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TORAT CHAIM:
The tension between rabbinic learning and community life

DAVID K. HOLTZ

Thesis Submitted in Partial Fulfillment of
Requirements for Ordination

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Referee: Dr. Michael Chernick

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For my parents,
Mel and Lola Holtz,
and for
Rabbi Robert A. Raab,
who started it all.

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PREFACE

As I approach the end of the beginning of my rabbinate, I find myself dwelling more and more on my experiences over the past five years at HUC-JIR in Jerusalem and New York. The process has been long, and occasionally frustrating, but the people I have had the privilege to learn from and study with have made it invaluable. There are many to thank, more than I realized until I sat down to do so, and I will not attempt to name them all individually, for fear that I would leave someone out. Please know, all of you who remain unnamed, that I am grateful.

The faculty of both the Jerusalem and the New York campuses have helped me to lay a foundation of basic knowledge, and have given me the tools with which to keep building my understanding of our tradition.

My classmates have at various times been loving, challenging, understanding, and provocative, but they have always been supportive of me and of each other, and I am proud to have begun this journey with them.

In selecting an area of study for a rabbinic thesis, the choice of advisor is perhaps more important than the topic itself, and so I have indeed been fortunate that Dr. Michael Chernick agreed to work with me in this endeavor. During the past six months, he has provided me with starting points, permitted me to make my own mistakes, and been there to guide my

steps when that was what I needed. Much more than that, however, throughout my tenure at HUC-JIR, his personal dedication to the place of tradition in liberal Judaism has been an inspiration. Truly, he has opened up new worlds for me.

Though others have read this thesis in part or in whole, any errors in fact or interpretation are mine alone.

ברוך אתה, יי אלהינו, מלך העולם, שהחינו וקימנו והגיענו לזמן הזה.

Praised are You, Eternal our God, Ruler of the universe, who has kept me, and sustained me, and enabled me to reach this season.

D.K.H.

22 Adar, 5747
New York, New York

INTRODUCTION

This rabbinic thesis began as a study of the lived tradition vs. the literary tradition; that is, of the conception of Jewish law as either vital and ever-evolving, or as fixed and never-changing. During the research process, however, it became increasingly clear that this was the wrong question. Despite J. David Bleich's assertion that because the law comes from God, "there is no room for speculation concerning the possibility of human emendation or change,"[1] the fact remains (and will become obvious in the body of the thesis), that historically there was no such thing as a fixed, never-changing law. This holds true, surprisingly enough, even in the face of the development of codified law. The question therefore is no longer whether there was change, but rather, who was responsible for the changes which took place? The answer to that question will offer us help with our modern debate concerning "authority and autonomy."

The catch-phrase "authority and autonomy" has received a great deal of attention during the past twenty years, as Jews from all points of the ideological spectrum struggle with their relationship to God, the Jewish community, and their sense of self. Stated somewhat simplistically, the problem boils down to how much of what we do should we base on personal preference, and how much on the requirements of our religion, and thus our God. While this problem's modern parameters -autonomy vs. heteronomy- have emerged relatively recently, the tension between various potential sources of authority in Judaism has been around for a long time. Historically, this tension played itself out in the arena of the interpretation of Jewish law.

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[1]J. David Bleich; "Halakhah as an Absolute," **Judaism**, Winter 1980, pp. 36-37.

Control over interpretation and change of the law meant control over the Jews, for the simple reason that the two were inextricably bound together theologically and politically. Rabbinic doctrine held that it was the rabbis alone who were authorized to interpret, and to a very large degree this rule held. But at times the rabbinic interpretation and the needs of the community were in conflict, and this led to difficulty. Since the rabbi's position as community leader was contingent upon acceptance by the community, he could not ignore with impunity the community's legitimate needs. At the same time, his own needs - to uphold the law both for its own sake and as his source of authority - had to be considered. In addition, there were certainly instances in which the rabbi saw the long term needs of the community well before the community itself did so, and thus acted against the people's will, but in their own best interests.

There were also cases in which the community took matters into its own hands, passing *takkanot* which had the force of law. The rabbinic response to this varied from case to case, as the rabbis weighed the merits of the various positions. As we will see, the common thread running through all of this is that change in Jewish law resulted from a combination of historical circumstances, community needs, and the rabbis' attempts to balance the two while retaining their own authority.

There are four main sources for our study of this process of change: the Babylonian Talmud; the Codes; community *takkanot*; and rabbinic *teshuvot*. The first source, the Talmud, serves as the basis for the other three. Though concerned more with the ideal law, rather than with practical *halacha*, the Talmud is nonetheless the foundation of the legal system.

The Codes represent attempts by their authors to simplify and freeze the law. Since they contain the *halacha* of their time as understood by the

authors, Codes provide snapshots of the legal system as it existed in various periods. It should be noted, however, that not everything always made it into the picture.

Takkanot indicate the attempts of the communities to respond within the legal system to the needs of their time. The authority of the communities to pass such legislation has been well documented, but interestingly, *takkanot* concerning controversial subjects seem often to have inspired community members to ask rabbis if the legislation was valid.

Teshuvot are in some ways the rabbinic counterpart to *takkanot*. They permit rabbis to issue binding decisions on just about any topic, and while many responsa are simply clarifications of minor points of law, some are quite important, serving as precedents upon which later decisors will base their own rulings. These responsa give us a good idea of what rabbinic opinion was on a particular topic at a given point in time. Further, because rabbis tended to be familiar with what their predecessors had said, they also show the development of a trend over time.

The attempt to trace just such trends is the method we will employ in our examination of the rabbinic and community influences on change in Jewish law. By beginning with the "ideal" law as envisioned in the Bible and the Talmud, and following rabbinic and community responses to it over the centuries, we will demonstrate the ongoing dynamic nature of Jewish law.

CHAPTER ONE

In seeking to investigate the rabbinic and community influences on change in the law, our first task is to find an area of law that can be considered representative of the law as a whole. The best candidates are the areas of the law which are treated the most conservatively, for it is safe to say that, if we find flexibility in those areas, we will be likely to find it elsewhere. Using this criterion, family law is an excellent choice for discussion, since it is perhaps the most conservative of all law.[1] Within family law, some of the most problematic issues have to do with questions of status, including ממזרות (illegitimacy) and עגנות (grass-widowhood). Questions of personal status are treated with particular care, perhaps because the resolution of each case can impact on a number of people besides the individual involved. One example of this is the area of marriage and divorce, where the status of the parents determines that of the children. Over the centuries, one of the most controversial practices in this realm has been that of הפקעת קידושין, annulment of marriage. In order to fully understand the development of the attitudes toward annulment, we must begin with the biblical method of ending a marriage.

All of the הלכה concerning divorce is based ultimately on the law in Deuteronomy 24:1, which states:

> A man takes a wife and possesses her. She fails to please him because he finds something obnoxious about her, and he writes her a bill of divorcement, hands it to her, and sends her away from his house.

[1] Ze'ev W. Falk; Jewish Matrimonial Law in the Middle Ages, (New York: Oxford University Press, 1966), p. xvi.

The rabbis take this to mean that the husband's consent to a divorce is required, in the form of a written "bill of divorcement" - a גט. This is clear from a discussion in Mishnah Yebamoth 14:1, concerning the differences between the man who divorces and the woman who is divorced. The rabbis state:

> אינו דומה האיש המגרש לאשה המתגרשת, שהאשה יוצאה לרצונה ושלא לרצונה, והאיש אינו מוציא אלא לרצונו-The man who divorces is not like the woman who is divorced, because the woman goes forth with her consent or against her will, whereas the man divorces her only with his own freewill.

This idea is later picked up by Maimonides. In his list of the ten requirements for divorce in Hilchot Gerushin, he says first, "שלא יגרש האיש אלא ברצונו - A man does not divorce his wife except of his own free will." These clear statements of the requirement for the husband's consent to a divorce, based on Deut. 24:1, are not really problematic in and of themselves. After all, we would expect one of the parties to a contract to have some control over its dissolution. What happens, however, when a woman wants a divorce, and her husband, for whatever reason, refuses to grant it to her? Or when, as apparently occurred quite frequently in the Middle Ages, a man forcibly betroths a woman, and then extorts money from her in exchange for a writ of divorce? Or when two individuals want to be married, but the marriage ceremony itself was carried out contrary to rabbinic law? For all of these reasons, the practice of הפקעת קידושין developed.

No mention of annulment appears in the Bible, though that does not preclude the possibility that it occurred. The first references we have, however, appear in the Talmud. The six cases of annulment we find therein can be loosely divided into two categories: a marriage which had been accepted as valid, but due to later circumstances was annulled; and a marriage which from the start was not accepted as valid.[2]

In Ketubot 3a we read of a man who makes a conditional divorce, contingent upon his performing a certain task (to prevent the divorce). He is forcibly restrained from fulfilling the condition. According to the Torah, the divorce would not be valid, since he was restrained. The rabbis, however, are concerned about the effect this ruling would have, for what if the woman did not know what had happened, and assumed that she was divorced? Therefore, they declare the divorce valid, saying "Everyone who betroths, in accordance with the sense of the Rabbis he betroths, and the Rabbis have annulled his betrothal." By way of clarification, Tosefot comments on "אדעתא דרבנן מקדש," saying, "Therefore at the time of the marriage one says 'כדת משה וישראל - according to the laws of Moses and Israel.'"

In effect, the talmudic Rabbis are declaring that although the *get* may be invalid *d'oreita*, the marriage was conducted under rules which were *d'rabanan*, and therefore, they uproot the marriage. In this case it seems as though, rather than declare themselves in direct opposition to the Toraitic doctrine, the Rabbis accept the invalidity of the *get*, but then come up with another way of effecting the end of the marriage, in order to prevent

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[2]Rabbi Meir Bar-Elan and Rabbi Solomon Joseph Zevin, eds.; תלמודית אנציקלופדיה, (Jerusalem: Talmudic Encyclopedia Publ. Ltd., 1949), Vol. 2, p.137.

confusion.[3] However, in another case involving a questionable *get*, one in which the outcome is the same, Rashi reads the rabbinic opinion differently. The text of Yebamoth 90b reads as follows:

> Come and hear: If he [a husband who sent a letter of divorce to his wife by the hand of an agent] annulled [his letter of divorce] it is annulled: so Rabbi. R. Simeon b. Gamaliel, however, said: He may neither annul it nor add a single condition to it, since, otherwise, of what avail is the authority of the Beth din. Now, though here, the letter of divorce may be annulled in accordance with Pentateuchal law, we allow a married woman, owing to the power of the Beth din, to marry anyone in the world! - Anyone who betroths [a woman] does so in implicit compliance with the ordinances of the Rabbis, and the Rabbis have [in this case] canceled the [original] betrothal. Said Rabina to R. Ashi: This is a quite satisfactory explanation where betrothal was effected by means of money; what, however, can be said [in a case where betrothal was effected] by cohabitation! - The Rabbis have assigned to such a cohabitation the character of mere prostitution.

In this case, Rabban Gamaliel is concerned about the authority of his own court, which had decreed that the *get* could not be annulled. The Sages clearly realize that what they are doing is contrary to the toraitic ruling, but, as in the earlier case, they justify it by saying that the marriage was originally sanctified by rabbinic approval, which can be withdrawn at any time. This still does not indicate that they are in fact recognizing the validity of the *get*. Rashi, however, in his comment on "אפקעינהו רבנן

[3]For the sake of consistency, all English translations of Mishna and Gemara are taken from the Soncino Talmud.

לקדושין מניה," says simply, "They do so using the *get*" Rashi obviously believes that the Rabbis are not simply getting around the toraitic ruling, but are directly challenging it; they end the marriage by declaring the *get*, which is invalid *d'oreita*, to be valid!

Rashi's reading of Yebamot 90b may be based on a similar case found in Gittin 33a. There, the decision to sublimate the authority of Torah to that of the Rabbis is spelled out:

> **Mishnah** - ONCE, HOWEVER, THE GET HAS REACHED HER HAND, HE CANNOT CANCEL IT. IN FORMER TIMES A MAN WAS ALLOWED TO BRING TOGETHER A BETH DIN WHEREVER HE WAS AND CANCEL THE GET. RABBAN GAMALIEL THE ELDER, HOWEVER, LAID DOWN A RULE THAT THIS SHOULD NOT BE DONE, SO AS TO PREVENT ABUSES. **Gemara** - ...Our Rabbis have taught: If [the husband] did cancel [the *Get* before a Beth din] it is canceled. This is the ruling of Rabbi. Rabban Simeon b. Gamaliel, however, says that he can neither cancel it nor add any additional conditions, since if so, what becomes of the authority of the Beth din? And is it possible then, that where a *Get* is according to the Written Law canceled we should, to save the authority of the Beth din, [declare it valid and] so allow a married woman to marry another? - Yes. When a man betroths a woman he does so under the conditions laid down by the Rabbis, and in this case the Rabbis annul his betrothal.

It should be pointed out that while the phrase "declare it valid" has been added by the translator to make explicit a seemingly implicit statement, the Hebrew text reads smoothly without it; thus, "...to save the authority of the Beth din, allow a married woman..." If however, there is any doubt that the Rabbis believed themselves to be authorized to act in

opposition to precepts of Torah, one has only to look at the next example, from Gittin 73a:

> IF HE SAYS, THIS IS YOUR GET FROM TO-DAY IF I DIE AND HE GETS UP AND GOES ABOUT etc. R. Huna said: His *Get* is on the same footing as his gift; just as if he gets up he can withdraw his gift, so if he gets up he can withdraw his *Get*... Rabbah and Raba did not concur in this opinion of R. Huna, as they were afraid it might lead people to think that a *Get* could be given after death. But is it possible that where a *Get* is invalid according to the Torah we should, for fear [of misleading people], declare it effective for making a married woman marriageable? - Yes; whoever betroths a woman does so on the conditions laid down by the Rabbis, and the Rabbis have nullified the betrothal of such a one. Said Rabina to R. Ashi: This can be well where he betrothed by means of a money gift, but if he betrothed by means of intercourse what can we say? - He replied: The Rabbis declared his intercourse to be fornication.

In this instance the Rabbis have stated clearly and directly that they are declaring the *get* to be effective, even if it is invalid *d'oreita*. While this clarifies their position on rabbinic authority in relation to toraitic authority, it also leads to other questions which will later prove to be of concern. For one, if they declare the *get* valid, are they saying that the woman is divorced, which would be the simplest method, or, based on the phrase "אפקעינהו רבנן לקדושין מניה," are they declaring that as far as the law is concerned the marriage never occurred? If the answer is the latter, (and, as we will see, there is every reason to believe that it is) there are interesting and troublesome ramifications to this issue.

The first reason for assuming that the Rabbis are not referring to an ordinary divorce in the above four cases is that the terminology used is different here than in other divorce cases. Nowhere else (with the exception of the cases in our second category of annulment) in reference to a divorce do we find the word "אפקעינהו" - "they annulled." This seems to point toward a special category of marital dissolution.

The other reason is even more telling. In each of the four cases, immediately after the phrase "אפקעינהו רבנן לקדושין מניה," we read of a short encounter between Rabina and R. Ashi. The account from Gittin 73a is representative:

> Said Rabina to R. Ashi: This can be well where he betrothed by means of a money gift, but if he betrothed by means of intercourse what can we say? - He replied: The Rabbis declared his intercourse to be fornication.

Rabina's question implies that he is not speaking about ordinary divorce, for in the case of divorce, the issue of how the marriage was effected is irrelevant. Divorce acknowledges the prior existence of the marriage, and ends it from that point forward. In this case, however, Rabina is asking how it is possible to declare a marriage which had been consummated to be **as though it had never occurred!** In fact, this is the fundamental difference between rabbinic annulment and toraitic divorce; the latter acknowledges the prior relationship, while the former uproots the marriage retroactively, making it as though it never happened.[4]

[4]Bar-Elan and Zevin; Vol. 2, p.138.

Having determined that, despite the fact that the discussions centered around the validity of a *get*, the real issue in the above four cases was one of annulment, we can now proceed to the basis for this rabbinic practice. The central concept is that, as stated in all four talmudic cases, anyone who betroths does so "אדעתא דרבנן," with the knowledge and implicit approval of the Rabbis. This is why at the time of marriage one recites "...according to the law of Moses and Israel." Who is "Israel?" According to both Rashi (Yebamot 90b) and Tosefot (Ketubot 3a), "Israel" means the Rabbis. Therefore, if one says at the time of marriage that the betrothal is occurring according to the law of Israel/the Rabbis, then the Rabbis have the authority to withdraw their approval at any time, effectively annulling the marriage.

And, as we have seen from the dialogue between Rabina and R. Ashi, the Rabbis felt empowered to withdraw that approval no matter how the marriage had been effected. Though the Talmud itself does not indicate the method of annulment, the system seems to have been clear. If the marriage had been initiated by כסף, then it could be annulled by declaring retroactively that the money used was merely a gift, on the principle of "הפקר בית דין הפקר." If the marriage had been initiated through שטר, they declared, using the same principle, that the contract did not belong to the betrother, and so could not be used for purposes of betrothal. And if the union had been effected through ביאה, the Rabbis were prepared, as R. Ashi indicated, to declare the intercourse to have been בעילת זנות - an act of prostitution.[5]

There are problems with this to be sure, particularly with the issue of ביאה, as Rabina seems to have noticed. One of the biggest difficulties is

[5] Ibid.; p.138.

that while we might legitimately say that the first act of marital intercourse was in fact בעילת זנות, it defies the bounds of reason to declare that every subsequent cohabitation during a marriage of any length could be so construed. In effect, the Rabbis have created a legal fiction to support their authority.

A further difficulty, one with potentially far-reaching implications, is that if annulment means that it is as if the marriage never occurred, then the status of any children from that "non-marriage" may be changed considerably. This actually has more of an impact on children of adulterous relationships, who may have the stigma of ממזרות removed by the simple fact that, if their mother was never really married in the first place, they are not the product of an adulterous relationship. In fact, the ראשונים use their authority to annul marriages to handle other situations, such as the case where a woman's husband is declared dead on the testimony of one witness, and therefore remarries, only to have her first husband reappear. By annulling the first marriage, the children of the second marriage are prevented from becoming ממזרים.[6] In our four talmudic cases, however, the Rabbis do not discuss that issue, being instead concerned with the possibility of producing adulterous liasons as a result of questionable writs of divorce.

We now turn our attention to the second category, that of annulment of a marriage which from the start was not accepted as valid. These cases have the advantage of involving neither the legal fiction of uprooting long-established marriages, nor the problem of the status of children, as they concern marriages whose validity is immediately brought into question.

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[6] Ibid.; p.139.

They are also a clear indication that the issue under discussion is not the validity of a particular *get*.

The first example of this second category is found in Yebamoth, 110a:

> Surely it once happened at Naresh that a man betrothed a girl while she was a minor, and, when she attained her majority and he placed her upon the bridal chair, another man came and snatched her away from him; and, though Rab's disciples, R. Beruna and R. Hananel, were present on the occasion, they did not require the girl to obtain a letter of divorce from the second man! - R. Papa replied: At Naresh they married first and then placed [the bride] upon the bridal chair. R. Ashi replied: He acted improperly, and they deprived him of the right of valid betrothal. Said Rabina to R. Ashi: [Your explanation is] satisfactory where the man betrothed [her] with money; what [however, can be said where] he betrothed her by cohabitation? - The Rabbis have declared his cohabitation to be an act of mere fornication.

In this case, it is assumed that in the process of "snatching" the girl away, the second man had also betrothed her, presumably against her will. However, in cases where the betrothal was questionable, the Rabbis had a tendency to require a *get* anyway, just to be safe. Here, though, we are told specifically that although two of the disciples of Rab were present, they did not require a *get*. In attempting to explain this, R. Ashi said that because the man behaved "לא כהוגן - improperly," the Rabbis annulled the betrothal, and therefore a *get* was unnecessary.

This "eye for an eye" attitude comes through even stronger in the second case of a marriage considered invalid from the start. In Baba Batra 48b, we find a discussion of a man pressured to sell a field under threat of

physical violence. The sale is considered valid, for it is held to be analogous to the case of a woman who accepts betrothal under threat of physical violence, about which it is said:

> ...if a woman consents to betroth herself under pressure of physical violence, the betrothal is valid. Mar son of R. Ashi, however, said: In the case of the woman the betrothal is certainly not valid; he treated the woman cavalierly and therefore the Rabbis treat him cavalierly and nullify his betrothal. Rabina said to R. Ashi: We can understand the Rabbis doing this if he betrothed her with money, but if he betrothed her by means of intercourse, how can they nullify the act? - He replied: The Rabbis declared his intercourse to be fornication.

Interestingly, though Mar declares the betrothal to be "certainly not valid," he still requires that it be annulled. The implication here is that the betrothal is in fact technically valid, despite its reprehensible nature, and therefore cannot merely be ignored. It is interesting to note that in these last two cases, the talmudic Sages do not cite "אדעתא דרבנן" as the rationale for annulment, but rather use "לא בהוגן." Indeed, this becomes a point of contention among the ראשונים. They debate as to whether these marriages (i.e. those in our last two cases) depend on rabbinic sanction and can therefore be declared to have never occurred "according to the laws of Moses and Israel," or whether the marriages in and of themselves are valid, since they never claimed to follow rabbinic procedure, and therefore the rabbis must rely on their authority to declare something to be הפקר in order to annul them.[7] In either case, however, the authority of the Rabbis living

[7] Ibid.; p.139.

at the time of the development of the Talmud to annul marriages is unquestioned.

Thus, at the end of our survey of the talmudic cases, we are left with the unmistakable picture of Rabbis who felt certain that it was appropriate and justifiable in a variety of circumstances for them to annul marriages that had been initiated in ways which were valid *d'oreita*. We can therefore say with some degree of assurance that at the time of the compilation of the Talmud, the written tradition endorsed rabbinic authority to annul a marriage.

We cannot say with equal certainty what the attitude toward annulment of marriage was in the centuries immediately following the completion of the Talmud. The earliest reference we have is second-hand, a 13th century *teshuva* of the Rashba, referring to a 10th century opinion of Sherira Gaon. The Rashba indicates that Sherira gave his approval to a *takkana* requiring two witnesses to marriage, or the marriage would be annulled.[8] Thus it would seem that, at least in the area controlled by the gaonate, annulment of marriage was a reality in the 10th century.

By the 12th century, however, we have reason to conclude that the practice of annulment was no longer quite so acceptable. In the introduction to his **Mishne Torah**, Maimonides states that he is going to compile all the *halacha* as it has developed to his day. Given Sherira's statement, and the talmudic passages above, we would expect to find reference to annulment in this Code. Yet there is not a single mention of it! The **Mishne Torah**, purported by its author to reflect all of *halacha*, is silent on the issue of annulment. Unless we decide that the Rambam accidentally left out this

[8]Menachem Elon; המשפט העברי: תולדותיו, מקורותיו, עקרונותיו, (Jerusalem: The Magnes Press, 1973), vol. 2, p. 689.

topic, an unlikely possibility, we are forced to conclude that for him annulment was not a viable halachic option, talmudic passages to the contrary notwithstanding. But why not? Why is Maimonides, a man with a firm belief in the authority of the rabbinate, shying away from this practice?

There are several possible explanations. The first is that the Rambam simply believed that the practice of annulment was not a good one, that it led to too many problems, and should therefore be eliminated. He could not say that it was halachically wrong, since the weight of opinion from the Talmud on was that it was valid, so he did the next best thing - he left it out. In this way, he didn't have to say anything about it; the mere fact that he did not mention it in a compendium of "all the *halacha*" is enough to indicate his position that this shouldn't be done. Now, of course, this is an argument from silence, but nonetheless one that adequately explains the glaring omission of a discussion of annulment from the **Mishne Torah**.

Another possible explanation is that which is expressed quite often in later *teshuvot* on the subject, that the Rabbis of the Talmud may have had the authority to annul, but the later sages did not have that authority. This is a particularly interesting idea, in that it can be read in two ways. First is the possibility that the later rabbis believed that they were simply not as qualified as earlier generations of sages, and that while Ravina and Rav Ashi may have been able to annul a marriage, "we simply don't know enough." This attitude does appear in the tradition. However, it seems highly unlikely that Maimonides, a man who took it upon himself to compile all of the halacha without listing sources, and at times apparently rendered halachic decisions according to himself, accepted the notion that he was not as qualified a scholar as those earlier Rabbis.

Rather more plausible is the second reading of the phrase "we do not have that authority," in which the word "authority" is read literally. The later rabbis realized that they had not been empowered by their communities to annul marriages, and therefore could not take it upon themselves to do so. This would explain why as early as the 10th century, Sherira Gaon, head of an enormous international Jewish community, advocated a *takkanat ha-kahal* in order to facilitate an annulment. Even he did not feel he had the authority to annul a marriage without it. So too, then, Maimonides may have believed that he had not been empowered to declare annulment of marriage to be within the scope of rabbinic authority.

Yet this does not explain why he leaves any mention of annulment out of his Code entirely. Why not declare it to be halachically acceptable given a community *takkanah*? Perhaps because this would make it a secondary piece of halacha. He discusses the validity of community *takkanot* elsewhere in the Code, so mention of a particular *takkanah* would be redundant. Or perhaps, as above, he simply did not like the practice. Ultimately, it is difficult to say precisely what the reason for this seeming lacuna is. While we will return to this problem when it appears -or rather, fails to appear- in later Codes as well, for now it is sufficient to say that by the 12th century in the Sephardic communities, a major scholar and codifier had written annulment of marriage out of his spectrum of practice.

At this point in time we see a similar, albeit less clear-cut opinion in the lands of Ashkenaz. There, too, scholars began to question the unequivocal nature of the talmudic statements that the rabbis have the authority to uproot a marriage which is valid *d'oreita*, and that a woman whose marriage is so ended does not require a *get*. Fortunately, we do not

have to argue from silence in this case, for we have some of the *teshuvot* of the period.

The first instance we will examine occurred in the 12th century in Cologne, where, at the time, there were no specific statutes on the books regarding "how to get married."[9] A young woman was promised to a man by her father and mother. Another man came along, and proposed marriage to her. Her father told her to accept the second man, and called the community together for the marriage. As the second man was preparing to betroth the woman, relatives of the first man got to her, and through trickery caused her to be betrothed to the first man, before the invited witnesses. When the parents realized what had happened, they told their daughter to throw away the betrothal, and she married the second man right then and there. Then the father went to Mainz, and called together all of the sages, and explained what had happened, declaring that we don't permit such charlatanism in the Jewish community. The rabbis of Worms and of Speyer wanted to annul the betrothal of the first man, saying that it was similar to the case in Yebamoth 110, in which the woman of Naresh was kidnapped and betrothed, and the Rabbis annulled the marriage "משום שעשו שלא בהוגן." In this instance, they say, the first man kidnapped the woman from the second man, something which was also לא בהוגן, and therefore these sages would annul.

The rabbis of Mainz have a different opinion on the case, however. They ask if the woman might not have accepted the betrothal at the time it was made, in which case it would be valid, even though she rejected it later on. More importantly, from our perspective, is their statement that "Even if the talmudic sages had the power (בוח) to annul marriages, we do not have

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[9] Ibid.; p. 687.

the power to annul..."[10] They do not say why they do not have the authority, but the sequence of events suggests a reason. As we saw above, when the parents of the girl realize what the relatives of the first man have done, they tell her to throw out the betrothal, and then we read, "וקידשה השני באותו מעמד - the second one married her right then and there." Clearly the parents had no doubts at the time that the first betrothal was invalid; it is only after the fact that the father calls upon the rabbis for an opinion. This suggests that in practice, individuals were taking it upon themselves to abrogate questionable annulments, even though in theory only the rabbis could do it. This being the case, the rabbis of Worms and Speyer were merely rubber-stamping something which was occurring anyway. The rabbis of Mainz take a different tack, perhaps in an attempt to regain rabbinic control of the situation. They declare that a *get* is necessary, and suggest to the relatives of the second man that they bribe the first man to give the woman a *get* Since the only way to receive a valid *get* was through the Bet Din, the rabbis have once again made themselves indispensible to the process. The movement away from annulment, therefore, can be seen as a move by the rabbis to maintain or restore their authority. This is not necessarily to suggest that the rabbis of Mainz were motivated entirely by concern for their authority. Their expressed concern, that the use of annulment might be confusing and inconsistent, should be accepted as legitimate. However, the only way to insure control over this practice was to assert rabbinic authority.

One century later the view that only the talmudic sages could annul a marriage was even more firmly entrenched. A different solution to the problem arose, however, and we see it first in the thinking of the Rosh,

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[10] Ibid.; p. 688.

Rabbi Asher ben Jehiel, who spent the first part of his career in Worms. It seems that a young man betrothed a woman "with all manner of trickery."[11] The woman declared that she would rather remain an עגונה for her entire life, than go through with the marriage to this man. The Rosh says that, even though it is similar to the case of the woman at Naresh, and even though the man behaved "שלא בהוגן," still the authority to annul rested only with the Rabbis of the Talmud, and the solution would be to induce the man to give the woman a *get*. He indicates that if it cannot be obtained by bribery, then the community should beat him until he relents, and that, in keeping with previous decisions, this would not be considered an invalid *get*.[12]

So far this is nothing new. However, the innovation occurs in a response to a similar question. After restating his opinion that the fact that a man behaved "שלא בהוגן" is not enough to annul a marriage, the Rosh declares:

> A Bet Din can pass legislation saying that all betrothals which occur without the knowledge of the girl's father and mother will not be valid, and that the Bet Din will annul the money involved.[13]

So here is a return to the possibility of annulment. But why is it necessary? We have already seen a decision declaring annulment to be impossible, and requiring a *get*. Why bring back the practice, even in altered form? The answer is to be found in the simple fact that the Rosh's opinion is being given in response to a question on the subject. Obviously, despite

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[11] Ibid.; p.689.
[12] Ibid.; p.689.
[13] Ibid.; p.690.

the earlier ruling, the issue of annulment refused to go away. The attempt to require a *get* in order to restore rabbinic control over the marital process was not entirely successful, and now the Rosh is looking for another solution, one which coopts the process. Note that in this solution proposed by the Rosh, the *takkanah* was to be passed by the Bet Din, and the actual annulment was to be carried out by the Bet Din. Since the Bet Din was made up of rabbis, this was a way to give *de jure* sanction to a *de facto* activity, and at the same time bring it under rabbinic auspices.

Further support for this interpretation of the Rosh's decision is provided by the Rosh himself later on in this *teshuva*. He sets up a straw dog, raising the question as to whether such a *takkanah* would have validity. He wonders if betrothal is a matter of איסור, in which case a court cannot uproot something toraitcally valid, or whether it is a question of ממון, concerning which all conditions are enforceable. His response is that it is in fact both; that betrothal is a matter of איסור, and so in and of itself cannot be simply annulled, while at the same time the principles of "הפקר בית דין הפקר," and of "כל המקדש אדעתא דרבנן מקדש," apply to the method of effecting betrothal. Thus, says the Rosh, the only proper method of annulment is a rabbinic *takkanah* whose validity is itself based on the rabbinic authority over monetary matters and marital practices.[14]

It is unclear whether this *teshuva* was written while the Rosh was still in Worms, or whether he had already moved to Barcelona. Either way, however, we can say with some degree of certainty that his opinion reflects Ashkenazic, rather than Sephardic thinking. Yet in the same period, we find a similar opinion given in Barcelona by the Rashba, Rabbi Solomon ben Abraham Adret. He too concludes that annulment of betrothal was some-

[14] Ibid.; p.690.

thing only the talmudic Sages were authorized to do, and then goes on to discuss the possibility of a *takkanah*. The question which comes to him however is slightly different than that before the Rosh, for the Rashba is asked whether a *takkanah* concerning methods of betrothal made by a Bet Din **or** by a *kahal* would be valid.[15] The wording of this question suggests an equating of the authority of the community with that of the Bet Din. And in fact, the Rashba says that a community (צבור) is like a Bet Din in matters of הפקרות.[16] However, while agreeing with the Rosh that such a *takkanah* would be valid, the Rashba seeks once again to maintain some degree of rabbinic authority. He says:

> The law seems clear to me, that the members of a community are permitted to do this, as long as the leaders agree, but if there is a Sage there who does not agree, then no.[17]

In effect, the Rashba is attempting to give veto power to whichever sage happens to be living in the community in question. Despite his tacit acknowledgment that a community can make a valid *takkanah*, and that it can declare money to be הפקר, bypassing the rabbis entirely, he tries to require the approval of the local rabbi, citing Baba Batra 9a, which says that "if there is a Sage, you must follow his opinion."

In the 14th century in Barcelona, the Rivash, Rabbi Isaac b. Sheshet Perfet, added a further stipulation to the comments of the Rashba. In answering a question from the city of Tortosa concerning the validity of a *takkanat ha-kahal* permitting the annulment of any marriage not performed

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[15] Ibid.; p.691.
[16] Ibid.; p.691.
[17] Ibid.; p.691.

in the manner therein prescribed, the Rivash first goes through the same arguments as his predecessors. He too arrives at the conclusion that a piece of community legislation permitting annulment is valid if it has been agreed to by the leaders and sages of the community. He concludes however, by saying the following:

> This is how it appears to me on this topic as far as the *halacha* is concerned. However, as far as practice, I am hesitant to keep the strict letter of the law, and I won't depend upon my own opinion, due to the seriousness of this matter, and send the woman out without a *get*, without the agreement of all of the sages of the province, that each of us may share the responsibility.[18]

The Rivash is saying that, while in theory it is enough to have the agreement of the local rabbi to validate a community *takkanah* regarding annulment of marriage, he is uncomfortable with the letter of the law, and so wants the practice to be different. He wants all the Sages of that particular province or area to agree to a *takkanah* of this sort, something which he must know is not realistic. Elon sees in this comment "a fundamental change in the approach of the halachic scholars to the use of legislative authority with regard to the annulment of marriage."[19] However, if we view this development with the same eye that we used with regard to the earlier decisions we examined, we will see that the comment of the Rivash is in fact the next natural step in the attempt to consolidate rabbinic authority.

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[18] Ibid.; p.696.
[19] Elon; p.693.

We must first ask why this question put to the Rivash has arisen at all. Surely the issue of the validity of a *takkanat ha-kahal* regarding annulment of marriage had been previously decided by the Rashba. Why then would Rabbi Abraham ben Alfula ask, a century or so later, about a *takkanah* in his community of Tortosa? While it is conceivable that he simply had not heard of the earlier responsa, the similarity of the language with that of the earlier question indicates that something else is at work here. We can postulate that he would only be asking a question to which he already knew the previous answer if he was looking for a new answer. He would want a new answer if the old answer no longer served its purpose; that is, if the community was simply not following the admonition of the Rashba to heed the opinion of the local sage. In his reply, the Rivash goes through all of the previous logic, including the need for the approval of the local rabbi, and then states that even this is not enough. No, in order for a *takkanah* concerning annulment to have validity, "all of the sages of the province" must agree, thereby removing any possibility that a community could rely on its own authority to annul a marriage, and thus bolstering the rabbinic position.

By the end of the 14th century, we see a further limiting of the community's authority as far as annulment. A question comes from the rabbi of Tunis to the Rashbatz, Rabbi Simeon ben Zemah Duran, in Algiers. He wants to know if a *takkanat ha-kahal* declaring that a marriage which takes place without the knowledge of the leaders and elders of the community is not a valid marriage can be upheld because it is similar to the cases in the Gemara which say "כל המקדש אדעתא דרבנן מקדש," and

whether, based on this *takkanah*, the community can impose *herem* on the violators.[20]

The Rashbatz begins his response by explaining that in every place in the Gemara which says "אפקעינהו רבנן לקדושין מניה," the meaning is that the Bet Din has the authority to declare someone's money to be ownerless, based on the principle of "הפקר בית דין הפקר," and therefore betrothal with that money would be invalid. He then expands this thought by indicating that every community also has the authority to declare money to be ownerless, since "כח הצבור על היחידים כבח הנשיא על כל ישראל - the authority of the community over individuals is like the authority of the Prince over all Israel," and therefore any community that has decreed that a wedding which takes place without the knowledge of the leaders of the community is invalid, may in fact invalidate the marriage by invalidating the betrothal money. He goes on to say that a community might do this to protect the young girls in their midst.

Following his tracing of the halachic acceptability of such a *takkanah*, however, the Rashbatz declares that there is reason to be concerned here about lewdness (חומר הערוית); even if we have the authority in matters of ממונא to annul, in matters of איסורא such as betrothal we must be strict. Therefore, we do not ever put such a *takkanah* into practice. He adds a further reason for invalidating this particular *takkanah*, that it did not specifically state that the method of annulment would be by declaring the marriage money to be הפקר. This problem seems almost gratuitous, for it is easily rectifiable, and thus no real impediment to the practice of annulment. It is indicative, however, of how far he has to stretch in order to ban a

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[20] Ibid.; pp.696-697.

practice which is both widespread, and halachically acceptable, and one which he himself says both the Ramban and the Rashba have permitted.[21]

Once again we face the dual questions of why this issue has resurfaced, and why the answer has changed. Or perhaps these are really two facets of a single question: What is it about the earlier answers that was so unsatisfactory as to cause the question to be asked yet again? It is clear that the declaration of *takkanot* concerning annulment of marriage was still widespread, for queries about their validity are far from rare. (The Rashbatz himself, in a reply to a question on this subject from the town of Constantine, says, "...as I have already been asked about this topic many times."[22]) The reason for the discomfort with this practice on the part of the questioners is less evident. One clue may be the fact that the authors of the questions are always rabbis in the community which has passed the *takkanah* under discussion. Surely these men knew that earlier generations of scholars had declared such legislation to be valid, and had set down guidelines concerning them, including the requirement that the local sages agree, and, more recently, that all of the sages in a province agree. As we reasoned above, if they already knew the previous answer, they must have been looking for a different one. But again, why? Following our earlier logic, it may have been that the existing guidelines were not being adhered to; that communities were going ahead with their *takkanot* without the sanction of the local rabbis, and so stricter rules were needed. What remains unclear is why the Rashbatz chose to eliminate annulment altogether. We will withhold speculation on this point for the time being.

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[21] Ibid.; p.698, note #285.
[22] Ibid.; p.698.

At the end of the 15th century, Rashbash the second, grandson of the Rashbatz, responds in similar fashion to a question from Tilimsan. He too traces the halachic validity of annulment, saying that a community *takkanah* would be valid, but he brings back the condition, not mentioned by his grandfather, that the local sage must approve. And yet, despite this condition, his empowering of the community seems quite clear-cut. He takes the principles we have seen used before in the name of the rabbis, namely, "בל המקדש אדעתא דרבנן מקדש," and "אפקעינהו רבנן לקדושין מניה," and phrases them in terms of the community. Thus, he says that whoever betroths, "אדעתא דציבור קא מקדש - in accordance with the sense of the **community**, he betroths" and therefore, he continues, "ציבורא אפקעינהו לקדושיה מיניה - the **community** annuls his betrothal." The Rashbash has thus indicated that, insofar as the halacha of this issue is concerned, the community's authority is equal to that of the rabbis. Shortly thereafter, however, he goes on to rule as did his grandfather, that while the halacha may permit annulment, we cannot allow it in practice. At the close of his response, he says that "we cannot perform any action in the community of annulment of marriage...and therefore the betrothal remains valid."[23]

This final comment may hint at the rationale behind the banning of annulment altogether. Having pressed the halachic logic to its ultimate conclusion, that in theory the community is equal in authority to the rabbinate,[24] both the Rashbatz and the Rashbash were faced with a dilemma: either permit communities to control an important and clearly needed practice, and accept the possibly far-reaching consequences (in terms of the personal status of individuals from different communities); or, decide that

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[23] Ibid.; p.700.

[24] In theory. In reality, the community, which selected the Rabbis, probably had more authority.

the lesser evil would be to eliminate annulment, thereby causing difficulty for some, but protecting the general principles of marriage and marital status. As we have seen, they chose the latter course, one which, perhaps coincidentally, served to strengthen rabbinic control over the entire process of both marriage and divorce.

In this same time period, the end of the 15th and beginning of the 16th centuries, a somewhat different decision was rendered on the same issue, one which also sought a way of avoiding problems in determining marital status of individuals from different communities. This was a particularly difficult matter in the city of Salonika, whose Jewish population was comprised of many small groups from different countries, each of which regarded itself as a separate, autonomous community with valid powers of legislation.[25] The possibility of a problem arising in which a difference in the definition of marital status from community to community played a major role was very real in this situation. In response to the question of one of these communities concerning a *takkanah* of annulment, Rabbi Moshe (Maharam) Eleshkar, who lived in Egypt and in Israel, picked up on the final comment of the Rivash, requiring all the sages of a particular province to agree to a *takkanah* concerning annulment for it to be valid, and developed it.[26]

Eleshkar's response begins with a re-emphasis on the authority of a community to issue legislation. (In fact, Elon contends that Eleshkar felt that the community had more power than the Bet Din in this area.[27]) However, he continues by saying that although legislative authority is

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[25]Elon; p.701, note #301.
[26]Ibid.; p.700.
[27]Ibid.; p.701, note #303.

extended to a small local community, or even to a craftsmen's guild, this does not mean that we can "mitigate the holiness of Torah" on the ruling of one community alone. In this particular instance, that of annulment, we require more than this, for the simple reason that while the *takkanah* is not binding beyond the one community, its effects would be felt in the surrounding area. Therefore, for a *takkanah* affecting the area of marriage and divorce, such as one of annulment, to be valid, it must be approved by all of the communities in a given country, or, at the very least, by most of those communities.[28]

Maharam Eleshkar has provided a different reading of the Rivash, and in so doing, has diverged from the direction taken by the Rashbatz and the Rashbash. Whereas those two felt the hesitancy of the Rivash to permit annulment on his own authority, and extrapolated from there that it is not to be permitted at all, Eleshkar went the other way. He took the Rivash's opinion, and his final statement that the matter requires further consideration, at face value, and sought to make it more workable, especially in the unique situation in Salonika. His solution would solve the problem of inconsistent marital status from community to community, and would at the same time curb the authority of the local communities, whose *takkanot* in these areas of law would not be valid in and of themselves. A workable solution, but as we will see, one not accepted by the codified tradition.

Before turning to the codes however, let us look at the change over the course of one century in the *takkanot* of annulment in one community, that of פאס. The first ruling, in 1494 (the same period as the Rashbash and Maharam Eleshkar), said that a man could not marry a woman unless he did

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[28] Ibid.; pp.703-704.

so before ten men, among whom was one of the sages or judges of the city. If this was not obeyed, the marriage would be annulled. This rule is in keeping with the opinions given earlier by the Rosh and the Rashba. However, as Elon points out, this *takkanah* was made in North Africa, over one-hundred years after the Rashbatz, the Chief Rabbi of Algiers, had declared that such a *takkanah* was halachically valid but not to be used.[29] This lends support to our earlier argument that despite rabbinic statements to the contrary, communities were going ahead with the practice.

Yet in 1592 the same community passed new legislation, still requiring both a sage and a *minyan* to be present for marriage, but with a different outcome if the rule was violated. After stating that both the witnesses to the marriage and the groom himself may be beaten, the *takkanah* says of the groom that:

> He will remain in prison until he gives a valid writ of divorce to the betrothed woman, and he will not leave there on Sabbaths or holidays until he divorces her with a valid writ. And even if her father and mother want to give her to him, it makes no difference until he divorces her completely, and afterwards if he wants to make a new wedding, they have permission.[30]

This community seems to have decided that the earlier *takkanah* of annulment was no longer valid, and that while the concept of protecting the young woman remained an important one, another way would have to be found to implement it. In an autonomous community, one which had the power to punish and imprison those who transgressed against its will, this

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[29] Ibid.; p.704.

[30] Ibid.; p.705.

posed little problem. If they couldn't annul, they could force the man to give a writ of divorce, and, as we have already seen, the tradition holds that a writ of divorce obtained in this way is valid, and not considered to have been coerced.[31] Given this power of enforcement, it seems unlikely that any transgressor would resist for very long;[32] For that matter, it would seem foolish for anyone to knowingly transgress such a requirement, and perhaps that is the real intent of the *takkanah* - as a deterrent. Regardless, it is evident that by the end of the 16th century the opinions of the earlier North African authorities had been accepted by at least part of the North African community.

During the same period, the rabbinic attempts to eliminate the practice of annulment of marriage continued elsewhere. In Safed, Joseph Caro was writing his commentary to the **Arba'ah Turim**. The **Tur** had been compiled in the first half of the 14th century in Toledo by Jacob ben Asher, son of the Rosh (who declared a *takkanat ha-kahal* permitting annulment to be valid). Jacob was contemporaneous with the Rivash, who wanted all the sages of the province to agree to such a *takkanah* Yet despite these statements of his father and his colleague, among others, Jacob did not even mention the practice of annulment in his Code. This takes us back to the 12th century and Maimonides' **Mishne Torah**, which, as we saw above, also was without reference to annulment. If anything, its absence from the **Tur** is even more puzzling, given its apparently wide-spread use at that point in time. The only plausible explanation is that, as we speculated with

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[31] See, for example, **Mishne Torah**, Hilchot Gerushin 2:20.

[32] There are however analogous cases in the State of Israel today, in which men are choosing to languish in prison, rather than give their wives writs of divorce.

Maimonides, Jacob felt that the discussion of the validity of a *takkanah* would be redundant.

Whatever Jacob ben Asher's reasoning for leaving any mention of annulment out, Caro chose to include it, in a somewhat forced way, in his commentary on **Tur**. In a comment on a discussion of the validity of betrothal made with objects forbidden for profitable use, Caro says:

> The Maharik (מהרי"ק) wrote in shoresh 24 that if a community passes legislation saying that from then on no man can marry a woman with less than ten men present, and someone comes along and marries with less than ten men, **the marriage is valid** (emphasis the author's). And this is also true of one who marries in defiance of the ban of Rabbenu Gershom, and so too says הר"ש בר צמח in his responsa, and so too says בא"ח in the name of הרשב"א.[33]

For Caro then, the issue seems clear-cut; a community can make any *takkanah* it wants with regard to marriage, but if someone violates that rule, the marriage is still valid. He is very adamant about this, declaring the earlier ruling of the Rivash to have been misinterpreted. However, it is important to note that in the responsum of the Maharik which he quotes, the *takkanah* under discussion does not indicate that a violator will have his marriage annulled. This seems to be an important theoretical distinction which Caro himself makes in one of his own responsa,[34] but the practical significance of which remains unclear. In either case - whether the

[33]Beit Yosef to Tur, Even Ha'ezer 28 (end).
[34]Elon; pp. 705-706.

takkanah says that the marriage will be annulled or not - the end result according to Caro is that the marriage is valid.

Interestingly enough, though he deals with the issue of annulment in his responsa and in his commentary on the **Tur**, when the time comes to write his own Code, Caro does just what his predecessors in that genre did; he leaves it out. Nowhere in the **Shulhan Aruch** does he mention annulment, and this despite his strong feelings against it. One might assume that in writing a Code representative of the development of the Law to that date, the best way to eliminate a practice would be to rule clearly against it. Yet once again we are left to wonder why this is not the case. It is conceivable that Caro felt that by not mentioning it at all as one of the accepted practices of his day, it would wither away. But if that were the case, why would he have insisted on making a comment about it in the **Beit Yosef** to **Tur**, where it was also not mentioned?

Ironically, Moses Isserles did to Caro's **Shulhan Aruch** just what Caro had done to **Tur**; he made a comment on annulment to a discussion of the validity of betrothal made with objects forbidden for profitable use, even though the author of the Code had made no mention of it. Isserles says:

> There is a community which agreed upon legislation amongst them that anyone who betrothed without ten individuals, etc., and someone broke the rule and got married with what was stored away for the wedding, and the woman required a *get*. Even though the community had made the comment that it would not be considered a betrothal, and they would invalidate the money (*Hefker mamono*), still we should be strict in a matter of מעשה.[35]

[35]Rema to Even Ha'ezer 28:21.

The importance of Isserles' comment is reflective of the importance of the entire **Darkhei Moshe**; it gives the Ashkenazic opinion on the point of law being discussed. Up to this point we have dealt almost exclusively with Sephardic rabbis and communities, and seen the development of the attitude toward annulment only in that light. With this statement of Isserles, however, we sense that, on this particular topic, the Ashkenazic and Sephardic rabbis were in agreement.

This agreement is not so clear when it comes to their communities, however, for while we have examined references to several *takkanot* from Sephardic communities, it appears that, up to this point in time, there are none to be found among Ashkenazic communities.[36] This may be attributed to the general differences between the Sephardic and Ashkenazic communities in the period between the 10th and the 14th centuries. In Sephardic communities, scholarship was generally on the decline, which accounts for the need for and creation of Codes. The authority tended to be centralized, with, as we have seen, either the rabbis or the local community leaders in power. It was easy and thus common practice for this centralized authority to issue *takkanot*. In Ashkenazic communities, on the other hand, this period was marked by a great deal of scholarship; the average German Jew was something of a *talmid hacham*.[37] There was no need for Codes (and indeed none were produced in Ashkenaz during this period), and there was little, if any central authority. Community practices were determined by custom and discussion, rather than by legislation. By the 16th century,

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[36] Elon; p.706.

[37] See, for example, the long list of *baalei ha-tosefot* listed by Urbach in בעלי התוספות, (Jerusalem: Bialik, 1955).

however, conditions in Ashkenaz had changed sufficiently to permit the beginnings of the acceptance of the **Shulhan Aruch**, as commented upon by Isserles. Eventually, the dearth of scholarship and the centralization of authority, particularly in Eastern Europe, led to large numbers of *takkanot* Before we look at that development however, let us return to the course of events outside of Eastern Europe.

All through the 16th and 17th centuries, Jewish communities in Italy and other countries around the Mediterranean continued to pass laws giving requirements for marriage, and declaring that if they were violated, the marriage would be annulled. These included קאסלי in 1571 and Corfu in 1652.[38] Perhaps the most comprehensive *takkanah* of this type was that found among three major Jewish communities of the northern Italian mainland. Before we examine the legislation itself, it is important to understand the particular circumstances of these communities.

The Jewish presence in northern Italy was the result of a combination of geography and history. While Jews had originally moved into France and then Germany from Italy, the communities of northern Italy, including Padua, Venice and Ferara, were largely populated by Jews returning from the Ashkenazic heartland. During the period of Chelminitsky, Jews from Poland also made their way into northern Italy. Thus, these Jewish communities were predominantly Ashkenazi in population and therefore in character. However, the expulsion from Spain in 1492 brought a large wave of Sephardic immigration to the area, and by the end of the 15th century, the population of the Jewish communities of northern Italy was quite mixed. This certainly had an impact on the application of Jewish law, and may

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[38]Elon; p. 706.

account for the strange history of legislation concerning annulment in the area.

In a 17th century גזרה concerning the proper method of marriage, issued in Padua, the authors present the "legislative history" of their topic, before rendering there own decision. They refer to an early *takkanah* accepted by all of the local communities, issued in the late 15th century, at the time of the "Gaon," Judah Mintz, and agreed to by "the majority of the sages of the generation."[39] They indicate that it was renewed in the year 1554 in Ferara, in a general assembly made up of the majority of the sages of Italy and representatives of the communities, and presided over by Rabbi Meir Katzenelenbogen of Padua. The *takkanah* was renewed once again in Venice, in 1577, and now the sages of Padua were reiterating their support for it at the beginning of the 17th century. They say that in order for a man to marry a woman, he must have the approval of both her parents, or of her closest relatives, and he must perform the marriage before ten men. Punishment for transgressing this law included *herem* for both the groom and the two witnesses. More to the point of our study, however, is the following phrase:

> And the *kiddushin* [that is the money, ring or other item given to effect the betrothal] which was given contrary to this agreement will be as an ownerless item (כדבר הפקר), and it [i.e. the betrothal] will be uprooted and completely annulled, and considered as a broken shard signifying nothing.[40]

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[39]Daniel Karpi, ed.; פנקס ועד ק"ק פאדוואה, (Jerusalem: Israeli National Academy of Sciences, 1980), p. 227.

[40]Padua; p. 228.

This *takkanah*, (or more precisely, *g'zerah*), tells us several things about the attitudes toward annulment during this period. First and foremost, it shows that despite the declarations of the rabbis that annulment of marriage was a theoretical possibility only, the neighboring Jewish communities in northern Italy (Padua, Venice and Ferara) had on their books legislation of annulment for at least several hundred years. At the same time, it indicates that these communities had taken to heart at least some of the rabbinic attempts at controlling this practice, for they had passed this legislation with "the agreement of the majority of the rabbis of Italy and representatives of the communities."[41] Finally, the existence of these earlier *takkanot*, agreed to by the local rabbis, as well as the signatures of rabbis on this latest *takkanah* of Padua, point up once again the tension between what the rabbis seemingly wanted to do (i.e. eliminate the practice altogether), and what they felt compelled to do by their communities (somehow maintain the practice). This tension is highlighted for us in a responsum of Jacob Halprin, a rabbi in Padua at the beginning of the 17th century.

Halprin's is the first of four rabbinic signatures to appear on the *takkanah* of Padua, restating that community's commitment to the practice of annulment. We might infer from this that he was a supporter of this policy, and thus we would expect him to make use of the *takkanah* if need be. It is strangely absent, however, from his response to a question of the validity of a marriage written in 1615. In this particular case, which occurred in Padua, the young woman was leaning out her window, while the groom and either two or three witnesses stood below. The woman lowered a

[41] It is unclear whether this means all of Italy or only northern Italy, but in terms of this study, this point is relatively unimportant.

rope from her window, to which the groom attached the ring. As she pulled up the ring, the young man recited "Behold, you are betrothed to me..." Rabbi Halprin was asked to decide the case. It seems self-evident that, based on the community law that all marriages must take place before ten men or be invalidated, this marriage should not stand. However, at no point in his responsum does Halprin refer to the *takkanah*![42] He says that the girl obviously was a willing party to this marriage, and he sugggests that the best solution would be for her parents to give their approval to the marriage of their daughter and her beloved. Why would he render such a decision?

The answer may very well indicate once again the political nature of the issue of annulment. It is clear that the communities of northern Italy wanted to be able to annul marriages, and that the rabbis who served as their elected leaders had little choice but to enact and renew such legislation, whether they personally supported it or not. It is equally clear, however, that in the process of actually deciding a case, these same rabbis did not feel themselves to be required to use the power granted by such a *takkanah*. In this way they acknowledged the desire of the community, while in fact following their own opinions on the matter. In effect, they have accepted the community's authority to pass legislation, but have reserved the decision on its implementation to themselves. This may in some ways be a reflection of the mix of Ashkenazic and Sephardic attitudes in these communities; while Sephardic communities routinely used legislation, Ashkenazic communities did not. The fact that Halprin is of Ashkenazic descent may indicate that, while bowing to community pressure in passing legislation, he was simply not comfortable with its use.

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[42]Elon; pp. 706-707.

We find a completely different attitude toward *takkanot* of annulment of marriage on the part of the rabbis of Damascus in the 18th and 19th centuries. These leaders seem to be very much in favor of such legislation, the first of which appears under the leadership of Rabbi Mordecai Galanti. After requiring that any marriage take place before ten men, as well as the rabbi, and after describing the qualifications of the witnesses, the *takkanah* goes on to say:

> And the man who behaves maliciously and marries a woman before two witnesses, without having at the same time ten men present, as required - his betrothal will not be a betrothal, it will have no validity, and will not be established, and it will be as dust of the earth, and a thing of no substance. And as for the money which he gave to the woman in the name of betrothal, behold we declare it utterly ownerless, by the authority of a valid Bet Din which we have, and we completely annul his betrothal like the Bet Din of Rabina and Rav Ashi, who were empowered to expropriate people's money.[43]

The astounding thing about this *takkanah* is that in preparing it, the authors seem to have completely ignored the thinking of the rabbis as it had developed over the course of centuries. This *takkanah* finds its support directly in the Talmud, bypassing entirely the Codes and the corpus of *teshuvot*. The phrasing hints at earlier arguments in support of annulment, such as "לא בהוגן" (in this case "one who behaves maliciously"), but ultimately roots itself firmly in the authority of a valid Bet Din in every generation to make decisions as did the court of Rabina and Rav Ashi (This

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[43] Ibid.; p. 708.

too may be an allusion to the talmudic cases of annulment, each of which end, as we have seen, with a discussion between those two Sages).

If there was any doubt that the rabbinic authorities of Damascus meant to use this authority to annul marriages which were performed in violation of the requirements of the *takkanah*, it disappeared in the mid-19th century, when the community was led by Rabbi Isaac Abulafia. During his tenure, the original legislation was restated and strengthened. At the same time, a dispute arose as to whether this was really a valid *takkanah*, since Damascus had decided to accept Caro's **Shulhan Aruch** as authoritative, and, as we saw above, annulment is not mentioned therein. The challenge came from the Jewish community in Jerusalem, particularly Rabbi Shalom Moshe Hai Gaigin. Abulafia has two different responses to this argument. The first is that the community accepted the **Shulhan Aruch**, but not all of the *teshuvot* of Caro. And, since Caro's prohibition against the actual use of a *takkanat ha-kahal* regarding annulment is found not in his Code, but in his responsa, it is not binding on the community.[44]

Abulafia's second argument is more to the point of this study. He states that, as far as the question of the authority of the rabbis and of the community to pass a *takkanah* annulling a marriage which is toraitically valid, the Rivash and the Rashbatz and other authories have already declared it permissible, based on two principles: one, that "כל המקדש אדעתא דרבנן מקדש;" and two, that "הפקר בית דין הפקר." He goes on to say that if the rabbis thus have the authority to annul a marriage which the Torah has declared to be valid, how much the moreso can they uproot a marriage despite the statements to the contrary of Joseph Caro. For of what possible use is the authority to make *takkanot* if you then declare that this is only in

[44] Ibid.; p. 709, note #328.

theory and not in practice?[45] The current practice concerning annulment and/or divorce in the Syrian Jewish community is a matter for further investigation.

While the Sephardic communities insisted on their authority to pass legislation regarding annulment well into the 19th century, their counterparts in Ashkenaz were not so defiant. As we have said, the use of *takkanot* increased in the Ashkenazic communities as authority became centralized, but, at least with regard to annulment, the communities did not seem ready to buck the trend. This can be seen clearly in two *takkanot* of the 17th century, one from Poland (the Council of the Four Lands) and one from Lita.

The *takkanah* of the Polish communities is simple and straightforward, and reads as follows:

> קדושין בלא חופה כופין על הגט - If a betrothal takes place without an official ceremony, we force [the man to give the woman] a writ of divorce.[46]

Given the ongoing debate over this subject through the centuries, the brevity of this piece of legislation is somewhat surprising. The content, however, makes sense given the historical circumstances we have previously described. At this point in time, when the newly centralized authority was passing legislation, the **Shulhan Aruch** was beginning to be accepted. Isserles' rejection of annulment would therefore hold more weight, and the Council may have been loathe to fight that.

Even more pertinent may be the relationship of the rabbinate to the Council. If frequency or percentage of legislation concerning a topic is any

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[45] Ibid.; p. 709.

[46] Israel Halprin, פנקס ועד ארבע ארצות, (Jerusalem: Bialik Foundation, 1944), p. 50, #146.

indicator of that topic's importance, then the authority of the rabbinate in the lands under its control was of vital concern to the Council.[47] Following our earlier line of reasoning, we can see that forbidding annulment and requiring a writ of divorce is in keeping with a desire to maintain rabbinic authority, even if the community wants the option of annulment.

A similar *takkanah* appears in the legislation of the Lithuanian community, after its secession from the Va'ad in 1623. While it goes into more detail concerning precisely what falls under the term "force," the idea is the same; an "improperly" performed marriage cannot be annulled, but must be dissolved through a writ of divorce.[48] Given the similarities betwen this community, and that governed by the Council, we may assume that the rationale behind the two pieces of legislation is the same, including the concern for rabbinic authority.[49] Thus, by the 17th century, annulment of marriage ceased to be even a remote possibility in Eastern Europe.

Our examination of the developing resistance to and ultimate demise of the practice of annulment of marriage proves instructive in several ways. First, it indicates that, at least for the rabbis, talmudic approval did not automatically mean that something should be put into practice. At the same time, we have seen that, for the communities, codificatory disapproval did not necessarily mean that a practice should be stopped. For both rabbis and communities, the overriding factor seems to have been pragmatism, an

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[47]See for example Nisson E. Shulman; Authority and Community: Polish Jewry in the Sixteenth Century, (New York: KTAV Publishing House and Yeshiva University Press, 1986).

[48]Simon Dubnow, פנקס המדינה; (Berlin: "עינות")1924, p.9, #43.

[49]See, for example, Steven Denker's discussion of the Va'ad's increasing intervention in the relationship between a rabbi and a local community, in his unpublished thesis, "A Study in Parish Halaka," HUC-JIR, New York, 1984.

accomodation to the needs of the parties involved, but without jeopardizing the legal system as a whole. This concern will be evident as well in our discussions of the disqualification of judges and witnesses.

CHAPTER TWO

At first glance, the connected issues of פסולי עדות and פסולי דיינים, the disqualification of witnesses and judges, do not seem to be nearly as controversial as the question of הפקעת קדושין, the annulment of marriage. And, in truth, the development of the changes in the laws concerning disqualification does occur in a relatively harmonious way, with the needs of the people seen in much the same light by the rabbis, the communities and the Codes. However, upon closer examination, it becomes evident that these changes reflect a shift in the reading of the Talmud no less profound than that which we have seen with regard to annulment of marriage. As we will see, this shift indicates that the same forces which led the rabbis to oppose the communities' needs for the power to annul, also caused them to endorse the communities' desire to accept certain disqualified individuals as witnesses or judges. For the sake of clarity, we will concern ourselves here only with judges, leaving witnesses for the next chapter.

The talmudic discussions of the composition and jurisdiction of the various courts, as well as the qualifications required of judges, are found primarily in tractate Sanhedrin. Chapter I concerns itself primarily with identifying which types of cases are to be tried by a court of three, which by a court of twenty-three (Small Sanhedrin), and which by a court of seventy-one (Great Sanhedrin). For the most part, civil and minor criminal cases are to be tried by the court of three, while capital cases are in the jurisdiction of the Small Sanhedrin. The Great Sanhedrin is also qualified to hear capital cases, and is responsible for trying a false prophet, a tribe, or a high-priest. Further, only the Great Sanhedrin can authorize a war of free-choice, or the building of any addition to the Temple court-yards or to Jerusalem itself.

There is no clear indication in the text as to how the members of any of these courts are to be chosen. The authority to render decisions, i.e., to be a judge, was passed from master to disciple (San. 5a-5b); the tradition claims that this practice continued unbroken from the days of Moses and Aaron.[1] By the time of the Talmud, the granting of *smicha* seems to have been the prerogative of the *resh galuta* (San. 5a). However, the procedure for being appointed as a member of a standing community court is not discussed explicitly. The implication seems to be that the *Nasi*, as head of the Great Sanhedrin, was empowered by the Roman authorities, and he chose the other judges.[2] As for the Small Sanhedrin, the Mishna says that "SMALL SANHEDRINS FOR THE TRIBES CAN BE INSTITUTED ONLY BY A COURT OF SEVENTY-ONE;" while it is possible that this means that the Great Sanhedrin merely authorized the existence of the court, it seems more likely that it actually selected the members as well. In regard to the court of three, however, we read the following:

> **Mishnah.** [23a] CIVIL ACTIONS [ARE TO BE TRIED] BY THREE. EACH [LITIGANT] CHOOSES ONE, AND THE TWO JOINTLY CHOOSE A THIRD: SO HOLDS R. MEIR. BUT THE SAGES RULE: THE TWO JUDGES NOMINATE THE THIRD.

This seems straightforward enough; in any case to be tried before a court of three, the litigants are empowered to select two of the judges. However, this implies that there is no standing Bet Din, but rather that one is convened when the need arises. Yet we know from the many talmudic references to "the court of R. Ploni," that there **were** standing courts of

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[1] Encyclopaedia Judaica, (Jerusalem: Keter Publishing House Jerusalem Ltd., 1972) Vol.4, p.722.
[2] Ibid; p.722.

three. So to what is the above Mishna referring? The Gemara attempts to give an answer by reading the Mishna somewhat differently:

> *Gemara.* Why should each of the parties choose one [Beth din]: do not three [judges] suffice? -The Mishna is meant thus: If each party chose a different Beth din, [so that one is not mutually accepted], they must jointly choose a third.

The understanding now is that each of the litigants was to choose one of the standing courts of three, and these two courts would then choose a third. This alleviates the problem cited above, but only temporarily. The discussion continues in the Gemara, and when the Rabbis reach the statement "THE SAGES RULE: THE TWO JUDGES NOMINATE THE THIRD," they retract their earlier interpretation:

> We learned: THE SAGES RULE: THE TWO JUDGES NOMINATE THE THIRD. Now, should you think it means as we have said, viz., Beth din; can a Beth din, after being rejected, go and choose them another? [Surely not!] Again, how interpret, EACH PARTY CHOOSES ONE?- But it means thus: Each [litigant] having chosen a judge, these two [litigants] jointly select a third.

Further discussion leads to the understanding that it is not the litigants who choose the third judge, but rather the first two judges themselves. Either way, however, the final word in the Gemara seems to indicate that the courts of three being referred to here are to be selected as needed, and do not sit permanently. This returns us to the question raised above, namely, if we know that there were standing community courts made up of three judges, to what is this Mishna referring? The most likely answer is that the reference here is to another type of court entirely, a

court of arbitration, convened by the litigants for the sole purpose of adjudicating a specific point of contention. There are several factors which support this notion that what is being referred to is a separate system.

As we have seen, the judges of the standing courts were apparently selected by a higher authority. For example, in San. 36b we read, "We do not appoint as members of the Sanhedrin, an aged man....," indicating that it is the rabbis who do the appointing. This being the case, courts made up of judges selected by the litigants themselves must belong to a different category.

Further evidence of this division of the judiciary system into two categories appears in connection with our general topic, that of the disqualification of judges and witnesses. The Mishna goes on to say:

> EACH PARTY MAY OBJECT TO THE JUDGE CHOSEN BY THE OTHER, SO HOLDS R. MEIR. BUT THE SAGES SAY: WHEN IS THIS SO? ONLY IF THE OBJECTOR ADDUCES PROOF THAT THEY ARE EITHER KINSMEN OR [OTHERWISE] INELIGIBLE; BUT IF FIT OR RECOGNIZED BY THE BETH DIN AS MUMHIN, THEY CANNOT BE DISQUALIFIED.

This Mishna is discussing the eligibility of judges being chosen for a court. And yet, that very eligibility is partly contingent on how the candidate is viewed by "the Bet Din." Which Bet Din? Obviously not the one being formed. The only possibility is an already existing, standing court, which has some influence on the type of person being selected for a different court - a court of arbitration!

There is more. In the Gemara on the first part of this Mishna, the Rabbis question whether a debtor, one who has been summoned to appear before a court, may reject the authority of that court:

> Can then the debtor too reject [the Beth din chosen by the creditor]? Did not R. Eleazar say: This refers only to the creditor; but the debtor can be compelled to appear for trial in his [the creditor's] town?-It is as R. Johanan said [below]: we learnt this only in reference to Syrian lawcourts; and so here too.

The Rabbis, while accepting the creditor's right to choose the jurisdiction of a case, are rejecting the debtor's authority to refuse to be tried by that court. Basing themselves on R. Eleazar, they say that the Mishna's statement, "EACH PARTY MAY OBJECT TO THE JUDGE CHOSEN BY THE OTHER," refers only to "Syrian lawcourts; and so here too." The phrase "Syrian lawcourts" is a derogatory one, a reference to "tribunals set up by the Romans and in charge of Jewish judges whose decisions were based on precedent and common sense rather than Biblical or Rabbinic Law."[3] By linking these Syrian courts with the courts under discussion, the Rabbis are making it quite evident that these are not official standing courts of law.

This is made even clearer later on, in another comment on, "EACH PARTY MAY OBJECT TO THE JUDGE CHOSEN BY THE OTHER." The Gemara reads, "Has anyone the right to reject judges?-R.Johanan said: This refers to the Syrian courts." By implication it also refers to the courts under discussion here, and thus we discover that the selection of judges is **not** a normally accepted practice in the standing community courts, but **is** regular procedure in the courts of arbitration.

Talmudic references aside, this ruling also makes pragmatic sense. Imagine the utter confusion that would be rampant in a system in which defendants could refuse to be tried by a court of law to which they had been

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[3]The Soncino Talmud, (London: The Soncino Press, 1936), Tractate Sanhedrin, p.130, note #2.

summoned! In order to preserve the authority of the courts, and the judges who constituted them, the Rabbis had to deny the involved parties the ability to reject the judges of official courts. The rejection of judges chosen for courts of arbitration, however, like those of the Syrian courts, was another matter altogether.

Yet, at the same time, there **were** rules by which individuals could be disqualified from initially becoming judges of standing courts. The Talmud lists a variety of reasons someone could be declared ineligible; do they apply to judges of courts of arbitration as well? Apparently so, for, as we saw above, the Mishna declares that one party may object to the judge chosen by the other, "ONLY IF THE OBJECTOR ADDUCES PROOF THAT THEY ARE EITHER KINSMEN OR [OTHERWISE] INELIGIBLE." As it turns out, these are the same criteria used to determine whether an individual is eligible to be a judge in a standing court. The importance of this point will become evident after we have examined the reasons for which a judge might be disqualified.

The first category of ineligibility is that of relatives. This comes from the Mishna quoted above, that litigants may object to the judge chosen by the other, "IF THE OBJECTOR ADDUCES PROOF THAT THEY ARE EITHER KINSMAN OR [OTHERWISE] INELIGIBLE." (San. 23a) We learn in San. 27b just who is meant by "kinsman":

> **Mishnah.** NOW, THE FOLLOWING ARE REGARDED AS RELATIONS; A BROTHER, FATHER'S BROTHER, MOTHER'S BROTHER, SISTER'S HUSBAND, THE HUSBAND OF ONE'S PATERNAL OR MATERNAL AUNT, A STEP-FATHER, FATHER-IN-LAW, AND BROTHER-IN-LAW [ON THE SIDE OF ONE'S WIFE]; ALL THESE WITH THEIR SONS AND SONS-IN-LAW; AND ONE'S STEP-SON HIMSELF.

The basis of this particular disqualification is Deuteronomy 24:16. This is explained further on in San. 27b:

> **Gemara.** Whence is this law derived?-From what our Rabbis taught: "The fathers shall not be put to death for [on account of] the children." What does this teach? Is it that fathers shall not be executed for sins committed by their children and vice versa? But is it not already explicitly stated, "Every man shall be put to death for his own sin?" Hence, "Fathers shall not be put to death on account of children," must mean, fathers shall not be put to death on the testimony of their sons and similarly, "and sons shall not be put to death on account of their fathers," means, nor sons on the testimony of their fathers.

In similar fashion, the Gemara goes on to prove that this applies to all paternal relations and all maternal relations, and that it holds true of evidence given for condemnation or for acquittal, in capital as well as in civil cases.

A second category of individuals ineligible to be judges is that of interested parties, those who are נוגע בדבר. In a discussion of the possibility of renouncing one's interest in a particular matter, and thus becoming eligible to judge or give testimony, we read in Baba Batra 43a:

> Has it not been taught: If a scroll of the Law belonging to the inhabitants of a town has been stolen, the judges of that town must not try [the alleged culprit] nor can the inhabitants of the town give evidence [against him]?

The Gemara is declaring that since the scroll is for public reading, its theft affects everyone in the town, and it is therefore not possible to

declare oneself "uninterested," even by formal *kinyan*. Therefore, no one in the town is eligible to adjudicate or to testify. We infer from this that in situations in which one has an interest, one becomes ineligible as a judge.

The final category of exclusion which we will examine is that of רשעים, transgressors. It begins in the Mishna not as a category, but rather as a listing of shady characters who are disqualified by virtue of their professions. In San. 24b we read:

> **Mishnah.** AND THESE ARE INELIGIBLE [TO BE WITNESSES OR JUDGES]: A GAMBLER WITH DICE, A USURER, A PIGEON-TRAINER, AND TRADERS [IN THE PRODUCE] OF THE SABBATICAL YEAR. R. SIMEON SAID: AT FIRST THEY CALLED THEM 'GATHERERS OF [THE PRODUCE OF] THE SABBATICAL YEAR.' BUT WHEN THE OPPRESSORS GREW IN NUMBER, THEY CHANGED THEIR NAME TO 'TRADERS IN THE SABBATICAL PRODUCE.' R. JUDAH SAID: WHEN IS THIS SO?-IF THEY HAVE NO OTHER OCCUPATION THAN THIS. BUT IF THEY HAVE OTHER MEANS OF LIVELIHOOD, THEY ARE ELIGIBLE.

Immediately following this, the Gemara elucidates the wrong-doings of each of these types of people. Then, San. 25a tells us that "the Torah said: Do not accept the wicked as witness." While not an exact quote, this is taken by the tradition to be the meaning of Exodus 23:1, "You must not carry false rumors; you shall not join hands with the guilty to act as an unjust witness." Into this new category of "the guilty," the Gemara also places robbers, those who compel a sale, herdsmen, tax-collectors and publicans. As with the individuals listed in the original Mishna, each of these types was added for illegal or immoral acts. Thus, herdsmen are included because they intentionally drive their animals onto private property, while tax collectors and publicans are thought to overcharge.

So, רשעים becomes a catch-all category for disqualifying anyone known to be or suspected of being engaged in illegal or immoral activities.

There are other categories of disqualification for adjudication and testimony; indeed, Maimonides lists ten categories in all. However, the three we have discussed will suffice to show the importance of the fact mentioned earlier, that the criteria for disqualification of judges were the same for both standing courts and courts of arbitration.

As we saw above, either party in a dispute being brought before a court of arbitration may reject the judges of the other if they are found to be kinsmen or otherwise ineligible. (San. 23a) Naturally, this implies that either party is also free to accept the judges. This is made explicit in San. 24a:

> **Mishnah.** IF ONE [OF THE CONTENDING PARTIES] SAYS TO THE OTHER: I ACCEPT MY FATHER OR THY FATHER AS TRUSTWORTHY, OR, I HAVE CONFIDENCE IN THREE COWHERDS, R. MEIR SAYS, HE MAY [SUBSEQUENTLY] RETRACT; BUT THE SAGES RULE, HE CANNOT.

This Mishna, and the *sugya* which follows, illustrates a crucial point. The explicit acceptance of father or cowherd as a judge can be broadened beyond "relative" and "transgressor," to include all categories of otherwise ineligible individuals. The *sugya* says, "If one accepted a kinsman or a man [otherwise] ineligible [as judge or witness]..." (San. 24b). Thus we understand that, in cases of courts of arbitration, a litigant may accept as judge any individual, no matter what the cause of his ineligibility. This is **not** true in the case of a standing court; if an individual was found to be ineligible to be a judge, he was ineligible, period. Nowhere does the Talmud

indicate that anyone, not even the *Nasi*, has the authority to ignore the rules and appoint as a judge to a standing court someone who is פסול.

This distinction is the crux of the later problem, and so bears reiteration. The Talmud states that there are a variety of reasons that an individual may be declared ineligible to be a witness. Further, these causes of ineligibility apply both to standing, community courts which have been appointed by a higher authority, and to courts of arbitration which have been convened by the litigants themselves. However, while otherwise ineligible individuals may act as judges in courts of arbitration if they are accepted by the litigants, they may not under any circumstances serve as judges on the standing courts.

Several centuries after the final redaction of the Talmud, the rules concerning fixed courts, courts of arbitration and the eligibility of judges remained basically intact. In the **Mishne Torah**, Maimonides clarified many of the issues we raised above. Concerning the procedure for the establishment of fixed courts, he states that a court of three is indeed to be an established court. In the Laws of Judges, 1:1, we read, "It is a positive command to appoint judges and officials in every city and every district." After explaining which towns are to receive Sanhedrins, he says, "If a town has a population of less than one hundred and twenty, a court of three is established there. (Laws of Judges1:4)

Following that, we learn of the qualifications which Maimonides declared to be necessary for a judge. He goes through a long list of things, and then says:

> In the case of a court of three, all the above-mentioned requirements are not insisted upon. Nevertheless, it is essential that every one of the members thereof possess the following seven

> qualifications: wisdom; humility; fear of God; disdain of gain; love of truth; love of his fellow men; and a good reputation. All of these requirements are explicitly set forth in the Torah. (Laws of Judges 2:7)

Clearly, as these are indeed toraitic prescriptions, no one has the authority to appoint as judges individuals who do not meet these requirements. In addition to the character traits necessary, Maimonides stresses the need for *smicha*. In the first *siman* of chapter four of Judges, he says:

> No one is qualified to act as judge, whether of the Great Sanhedrin or of a Small Sanhedrin or even of a court of three, unless he has been ordained by one who has himself been ordained.

In order to circumvent the problem caused by the cessation in the fourth century of the laying on of hands as the method of ordination, he states:

> What has been the procedure through the generations with regard to ordination? It has been effected not by the laying of hands upon the elder but by by designating him by the title "Rabbi," and saying to him, "You are ordained and authorized to adjudicate even cases involving fines."

Also of interest are Maimonides' statements concerning individuals choosing the jurisdiction under which their case will be tried. As we saw in the talmudic system, there was a certain amount of leeway for individuals, especially creditors, to choose a particular fixed court to hear a case. Maimonides reinforces this point (Laws of Judges 6:6):

> If two parties to a suit are in violent disagreement with respect to the place where the lawsuit is to be tried, one saying, "Let us go to the local court," the other saying, "Let us go to the Supreme Court, lest the local judges make a mistake, and unlawfully exact payment of the claim," he is compelled to appear before the local court...

However, as we also said above, permitting defendants to refuse to be tried by a particular court would create havoc in the system. Therefore, Maimonides goes on to say (6:7):

> The preceding rule holds good in cases where both litigants appear as claimants, as well as in cases where the creditor insists that the suit be tried by the local court and the debtor demands that it be tried by the Supreme Court. But if the creditor is the one who demands that the suit be taken to the Supreme Court, the debtor must comply, for it is said, *And the borrower is servant to the lender* (Pr. 22:7). So too, if one who was injured or robbed desires to have his case tried before the Supreme Court, the local court compels the defendant to agree. This applies to similar cases as well.

At the same time, Maimonides maintains the distinction between these fixed courts, and the *ad hoc* courts of arbitration. In Chapter 7:1, he says:

> If one of the parties to a suit says, "Let So and so try by case," and the other says, "Let So and so try my case," the two judges, each chosen by one of the litigants, jointly select a third and the three try the suit, for in this way a correct judgement will be rendered. Even if the judge chosen by one

> of the parties is a great scholar and ordained, the litigant who selected him has no right to force him upon his opponent. The latter, too, can choose whoever he wishes.

The important phrase here is, "Even if the judge chosen by one of the parties is a great scholar and ordained." This clearly implies that the judge in this case does not have to be ordained. But as we saw, Maimonides states unequivocally that a judge in a community court, even a court of three, **must** be ordained. Thus, he is indicating that the particular court referred to in this chapter is not a standing court, and therefore must be a court of arbitration. The relevance of this to our topic becomes evident in the next *siman*, 7:2:

> If a litigant accepts as judge or witness a kinsman or a person who is otherwise ineligible, even if he accepts a person who is disqualified on the ground of religious delinquency to act as two competent witnesses or as a court of three fully qualified judges, and confirms the acceptance by a *kinyan*, he cannot retract.

As did the Talmud, Maimonides affirms the fact that an individual may accept as a judge in a court of arbitration someone who under no circumstances would be permitted to serve on a standing court. And, while he does not go on to enumerate those included under the phrase, "a kinsman or a person who is otherwise ineligible" (a surprising omission!), it is a clear reference to the categories listed by the Talmud. Thus we see that, for Maimonides, the distinctions between standing courts, and courts of arbitration, remain. Most importantly for our discussion, standing community courts absolutely had to be made up of ordained judges, while courts

of arbitration could be made up of just about anyone, as long as the litigants agreed.

Yet by the 13th century, a fundamental shift had occurred, and we find it reflected in the responsa of the Rashba. In one particular case, a community found itself in need of adjudication on the subject of a local tax. They had decided to allow the local court to hear the case, and wanted to know if this was permissible, since the judges were obviously interested parties, and coincidentally related to many of the townspeople. The Rashba declared that it had become customary for communities to accept interested parties and/or relatives as judges in certain cases, and that this was legitimate.[4] But as we have seen, this was, talmudically speaking at least, not at all legitimate. The right of accepting an otherwise ineligible individual as a judge applied only in cases to be heard before a court of arbitration, and not to those tried before a standing court. Here, however, the distinction between the two categories becomes blurred; rules concerning courts of arbitration are used in regard to standing courts. This seemingly minor decision represents a truly fundamental change in the judiciary system, and it requires further exploration. Why would the Rashba, somewhat conservative in his approach to talmudic law, permit such a shift? The answer is to be found in the peculiarities of the demography of the time.

We already know that in matters of community concern, such as communal property, taxes, charities, and the like, all members of the community were considered to be interested parties, and therefore ineligible to judge or testify regarding that particular matter. This was based on the talmudic precedent concerning the stolen scroll of the Law.

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[4]Rabbi Solomon ibn Adret; שו"ת הרשב"א, (Tel Aviv: "ספריתי" Chaim Gitler), Vol. 6, #7.

The ruling made sense when communities were in close proximity to one another, and maintained close ties, for then outsiders might be sufficiently aware of what was going on to be competent to adjudicate a problem. In the diaspora, however, Jewish communities were increasingly isolated from each other, and intimate contact decreased correspondingly. This meant that, in cases affecting the entire town, there was often no longer anyone left to judge or to testify other than townspeople. If they were disqualified, there would be no way to adjudicate many of the pending cases. Add to this the fact that over several generations the isolated communities became increasingly in-bred, so that most townspeople were related and thereby disqualified yet a second time,[5] and the result would be an inability for the judicial system to function at all. The community desperately needed a solution to this problem. The logical response, the one to which the community turned, and which the Rashba supported, was to apply the rule permitting ineligible judges to serve in courts of arbitration to the standing community courts.

Logical, perhaps, and certainly needed, but as we saw in the first chapter, the Rashba also had some interest in maintaining rabbinic authority. The question, then, is how this ruling of his, to accept as judges individuals who were ineligible by reason of interest or relationship, served to support rabbinic authority. We will see exactly how, once we have examined the Rashba's possible alternate rulings.

One possibility, which was surely never a viable option due its extreme nature, was to say that the court system was no longer adequate, and something entirely new had to be found. Not only would this not solve

[5]Elon, Menachem, ed.; The Principles of Jewish Law, (Jerusalem: Keter Publishing House Jerusalem Ltd., 1975), p.658.

the communities' problem, it would also eliminate the rabbis' main power base, the judiciary.

The other solution that comes to mind would have been to accept the fact that for community matters the standing courts were no longer an appropriate venue, and to delegate these cases to courts of arbitration. The advantage of such a switch would be that courts of arbitration were already talmudically authorized to employ ineligible judges, if the litigants agreed. Thus, without violating any talmudic laws, the problem would be circumvented.

There are several difficulties with this option, however. One is that these courts of arbitration could use anyone, regardless of the cause of their ineligibility; once having opened the door for relatives and interested parties, the possibility looms all too large that transgressors might also end up adjudicating community cases. More to our point, however, is the fact that standing courts had to be staffed by ordained judges - rabbis - while, again, courts of arbitration could use anyone. Thus, any solution which took power out of the hands of the standing court and placed it with the courts of arbitration, also subverted rabbinic authority. The only practical alternative was to provide the community courts with a means for retaining the authority to handle cases for which their judges were talmudically ineligible. And this the Rashba did.

A subtle reinforcement of the authority of the standing courts appears one generation later, in the **Tur**. Actually, the reference predates even the Rashba, since it is a quote from Maimonides, but it remains significant. After a discussion of all of the qualities required in judges who sit on the Sanhedrin, we read in Hoshen Mishpat, Judges 7, that:

> The Rambam has written that even though we are not as exacting with a court of three as we are in matters concerning a Sanhedrin, [the judges] still must have seven characteristics.

He then goes on to list the seven characteristics, including wisdom, compassion, and upright character. Thus the judges of a court of three, while perhaps not as completely qualified as those of a Sanhedrin, nevertheless had high standards to live up to. The relevance of this for our topic is clear; "we are not as exacting" holds open the door for the official acceptance of individuals who might be ineligible by reason of interest or relationship, but who still possess the seven personal characteristics laid down by Maimonides. At the same time it excludes other categories of ineligibles, notably transgressors, who certainly do not fit the Maimonidean mold.

The general acceptance of these two categories of disqualified individuals as judges in the community courts continued unchallenged, and was finally codified in the **Shulhan Aruch**. Of course, Caro first provides the original halacha. In Hoshen Mishpat 7:12 we read:

> A judge may not adjudicate any matter in which he has an interest. Therefore, if townspeople are robbed of their scroll of the Law, the judges of that town may not try the case...And therefore, tax-collectors are not judged by judges of the city [in which they collect] because they [i.e. the judges] or their relatives have an interest in the matter.

However, several lines later, we see the following:

> If they have passed legislation, or if it is the custom in that city, that the judges of the city

> will pass judgement even on matters of taxes,
> they may pass judgement.

It is interesting to note here that Caro has endorsed the use of a community *takkanah* to solve a pressing problem, while in his commentary to the **Tur**, he had declared invalid community *takkanot* permitting annulment of marriage. For him then, the issue is not one of community authority to pass legislation; he clearly believes that communities have such authority. For Caro, as for the Rashba, the issue is one of realism; the communities have pressing needs, and so do the rabbis, and this solution happens to work out the best for all involved.

At the same time, however, there are limits to how far they are willing to go. After a passage in the Shulhan Aruch which permits relatives or interested parties to serve as witnesses, Isserles adds a statement saying that community leaders are like judges, and therefore they may not include among themselves anyone who is ineligible to be a judge as a result of transgressions.

This raises an interesting question with regard to a *takkanah* of the Lithuanian Council concerning the qualifications of those asked to serve as a מנהיג ("director") of a community. The Council's *takkanah* includes the statement that the qualifications required therein may be superceded by local *takkanot* in every instance except that of פסולים. In no case were those disqualified to serve as judges to be permitted to function as community councilmen.[6]

We must ask, however, to whom is this regulation meant to apply? We already know that kinsmen and interested parties were no longer

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[6]Simon Dubnow, ed.; פנקס המדינה, (Berlin: "Ajanoth," 1925), #63.

considered to be ineligible as judges, so we may infer that neither were they ineligible to be councilmen. This phrase in the *takkanah* must therefore be directed at those who are ineligible for some other reason. Isserles' comment provides the answer; the *takkanah* is directed at those who are ineligible by reason of transgression. Why would such a *takkanah* be necessary?

> The fact that our *takkanah* insists that the localities may not drop this "behavioral" requirement, even though a wide degree of autonomy was available in other aspects of the selection of the communities' officers, suggests that communities sought to appoint officers who were not qualified according to the *halacha*.[7]

If any doubt exists that this was in fact the reason for the *takkanah*, it is easily laid to rest by looking at a piece of legislation passed in 1761, near the end of the Council's existence, which substantially amended the original ruling. In this later legislation, the Council established guidelines to permit a certain number of members of a local council to be from the group otherwise considered ineligible. If the local council had eleven members, one could be פסול, where there were thirteen, two could be פסול, and if there were sixteen, three could be פסול. Since, just as we said above, the term פסול here cannot be referring to those ineligible by virtue of relation or interest, this means that the Council was giving permission for known transgressors to serve as councilmen! Obviously, this move was in some way an acknowledgment on the part of the Council of the needs of the local communities. It had tried to stamp out the practice altogether, but

[7]Denker; p. 42.

failing that, it sought a compromise position. If this entire analysis holds true, it is remarkable not for the permissive trend it highlights, but rather for the notable step of adding another category of ineligibles to the eligible list. This is the first time that רשעים, in the broadest sense of the word, are not categorically rejected for a position of trust.

Thus, the changing nature of the rules of the eligibility of judges provides a reverse image of those concerning annulment; while the latter go from permitted to forbidden, the former move from forbidden to permitted. And yet both processes are the result of the same historical tensions between what the rabbis need, and think the people need, and what the communities themselves want. In this particular case, the thinking for the most part meshed nicely, and there was little controversy. Much the same is true of the development of the rules concerning witnesses.

CHAPTER THREE

The laws concerning the disqualification of witnesses do not begin with the same dichotomy as do the laws of judges; it seems that they are basically consistent for all types of courts, whether fixed or *ad hoc*. Nonetheless, they too go through a profound development and change throughout the centuries, change which has continuing ramifications in modern Israel. Since this development has been largely documented elsewhere, it will be sufficient for us to proceed in less detail than with our previous topics.

As with judges, the laws of witnesses find their main source in tractate Sanhedrin. In fact, the categories of disqualified individuals are similar, being largely derived from the same texts. Thus we find that just as relatives may not judge one another, so too they are forbidden to testify in cases concerning one another (San. 27b-28a). We also learn that if a scroll of the Law belonging to a particular town is stolen, the inhabitants of that town cannot give evidence against the thief, anymore than the judges of the town may try the case (Baba Batra 43a). Further, we discover that all manners of transgressor are barred from testifying, as they are from judging (San. 24b). And of course, just as we said there were additional categories of individuals disqualified to be judges, there are others ineligible to be witnesses. But while the number and types of disqualifications may be similar, they are not identical. We read in Nidah 50a:

> Anyone eligible to judge is eligible to be a witness, but there are those who are eligible to be a witness who are not eligible to judge.

Phrased in reverse, this means that anyone disqualified as a witness is automatically disqualified as a judge, while those who are disqualified as judges are not necessarily disqualified as witnesses. One example of a category which straddles these two functions is women. While women are permitted to testify in limited circumstances, they are never allowed to serve as judges.[1]

This leads us to one area in which the laws concerning the disqualification of witnesses changed considerably to reflect the pragmatic needs of the community. While technically excluded toraitically from testifying (based on Deut. 19:19), women were gradually accepted as witnesses in pressing cases, and when no other witnesses existed. So, for example, women could testify concerning the death of an individual, if that testimony was required to free the wife from the status of an *agunah*. Similar cases hold true for minors and slaves. This, however, did not stop Maimonides from including them in the ten categories of people prohibited from offering testimony (Laws of Judges 2:9):

> There are ten classes of ineligibles, and whoever belongs to any of them is disqualified from testifying. They are: women, slaves, minors, the mentally deficient, deaf-mutes, the blind, transgressors, the self-abased, kinsmen, and those that have an interest in the matter.

He is, of course, presenting what he perceives to be the ideal law as expressed by the Talmud, so even though exceptions were already being made, they are not reflected here. They are reflected elsewhere, however,

[1]Tosefot asks, rhetorically, how we can reconcile this with the biblical story of Deborah, and the clear statement therein that she judged Israel. One answer given, a weak one, is that she taught the judges, and they passed the judgments.

and, as in the previous chapter, we will concentrate on three categories: transgressors; kinsmen; and interested parties.

The issue of kinsmen is pertinent here for the same reasons as it was with regard to judges. And, once again, our first clear evidence of change in this area is in the responsa of the Rashba. In one instance,[2] a community explains that in order to clarify things, they have passed legislation declaring that if relatives of Reuven testify that they saw him breaking his oath, and they are reliable people, then the court would accept the testimony. They want to know if this *takkanah* is valid. In addition, they want to know if they may rely on a woman or a minor. The Rashba's answer goes directly to the issue of communal authority. He says that while this is not in keeping with the Written Law, the community has the authority to legislate as they see fit to respond to the needs of the time. Though he fails to mention it, we know that this is also not in keeping with the Oral Law, and so the Rashba is acknowledging the community's power to violate the law if necessary. In this case, it is the law of barring relatives from being witnesses. In similar instances, he affirms the custom of the time to accept the testimony of interested parties, in cases such as those concerning taxes, in which all the townspeople are considered interested parties.[3]

The rationale for his decision to accept ineligible witnesses is less obvious than in the case of ineligible judges, because while this certainly helps the community, it is not immediately clear how it protects rabbinic authority. However, the issues of judge and witness are closely interwoven; to unravel one area would be to destroy the fabric of the entire system. After all, of what possible use are judges, even ordained rabbinic judges, if

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[2]Responsa of the Rashba; Vol.4, #311.

[3]Responsa of the Rashba; Vol.5, #286.

the judiciary process is rendered helpless through a lack of witnesses? Viewed in this light, the Rashba's decision makes a great deal of sense from both the communal and the rabbinic perspectives.

The Rosh presents a similar opinion in one of his responsa. There, a dispute arises over the validity of legislation aimed at preventing the sale of seats in the synagogue. The question asked of Rabenu Asher is whether it is possible to try the case at all, since all the witnesses are townspeople and thus involved in the matter, and since so many of them are related to one another. After discussing the case itself, the Rosh goes on to say, "It is a custom throughout Israel that we do not bring witnesses in from the outside to testify on [community] legislation and [community] agreements. Rather, we permit witnesses from the town to testify on all matters, and they are valid witnesses, even for their relatives, since they have been accepted by the inhabitants of the town."[4]

This leniency with regard to the acceptance of witnesses is hinted at rather obliquely in the **Tur**. In Hoshen Mishpat, 37, we are told:

> All those ineligible to judge are ineligible to testify, with the exception of those who love or hate [a person involved in the case], who can testify even though they are ineligible to judge.

The text continues with a list of the categories of ineligibility, and includes relatives, and interested parties! Now at first this may not seem the least bit lenient. However, in light of the responsa we have cited so far concerning the acceptance of both witnesses and judges, we can read this as a tacit approval of the practice. If the categories of disqualification for judges and witnesses are virtually identical, as the **Tur** claims, and judges

[4]Responsa of the Rosh; Section 5, #4.

who are ineligible by virtue of relationship or interest are still acceptable in certain cases, then it follows that the same would hold for witnesses. Despite its apparent reinforcement of the original talmudic rules, the **Tur** has in fact supported the new rabbinic position!

This attitude of leniency with regard to the acceptance of witnesses who are either interested parties, or relatives, or both, eventually becomes clearly stated codified tradition. Though he does present the original, "ideal" law, which says that these witnesses should be disqualified, Joseph Caro also bows to the weight of custom. In the Shulhan Aruch, Hoshen Mishpat 37:22, he says:

> Now we are accustomed to accepting witnesses from a community with regard to their legislation and their agreements...and they are valid witnesses even if they are related, because they have been accepted.

The development over time is clear; many of the areas of disqualification of witnesses, like those of judges, are eventually compromised. And, if our analysis in the previous chapter of the Lithuanian *takkanah* concerning community councils is correct, we would expect to find at some point a ruling accepting the testimony of transgressors. This is not the case however. There is no indication anywhere - not in the responsa, nor in the Codes, nor in the community legislation - that the testimony of unreformed transgressors was ever considered acceptable, under any circumstances. That is, until modern times.

In a case which came before the rabbinic court in Israel, a remarkable decision was rendered concerning the ineligibility of transgressors to serve

as witnesses.[5] A woman brought two witnesses (the only two who were at her wedding, which was not arranged by a rabbi) to prove that she was the widow of the deceased, and thus entitled to part of the inheritance. The other heirs tried to have her claim thrown out, saying that she was not really the man's wife, because there was no validity to the marriage. Part of their reasoning was that, according to Jewish law, the witnesses were not legitimate because they were desecrators of the Sabbath. The court upheld the validity of the marriage, and in the process set a new precedent. The judges said that we must give careful thought to the matter of the disqualification of witnesses as a result of transgressions between man and God; given all that has occurred in the world in our time, transgressions of this kind do not really undermine the believability of such witnesses. Further, the rule concerning transgressors was meant to be applied to robbers, and others of their ilk, and to those bearing false witness. Also, there are many instances when otherwise ineligible witnesses were accepted in response to the needs of time and place (as we have already seen). Therefore, these witnesses were accepted as legitimate.

The ramifications of this case could be far-reaching indeed, not so much as a result of the particular decision, but rather for the principle it represents. We saw in the area of annulment of marriage that once the Shulhan Aruch was accepted as binding, the fact that it came out clearly against annulment was sufficient to apply the *coup de grace* to the *takkanot* permitting it. By the same token, the Rema's comment on Hoshen Mishpat 37:22, that leaders of the community are like judges, and therefore they can never accept into their midst one who is ineligible to judge by virtue of

[5]Collection of the Decisions of the Chief Rabbinate of Israel, the High Court of Appeal, 1950, part 7.

transgression, should have been a similar control. Apparently however, it had only limited success, for as we saw, while the Lithuanian Council tried to prevent just such an occurrence, it eventually gave in to community pressure, and permitted a limited number of transgressors to serve as local councilmen.

However, the fact that Isserles' comment barring transgressors as judges follows directly on Caro's statement permitting ineligible witnesses indicates that he meant it to apply to witnesses as well as judges, and in that instance it seems to have worked; as we said above, transgressors were never accepted as witnesses. The impact of the modern rabbinic court's decision, therefore, is that it signals a movement beyond the law as codified in the **Shulhan Aruch**. This is a significant step, for, regardless of our opinion of the specific issues of this case, it reflects the renewed vitality of Jewish law in an autonomous setting.

CONCLUSION

Despite the brevity of this study, several facts concerning the nature of the development of Jewish law in the three areas examined have emerged quite clearly. These can, with little hesitation, be applied to the general corpus of Jewish law.

First, we have seen that there is indeed a change over time in the interpretation of laws, and, in some cases, even in the laws themselves. While the Codes may have offered a temporary stasis, permitting a wider dissemination of the law, until the **Shulhan Aruch** they aways remained just that - temporary. Thus, there was an ongoing need for new Codes to address the changes in the law; if there had been no changes, there would have been no need for more than one Code.

Second, we have seen that the motivation for change had different sources, depending upon the issue at hand. As far as the communities were concerned, annulment of marriage was a great idea; it was the rabbis who saw a problem with it, and it took almost ten centuries of rabbinic maneuvering to finally stamp out the practice. On the other hand, it was the communities which were experiencing difficulties with the rules concerning judges and witnesses, and they needed to do something about it. In those cases, the rabbis reacted to communal necessity. In all three instances, however, the control of the law remained mostly in the hands of the rabbis. They may have had their hands forced on occasion, as with the rules of eligibility, but they were able to maintain their position as interpreters.

Finally, as we said at the end of chapter one, the ultimate issue for both rabbis and communities was always one of pragmatism and survival. Whether they agreed or disagreed on a particular point of law, both were concerned with the broader question of how to continue to function as a Jewish community. If the rabbis sometimes picked up on trends before their

communities did, and had to fight the communities, as was the case with annulment of marriage, it may have been because it was their job to see the larger picture, and their scholarship and international connections helped them to do so. Even in the case of disagreement, however, the survival of the system was of the utmost importance.

The implications of these conclusions are quite profound. For the general area of Jewish law, they mean that *halachic* Judaism has been incorrect in seeing the **Shulhan Aruch** as the final source of modern Jewish law. It would be far healthier for all concerned for the *halacha* to continue to grow as it did for hundreds of years, unfettered by the falsely imposed stasis of a Code. The decision rendered in the rabbinic court in Israel concerning the admissibility of the testimony of a transgressor points the way in that direction.

For the rabbinate as a whole, this study offers a lesson in the use and maintenance of authority; there are certain battles that should be fought, and others that should be conceded gracefully. As we saw, though they had the authority of the law behind them, the rabbis sometimes had to back down, in part because the real source of their authority was the community itself. This still holds true.

Perhaps most important, though, is the implication this thesis has for liberal Judaism. Part of the autonomy and authority debate has centered on who makes the rules for Judaism in our emancipated society. One of the answers put forward has been the rabbinate, but this has been rejected out of hand by many who say that without the legal authority of *halacha* behind them, liberal rabbis can do little more than make suggestions. However, as we just said, while traditional rabbinic authority came nominally from the *halacha* itself, the real source was the community, which agreed to support

the rabbis' decisions because they all wanted the same thing, namely the survival of the Jews. Therein lies the possibility for liberal Judaism. Liberal rabbis **could** in fact be doing more than merely making suggestions, if the liberal community came to the same understanding that Jewish communities throughout the centuries have reached, that rabbis and communities, despite their differences, are both struggling for the same thing. The issue is not the continuance of any particular law or custom, for those can be changed, but rather the survival of liberal Judaism as a coherent, cohesive whole.

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