: The halakhah is in agreement with the lenient authority in the case of mourning regulations.

Erubin 46a, Moed Katan 20a

This k'lal is really an extension of that regarding individual and majority opinions. The added variable of lenient or strict stance does not affect the result that the majority rules. The exception made for R. Akiva is a result of Samuel's k'lal favoring leniency regarding mourners.

The statements regarding Rav (as seen above in Chapter II, A) indicate his authority in the area of ritual law.

אמר רב הונא... דקיימא לן חלכא כרב באיסורי בן לקיאל בן  
לחומרא. -נדר כב:

Rav Huna said to them ... We have a fixed position that the halakhah follows Rav in religious laws, whether (his opinion is) lenient or strict.  
Niddah 24b

What concerns us here is that the way the Rabbis indicated complete authority was to emphasize that his decisions were accepted, whether lenient or strict.

The statement (see above, Chapter II, G) which tells us about Rav Aḥa and Ravina, indicates that generally Rav Aḥa is stricter and Ravina more lenient, and that the halakhah follows Ravina in his lenient opinions. However, this limitation is further qualified by the exception: that in three cases Rav Aḥa is more lenient, and the halakhah follows him. This seems to indicate that the basis upon which the halakhah was decided was not the authority of the individuals, but the leniency of their opinions. One could summarize that k'lal as: In disputes between Rav Aḥa and Ravina, the halakhah follows the more lenient of the two on any given question. In fact, in Yad Malachi the k'lal is stated:

דב אחא ורביןא הלכס כרביןא כחיקל

The fact that k'lalim could develop to determine under which circumstances the stricter or more lenient stance should be followed, points to a fairly open legal system. It also may indicate a sub-structure of halakhic procedure. R. Joḥanan, who is responsible for extending the individual versus majority k'lal into this sphere, may have known something about the inner structure of the Mishnah which we cannot see from this distance. Why was it necessary to augment the understood concept of majority rule with this additional issue? Was he countering a natural human tendency to choose the more lenient when two positions are



A discussion in Baba Kama 102a and in Avodah Zarah 6b raises some of these questions. The discussion can be summarized as follows:

R. Joseph was listening to Rav Huna. Huna stated that in one case the halakhah is according to R. Joshua b. Karḥa, and in another case the halakhah is according to R. Judah. R. Joseph turned away and remarked that he understood the necessity of mentioning that the halakhah was in accordance with R. Joshua because of the principle: יחיד ורבים הלכה

כרבים, and this showed that the halakhah followed the individual. But why the statement about R. Judah? Isn't this a case of: מהלוקת ואחר כך סתם, הלכה כסתם?

At this point in the argument, the anonymous gemara continues and points out that the מהלוקת under consideration is in Baba Kama, and the סתם is in Baba Meḥzia. Rav Huna's statement is necessary because one might think that אין סדר למשנה - the Mishnah has no order, and therefore this is an undisputed opinion followed by a dispute.

R. Joseph would say that there is order to the Mishnah, so this is a סתם ואחר כך מהלוקת. R. Huna would reply that one would not say there is no order to the Mishnah within one tractate, but would say it about two tractates. R. Joseph would then counter that all of Nezikin is considered one tractate. The matter is finally solved with the statement of a fixed law.

Several important issues arise here. First of all, it should be noted that R. Joseph (third generation

Babylonian) and R. Huna (second generation Babylonian) are actually involved in the discussion, only in the first part of the story. The gemara continues anonymously, and cites what the writer thinks Huna and Joseph would have said if they had in fact argued this point. Note also that even at the beginning, Joseph does not disagree with Huna in a substantive way. He merely disapproves of Huna's manner of presenting the decision about R. Judah, which he thinks should be stated more clearly, perhaps with an appropriate k'lal to back it up.

We do not know from this passage upon what R. Huna bases his decision - he may be arguing the point with relation to the מחלוקת ואחר כך סגם issue, or he may not be concerned with that whole debate at all. It may be that in stating that the halakhah follows R. Judah, he is repeating a tradition which was handed down to him, which is unrelated to the k'lalim discussed by R. Joseph. The סגם, the anonymous narrator/editor who continues the debate, ties this decision in with the question of order in the Mishnah, but we have no evidence that Huna himself would have made that connection in this context.

This leads us to the question of "order to the Mishnah." Obviously if one accepts a regulation like מחלוקת ואחר כך סגם, one assumes that the Mishnah is an orderly document, laid out intentionally according to some design. R. Johanan seems to be the earliest one to state this k'lal. We do not know if he originated the idea, or



transmitted something he learned. We know that R. Johanan had some contact with Rabbi (Judah ha-Nasi),<sup>5</sup> and in his k'lalim he may be an inside source, telling us something about the Mishnah which he learned from the compiler of the Mishnah. On the other hand, R. Johanan may have had other reasons for developing his k'lalim, and because of his authority, they were repeated and became normative.

We have a text that shows us R. Abahu (third generation Palestinian amora), leaning on the shoulder of his disciple R. Naḥum (fourth generation Palestinian amora), engaging in what looks like a quiz on k'lalei ha-mishna.

מחלוקת ואחר כך סגם מאי? איך הלכה בסגם. סגם ואחר כך מחלוקת  
מאי? איך אין הלכה בסגם. סגמא במחלוקת ומחלוקת במחלוקת  
מאי? איך הלכה בסגם. מחלוקת במחלוקת וסגמא במחלוקת מאי? איך  
וכי רבי לא שניא לי חייא מנין לו? - ובמחלוקת

"What (is the halakhah where) a dispute is followed by an undisputed statement?" The other replied: the halakhah is in agreement with the undisputed statement. "What (is the halakhah when) an undisputed statement is followed by a dispute?" The other replied: the halakhah is not in agreement with the undisputed statement. "What if the undisputed statement occurs in a Mishnah and the dispute in a Beraita?" The other replied: the halakhah is in agreement with the undisputed statement. "What if the dispute is in the Mishnah and the undisputed statement in the Beraita?" The other replied: If Rabbi has not taught it, whence would R. Ḥiyya know it!

Yebamot 42b

This passage is quite significant. First, it shows us that by the third and fourth generations, these k'lalim were already standard, to the point where they could be reviewed in this manner. Second, it gives a clear contrast between the legal authority of a mishnaic statement and a



beraita. There is an emphasis on the higher authority of the Mishnah over the beraita, and the Mishnah is seen here as a code.

More specifically, there is evidence of a conflict of authority between Judah ha-Nasi (Mishnah) and R. Ḥiyya (beraita). R. Ḥiyya was a tanna in Erez Israel in the transition period between tannaim and amoraim. He was said to be Rabbi's best student, and is credited as the author of the beraitot which constitute the Tosefta. The passage in Yebamot<sup>6</sup> asks how R. Ḥiyya could know a ruling if Rabbi did not teach it, thereby stressing the teacher-pupil relationship, and stressing R. Ḥiyya's dependence on Rabbi for halakhic authority. This functions to further the codification of the Mishnah, with the Tosefta relegated to a level of comment, but not ruling.

## CHAPTER IV

### K'LALIM NOT FOUND IN THE TALMUD

Of the k'lalim listed in Mavo Ha-Talmud attributed to Samuel ha-Nagid, most have footnote references in ס'ק'ל  
ס'ק'ל"א<sup>1</sup> which indicate their source in the Talmud. Those k'lalim which do not have source references, are not found in the Talmud, at least not explicitly stated. Some relate to tannaim and some to amoraim. In some cases we have references to post-talmudic works as the source of a k'lal. But many of the k'lalim which are mentioned here, and listed in Yad Malachi and/or Seder Tannaim ve-Amoraim, have no reference whatsoever. One can only speculate that those k'lalim are either the result of a tradition which was not recorded in documents which we have, or that at some point the k'lalim were fabricated by someone who noticed a particular trend in the texts or in popular behavior, or by someone who wanted to and could influence popular behavior in a particular direction. Again, this is conjecture, but it is all we have to go on.

In this chapter I will discuss those k'lalim in Mavo Ha-Talmud which are not substantiated by direct talmudic sources.

A. K'lalim Related to Rabbi Judah ha-Nasi

רבי ור' שמעון בן גמליאל הלכה כר' שמעון בן גמליאל.

(In a dispute between) Rabbi and R. Simeon b. Gamaliel, the halakhah is according to R. Simeon b. Gamaliel.

Simeon b. Gamaliel (II) was the father of Judah ha-Nasi, and was head of the Academy. That the halakhah should follow the father over the son is not surprising, but it is not stated in the Talmud. Seder Tannaim ve-Amoraim also states the k'lal, but gives no background information.<sup>2</sup> Yad Malachi<sup>3</sup> provides a k'lal which includes this one:

הלכה כרבי מחבירו ולא מחביריו ובמקום אביו אין הלכה כמותו.

The halakhah is according to Rabbi in a dispute with a colleague but not with (several) colleagues, but against his father, the halakhah is not according to him.

The reference there says that the source of this k'lal is geonic. Why is it that some k'lalim about Judah ha-Nasi already appear in the generation following him, but others do not seem to be "solved" until the time of the geonim? There is no clear answer. It may be that this particular k'lal seemed so obvious, since it involved father and son, that no one bothered to articulate it. Or perhaps it was not a problem to the amoraim which demanded a k'lal-type decision in the talmudic period. Or perhaps the talmudic authorities chose not to decide such disputes. It also may be that up until the geonic period, there was no clear indication of whether Rabbi or R. Simeon b. Gamaliel had won the popular support in such disputes. My impression

is that the last possibility is the most plausible. The amoraim were obviously concerned about k'lalim regarding Judah ha-Nasi, so that if they avoided making a decision, it was most likely because they were unable to do so.

רבי ור' יהודה פלכר כרבי. רבי ור' מאיר הלכה כרבי.

(In a dispute between) Rabbi and R. Judah, the halakhah is according to Rabbi. (In a dispute between) Rabbi and R. Meir, the halakhah is according to Rabbi.

Although these are separate k'lalim, they can be considered together because they pose the same problem. R. Judah and R. Meir are sages who precede Judah ha-Nasi by a generation. We know that R. Judah was one of Rabbi's teachers. The closest thing to a source for this is a passage in the Palestinian Talmud<sup>4</sup> as follows:

אי' חייא בשם ר' יוחנן: רבי וחבירו הלכה כרבי. וא' יורה:  
ואפילו רבי אצל רבי אלעזר ב' רבי שמעון.

R. Hiyya said in the name of R. Johanan:  
(In a dispute between) Rabbi and a colleague, the halakhah is according to Rabbi. R. Jonah stated:  
(the halakhah is according to) Rabbi even when he is opposed to R. Eleazar b. R. Simeon.

This does not solve the above problem completely, because R. Eleazar b. R. Simeon was a colleague and contemporary of Rabbi. Yad Malachi provides us with further insight:

הלכה כרבי מחבירו ואפילו אצל ר' אלעזר בר' שמעון... דהוצרך להצטרף  
הלחן ואפילו אצל איה אומר לו דהוה ס"ב למימר בדוקה ליה אינך תנאי  
הוא שמארו הלכה כרבי מחבירו אלא לא ליה ר"א בר"ט שהיה גדול מל' בגרד.

If R. Simeon b. Eleazar was considered greater in Torah than Rabbi, but still the halakhah was according to Rabbi, it can be argued that the same principle can apply to

individual figures in a preceding generation, i.e., R. Judah and R. Meir.

If that is the case, then the following k'lal is easily derived.

רבי ור' יוסי בל' יהודה הלכה כרבי .

(In a dispute between) Rabbi and R. Yose b. R. Judah, the halakhah is according to Rabbi.

If Rabbi has halakhic authority greater than R. Judah, it stands to reason that he also supercedes Judah's son. Also R. Yose b. Judah is a contemporary of Rabbi, so this k'lal would fall under the general category הלכה כרבי מחמירו.

The same applies to the beginning of the next k'lal.

רבי ור' ישמעאל בל' יוסי הלכה כרבי. ובמאן לאמר בוס אבין  
הלכה כאבין .

(In a dispute between) Rabbi and R. Ishmael b. R. Yose, the halakhah is according to Rabbi. But when he speaks in the name of his father, the halakhah is according to his father.

We can apply the k'lal הלכה כרבי מחמירו to R. Ishmael b. Yose. When considering a conflict of authority between Rabbi and R. Yose, we must remember that the halakhah followed R. Yose against all the major figures of his day, including R. Meir and R. Judah. (See Chapter I, Section D)

רבי ור' שמעון בן אלעזר הלכה כרבי .

(In a dispute between) Rabbi and R. Simeon b. Eleazar, the halakhah is according to Rabbi.

There is a footnote in Mavo Ha-Talmud which corrects this k'lal to read "R. Eleazar b. Simeon." In either case, the k'lal is included in the rule: הלכה כרבי מחמירו .

# B. K'lalim Related to Other Tannaim

כל מקום שם ר' שמעון בן אלעזר הוא מחלוקת הלכה נאמר.

The halakhah is according to R. Simeon b. Eleazar in any case where he taught and no one opposed him.

We have no explanation of this k'lal, but it is also found in Seder Tannaim ve-Amoraim.<sup>6</sup>

רבי מאיר ור' אליעזר בן יעקב הלכה כרבי י.

(In a dispute between) R. Meir and R. Eliezer b. Jacob, the halakhah is according to R. Eliezer b. Jacob.

R. Meir and R. Eliezer b. Jacob were contemporaries, and both students of R. Akiva. I can find no reference to this k'lal other than Mavo Ha-Talmud, nor any reason to substantiate or dispute it.

ר' אליעזר ור' יחוסף הלכה כר' יחוסף.

(In a dispute between) R. Eliezer and R. Joshua, the halakhah is according to R. Joshua. (7)

ר' אליעזר ור' גמליאל הלכה כר' ג. ואין הלכה כר' חיידי רבי אליעזר חוץ משמונה סוכות.

(In a dispute between) R. Eliezer and R. Gamaliel, the halakhah is according to R. Gamaliel. The halakhah is never according to the students of R. Eliezer except for eight halakhot.

Both of these k'lalim concern R. Eliezer b. Hyrcanus, and his authority relative to R. Joshua b. Hananiah and R. Gamaliel II. (See Chapter I, section B for a discussion of these three and their conflicts.) That the halakhah does not follow R. Eliezer is not surprising, since he was excommunicated and his rulings not accepted.<sup>8</sup> That it follows his students in eight halakhot is slightly more



significant, especially considering the post-talmudic nature of the k'lal. After many generations the sociological reality showed that generally R. Eliezer's students were not followed, but in eight particular cases, their rulings were followed by a majority of the people, hence, this k'lal.

### C. K'lalim Related to Amoraim

Most of the k'lalim regarding amoraim are found somewhere in the Talmud, either attributed to a later amora or cited anonymously. These are the exceptions listed in Mavo Ha-Talmud.

רב יהודה ורבה הלכה כרב יהודה .

(In a dispute between) Rav Judah and Rabbah, the halakhah is according to Rav Judah.

Rav Judah was a second generation Babylonian amora, and Rabbah was part of the third generation. We know that in disputes with his contemporaries (particularly Rav Joseph - see above, Chapter II, Section D.), Rabbah had authority. But Rabbah was a student of Rav Judah, which could be the basis for this k'lal. Elsewhere we see a general k'lal:  
בכל מקום אין הלכה כתלמיד במקום הרב ,  
of which this could be an application.

מר בר רב אשי הלכה כמותו במתן שאין מחלוקת איתו .

The halakhah is according to Mar b. R. Ashi when he is not in conflict with his teacher.

Seder Tannaim ve-Amoraim<sup>9</sup> reads:

והלכתא כמר בר רב אשי הכאלי גלמודא בר מ"מ הפך שבועה "  
ומכאן הודאא ."

In the whole Talmud, the halakhah is according to Mar b. R. Ashi except for two cases.

Mar b. R. Ashi was a seventh generation Babylonian amora. It is not at all surprising that a k'lal related to him is found in geonic sources (see below). The other k'lal related to someone so late is that about Rav Aha and Ravina (see Chapter II, Section G), and that, though stated in the Talmud, is anonymous.

We have two comments in Tosafot about this k'lal,<sup>10</sup> both in relation to "אשר נאמר," one of the k'lalim which Seder Tannaim ve-Amoraim counts as an exception to Mar b. R. Ashi's authority. Rabbenu Gershom attributes to Hai Gaon the statement that in this case the halakhah follows Mar b. R. Ashi. Further down in the same passage in Tosafot, Rabbenu Isaac cites the k'lal in Halakhot Gedolot and Seder Tannaim ve-Amoraim, saying that the halakhah follows Mar b. R. Ashi in all cases but two (as above).

If we compare the k'lalim, we see that the k'lal as stated in Mavo Ha-Talmud is less specific, and therefore attributes more authority to Mar b. R. Ashi than does the k'lal in Seder Tannaim ve-Amoraim, and seems to follow the opinion of Hai Gaon.

Hai Gaon was the last of the geonim (c. 1010), and was an associate of the author of Mavo Ha-Talmud (or his son-in-law, if we would accept the theory that this work was written by Samuel bar Hofri). His comment is notable because it shows a change in the halakhah from the eighth and ninth centuries (Halakhot Gedolot and Seder Tannaim

ve-Amoraim), to the early eleventh century. His opinion undoubtedly influenced the more liberal wording in Mavo Ha-Talmud which left open the possibility that " דאס פארן " was also decided according to Mar b. R. Ashi.

The implications here are quite important. First, this shows that some k'lalim about amoraim were not final until even the late geonic period. Second, and more significant, is that we see a development of the halakhah. As there is change in historical setting and in the authorities, there is also change in the way they perceive the halakhah and define it for themselves and future generations.

### CONCLUSION

In this study we have seen the development of several trends regarding k'lalei ha-p'sak. We have discussed the contradictory uses of the bat kol as a proposed source of halakhic authority, and the implications of its use in each case.

R. Johanan has emerged as an important formulator of k'lalim about the tannaitic period. We have suggested that his experience as a pupil of Judah ha-Nasi and of his circle gave him insight into the procedures in the School of Rabbi and the formulation of the Mishnah.

A general trend which emerged showed three or more generations between a teacher and a k'lal about him. Those cases where the time span was shorter, were clearly in reference to an overwhelmingly influential scholar (e.g. Judah ha-Nasi), whose authority was quite obvious. We have postulated throughout this study that the several generations that were allowed to pass indicate that the Rabbis were waiting and watching for something. We propose that they were watching to see what the community was doing; how popular behavior reflected the halakhic options. Once those sociological phenomena were apparent, the Rabbis felt comfortable verbalizing these trends as k'lalim. The Rabbis were also concerned about the support of a particular

teacher and his opinions within the academy itself, and waited for those trends to emerge.

We found a high degree of anonymity in k'lalim about amoraim. Assuming that passage of generations was standard in the formulation of k'lalim, we have proposed that some of these k'lalim are savoraic or geonic. Using k'lalim about late amoraim as a model, we postulated that anonymity may be an indication of late formulation of a k'lal.<sup>1</sup>

If this analysis is correct, then the nature of k'lalei ha-p'sak and of "authoritative halakhah," is really a sociological, political, and historical issue. The k'lalim are descriptive rather than prescriptive, and should be viewed as conditional, temporal decisions, rather than decisions to bind all generations.

## NOTES

### INTRODUCTION

1. Seder Tannaim ve-Amoraim is a late Geonic work. The author is unknown. According to Azaria de Rossi, it was written in the year 887. It was used by the author of Mavo Ha-Talmud in preparing his list of k'lalim.
2. Yad Malachi is a work published in Leghorn in 1767. The author was Malachi ben Jacob ha-Kohen, an Italian scholar who died between 1785 and 1790. Yad Malachi "deals with the methodology of the Talmud and the codifiers. Part 1 contains principles of the Talmud in alphabetical order; Part 2, principles of the codifiers in chronological order; and Part 3, principles of various laws in alphabetical order." ("Malachi ben Jacob ha-Kohen" in the Encyclopedia Judaica, Volume 11 p. 817.)
3. Ha-GRI"B is an acronym for Ha-Gaon Rabbi Judah Bachrach (1775-1846), a Lithuanian rabbi and author. He wrote glosses to the Talmud, to Maimonides' Mishneh Torah, and other works.

### CHAPTER I

1. Parallel texts can be found in Rosh Hashanah 14b, Hullin 43b, Tosefta Sukkah 2, Tosefta Yebamot 1:13, Tosefta Eduyot 2:3, T. J. Sukkah 2:8, T.J. Yebamot 1:6.
2. Baba Mezia 59b.
3. Another reference to the bat kol is in Berakhot 51b-52a, where both views of the bat kol (as authoritative and not) are cited in an argument related to Bet Shammai and Bet Hillel.
4. See section I-A. Reference is to Erubin 13b and T. J. Berakhot 1:7, 3b.
5. Baba Mezia 59b.
6. Ibid.
7. The reference to "R. Simeon b. Gamaliel" in Erubin is in error. The parallel passage in Tosefta Ta'anit 2:5 reads: "אחרי פטירתו של רבן גמליאל" - "After the death of Rabban Gamaliel..."



8. Berakhot 27b.
9. Baba Mezia 59b.
10. Sanhedrin 14a.
11. T. J. Hagiga 3:1, 78c.
12. Horayot 13b - 14a.
13. Sanhedrin 20a.
14. Kiddushin 52b; Nazir 49b.
15. Menahot 104a.
16. Horayot 13b, Tosefta Berakhot 5:2.
17. The three excluded cases are found in the following sources: surety - Baba Batra 173a; Sidon - Gitin 74a; latter proof - Sanhedrin 31a.
18. Gitin 59a.

## CHAPTER II

1. Hullin 137b.
2. Bezaḥ 4a.
3. See Chapter I, section C for their debate about R. Akiva and R. Tarfon.
4. The three cases in which the halakhah follows Rav Joseph are:
  - אבל - When one of the heirs has a field adjoining the field that is to be divided (See Baba Batra 12b).
  - י"ח - So long as they are dealing with the same subject (See case discussed in Baba Batra 114b).
  - אבנ - The case where the testator expressed the wish that his estate be divided between his wife and his son. The widow, according to R. Joseph, is entitled to half the estate (See Baba Batra 143a).
5. The statement is also found in Baba Mezia 110a and Kiddushin 59b.
6. אבא שאול, Section אפ.

7. The pneumatic ק"ג"ק stands for:

י אולט חלא מצער בהבא (ג"מ כה:)  
 ע"ב זומק עמפרד הוא נפסל (סנהדרין כג.)  
 ע"ח העומד מאילין (עירובין טו.)  
 קדושין סלא נמסרו לביאה (קדושין נא.)  
 ג' לוי דעתא בגיטא (גיטין עג.)  
 נ ור אובל נביאמ להכדיוס בסוף עדתין (סנהדרין כג.)

### CHAPTER III

1. The context shows Akiba taking a controversial action and Gamaliel asking him if he must always involve himself in controversy. Akiba answers:

איך רבין אד"פ טאגט אומר בן וחבירין אומרים בן לחבירין רבין  
 יחיד ורבים הלכה כרבים. - ברבובא כג.

He said to him: Master, although you say this way and your colleagues say the other way, you have taught us, master, that where an individual joins issue with the majority, the halakhah is determined by the majority.

Berakhot 37a

2. The statement יחיד ורבים הלכה כרבים is found in the following places in the Babylonian Talmud: Berakhot 9a, 37a; Shabbat 60b, 130b; Yoma 36b; Bezaḥ 11a; Yebamot 40a, 46b, 47a; Ketubot 21a; Baba Kama 102a; Avodah Zarah 7a; Bekhorot 37a; Niddah 30b, 48a.
3. See this mode of argument suggested and rejected in Bezaḥ 11a; and used in Baba Kama 102a and Avodah Zarah 7a which are parallel texts.
4. Yad Malachi, \*תקסג, כללי הריש
5. Ḥullin 137b.
6. The phrase: ובי רביא שנהא רבי חייא מנין לו appears elsewhere in Erubin 92a and Niddah 62b.

## CHAPTER IV

1. הגהות פג"י is the small section of notes below Mavo Ha-Talmud which gives Talmudic references for the k'lalim listed. פג"י is an acronym for Ha-Gaon Rabbi Judah Bachrach (1775-1846).
2. Kahana edition, p. 16 (section 22, IV).
3. כ"ל'י ה"א, section ר"ח.  
The gaonic reference is found in the ג'י, in Gitin.
4. T. J. Demai 2, 22d.
5. כ"ל'י ה"א, section ק"ח.
6. Kahana edition, p. 16 (section 22, II).
7. This k'lal is also found in Yad Malachi #קכ"ח, and in Seder Tannaim ve-Amoraim, Kahana p. 17, (section 23, V).
8. Baba Mezia 59b.
9. Kahana edition, p. 23 (section 38, III).
10. Tosafot Shavuot 42a  

ואמר בר רב אשי באמר קדאורייתא נמי מפנינן. ד"ב"ן פ' בשם הקונטרס דהלכתא בותיה  
 דקיימא לן כמר בר רב אשי המיפק שבויה וכן הגשומת דמינו גרשום מאור הגולה וכן רב  
 פאי גאון ...  
 ודבינו יצחק מנה הגשומת קדמוניות דלא מפנינן שבויה דאורייתא וכן בה"ג  
 ובסדר תנאים ואמוראים דהלכתא כמר בר רב אשי בכוליה הש"ס בר ממיפק שבויה  
 ואורייתא ...  
 ור"ח נמי פסק דהלכתא בכוליה הש"ס בר ממיפק שבויה וחיורי וסימני  
 הפך לבן וחיורי בבית דהמחמם (גל' דו. ושם) גבי צומת הגידין דקאמר  
 צ"ע אד"ג דלא חיורי.

## CONCLUSION

1. David ha-Livni, Mekorot u-Mesorot - Seder Moed, p 10-12.

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