

## **The Emergence of the Mishna and Tosefta**

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### **Overview**

The Mishna is the foundational law upon which was built the two Talmuds, Babylonian and Jerusalem. It is widely accepted that it was Rebbi who compiled the Mishna and that he did so in order to facilitate the transmission of the Oral Law through the vicissitudes of future exiles. Nonetheless, it is also recognized that the Mishnaic form preceded Rebbi. In addition, Rebbi's Mishna did not freeze the process of the Oral Law, but rather closed the era of Tannaim and initiated the era of Amoraim. This essay will examine some of the questions regarding Rebbi's Mishna; what was the difference between Rebbi's Mishna and earlier Tannaic texts such that it ended the Tannaic era? What is the relationship between Rebbi's Mishna and other extant Tannaic texts, particularly the Tosefta?

## The Emergence of the Mishna and the Tosefta

Shamma Friedman<sup>59</sup> writes:

The early scholars of the Mishna and Tosefta based themselves on sources from the Talmud and Rishonim. Statements such as “an anonymous Tosefta is the opinion of Rabbi Nechemiah”<sup>60</sup> or that the Tosefta was compiled by Rabbi Chiya have clouded their judgement. They base themselves on the words of the Gaonim and Rishonim as if they based themselves on tradition and history rather than their own opinions.

Friedman, as a scholar of Jewish history, rejects this approach. Nevertheless, we feel that not only is the approach of understanding the Mishna and Tosefta from the words of the Amoraim, Gaonim and Rishonim the authentically Jewish approach, but in addition it is more useful. Historical conjectures of the kind that Friedman and other scholars make can be neither proven nor disproved. One can choose whether to accept them or not. What is certain, however, and thus more valuable to us, is how Jewish tradition has viewed these texts and understood their purpose, value and historical relationship to each other. For only this gives us insight into the halachic process as it continues into the present day. Thus in this article we will base ourselves on traditional Jewish texts to show how they viewed the Mishna and Tosefta.

### The Emergence of the Mishna

The corpus of Tannaic<sup>61</sup> texts takes on two different forms: exegetical<sup>62</sup> and apodictic<sup>63</sup>. The various midrashic halachic commentaries such as the *Sifra* and *Sifrei* are examples of the former,

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59 Friedman, S. (2002) *Tosefta Aiqta Pesach Rishon* Bar Ilan University Press. p. 93

60 Sanhedrin 86a

61 Meaning ‘from the time of the Mishna’.

62 Meaning ‘derived from Scripture’.

63 Meaning ‘Stated without reason’.

while, for the most part, the *Mishna* and *Tosefta* are examples of the latter. There is a long standing scholarly dispute as to which form came first<sup>64</sup>. In addition even according to those who claim that the exegetical form preceded the apodictic, there is a sharp difference of opinion as to when the apodictic form emerged in history. This form, also referred to as the “Mishnaic form”, is usually considered to be a precursor to Rebbi’s *Mishna*, for even a cursory examination of the *Mishna* reveals a composite of texts which were assembled in time<sup>65</sup>.

Chanoch Albeck<sup>66</sup> and David Halivni<sup>67</sup> locate the emergence of the Mishnaic form in the end of the first century in Yavneh. They base this claim on a *Tosefta* in *Ediyut*<sup>68</sup> which explicitly documents the construction of the first *Mishna* in tractate *Ediyut*.

When the Sages gathered at the vineyard of Yavneh, they said “there will be a time when a person will seek a word from the teaching of the Torah and will not find [it] and a word of the teaching of the Rabbis [scribes] and will not find [it], as it is written “Therefore, behold the coming of days when... they will wander in search of the word of God but they will not find it ... [when] one word of the Torah will not be like the other” (Amos 8: 11-12). They said: Let us begin with Hillel and Shamai. Shamai says...

According to Albeck and Halivni this *Tosefta* describes the emergence of the first Mishnaic form – *Ediyut*, which itself is a precursor to the rest of Rebbi’s *Mishna*. Further evidence of this is the unique form of the entire tractate of *Ediyut* which indicates its relatively early redaction. The decision to initiate a new literary form was made as a reaction to the destruction of the Second Temple. This

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64 Halevi, Y. *Dorot HaRishonim* vol 3 and Hoffman *The First Mishna*

65 See for example *Mishna Pesachim* 1: 1 and end of chapter 30 of *Mishna Keilim* and the commentary of Rabbi Akiva Eiger in both places.

66 *Introduction to Masechet Ediyut*, Hebrew, *Nezikin* 275-279.

67 *Midrash, Mishna and Gemarah* p. 43.

68 Chapter 1 *Mishna* 1.

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terse Mishnaic form would facilitate the memorization and transmission of the Oral Law in the stormy exile ahead.

In my opinion that this Tosefta is not describing the emergence of a new halachic literary form, but rather describes an attempt to arrive at a halachic consensus in an era of great halachic division and confusion. This interpretation is borne out by several Talmudic passages which directly discuss the above Tosefta. The question that should be asked is not what were the historical facts but how do the traditional texts view these facts.

This claim of Halivni and Albeck is contradicted by all Talmudic discussions of this same Tosefta. In tractate Shabbos 138b the Talmud develops the verse cited by the Tosefta in a different direction:

And what is meant by the verse “they will wander in search of the word of God?” They said, in the future a woman will take a loaf of bread of Terumah and will go to the Synagogue and study halls to know if it is impure or pure and she will not understand if it is pure or impure.

The passage above indicates that the Sages of Yavneh were concerned that in the future there would be no halachic consensus among the various schools of Rabbis. The remedy for this is to establish a universal opinion of Halacha, which is in fact what the continuation of the Tosefta does:

They said let us begin with Hillel and Shamai. Shamai says that [dough] is obligated in challah for a volume of a kav, Hillel says two kavs, and the Chachamim say not like this [opinion] or that [opinion] but rather [dough] is obligated in challah from a volume of a kav and half.

The term ‘Chachamim’ (which translates literally as ‘Sages’) seems to refer to those same Sages who gathered at Yavneh. Their decision was to do away with the plethora of opinions which were in existence

at that time and to establish a universal consensus unifying halachic observance. In this way they sought to prevent the catastrophic prediction of the prophet Amos.

This interpretation of the event of Yavneh and the goal in composing the Tosefta is also born out by the Talmud in Tractate Berachot 28a. The Talmud recounts an episode that took place at the end of the first century CE in Yavneh when Rabban Gamliel was ‘overthrown’ as the president of the Sanhedrin. As a consequence, the Talmud tells us that Rabban Gamliel’s strict exclusivity policies were abandoned, the ‘doors of the study hall were opened to all’, and ‘there was no halachic debate which was not resolved’ on that day. The Talmud adds that Tractate Ediyut was ‘taught’ on that day.

Assuming that the Talmud and the Tosefta are referring to the same event, it appears that the redaction of the Tractate of that time was an attempt, as the Tosefta indicates, to arrive at a halachic consensus. Another goal of the compilation of the Tosefta was to record the minority opinions. The reason for this is explicitly stated in the opening Mishna of Ediyut: “In order that a future Sanhedrin will be able to rely on minority opinions in the future if it should warrant it”. We will discuss the reason for this aspect of the Tosefta later in this article.

From these Talmudic passages, it is clear that the Sages of Yavneh were concerned with the danger of Halachic confusion fostered by multiple opinions and the need to arrive at uniform legal standards. This, then, was the interpretation of the Tosefta, according to the Talmud. This interpretation is offered by the Tosefot Rid<sup>69</sup>, who writes, concerning the Tosefta in Ediyut:

In the beginning of the dispute, first Shamai and Hillel disputed, and after that, disputation increased between the students of the House of Shamai and the House of Hillel.

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69 Shabbat ibid.

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This is the meaning of the verse “They will wander in search of the word of God”. In the beginning the Torah was clear without dispute, for if any doubt would arise the Sanhedrin would rule on it and establish the law for all of Israel. Eventually oppression increased and people could not study the Torah properly, and as a result, doubt and dispute increased in Israel

In addition to the above Talmud passages, which directly contradict Halivni’s claim, his position is not even supported by a simple reading of the Tosefta. In his book *Midrash, Mishna and Gemara* he points out that the text of the Tosefta which reads: “they will seek a word from the teaching of the Torah and will not find [it] and a word of the teaching of the Rabbis [scribes] and will not find [it]”, indicates that there will be a lack of clarity in the halacha even when there no dispute. The lack of clarity came from a literary form other than the Mishna. As a result the simple Mishnaic form was developed. However the exegesis which follows this statement: “‘The word of God’ – that one word of the Torah will not be similar to another’ seems to indicate that the uncertainty will arise from multiple opinions<sup>70</sup>.

To summarize, both the Talmudic and medieval interpreters concur that the Tosefta saw dispute as the impending danger and this is why the Sages compiled Ediyut. We conclude that Albeck and Halivni’s assertion that the Tosefta is describing the emergence of the Mishnaic form is unfounded.

Despite my disagreement with Albeck and Halivni that the Tosefta describes the historical emergence of the Mishnaic form, it is true that Ediyut seems to have been redacted and edited before Rebbi’s *Mishna*. (Perhaps for this reason, there is no separate Talmud on Ediyut).

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70 See *Chasdei David* who learns “the reasoning of one will not be like the reasoning of the second”

Masechet Ediyut represents a significant intermediate point between the change from the exegetic to Mishnaic form (which probably began earlier), and the final edition of the mishna as it emerged from the study hall of Rebbi in the beginning of the third century CE. This is clear from three unique aspects of Ediyut; the recording minority opinions; arriving at halachic consensus; and the structure of the mishna which is arranged by Sage and not by topic.

### **Rebbi's Mishna**

In light of our conclusion in the above section that the concern of the Sages of Yavneh was to prevent the fragmentation of the Jewish people after the destruction of the Second Commonwealth and ensure a uniform halachic observance with all that entails, what motivated Rebbi to further consolidate the Mishnaic form and redact it a hundred years later?

The answer is to be found in a Baraita in Bava Metzia<sup>71</sup> which says:

The Rabbis taught: those who occupy themselves with the study of Scripture are engaged in something which is only partially worthwhile; while those who occupy themselves with the study of Mishna are engaged in something entirely worthwhile, and will receive reward for it; but there is nothing more worthwhile than the study of Gemarah; one should always pursue the study of Mishna more than the study of Gemarah.

This Baraita presents us with an apparent contradiction. While the first part ranks Scripture, Mishna and then Gemarah in ascending order of importance, the last statement places the study of Mishna over that of Gemarah in importance. Both the Babylonian<sup>72</sup> and the

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71 33a.

72 Ibid.

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Yerushalmi<sup>73</sup> raise the issue and both reconcile the difficulty in different ways. The Bavli says:

Rabbi Yochanan says; this statement (that there is nothing more worthwhile than the study of Gemarah – Rashi) was taught during Rebbi's (Rabbi Yehuda HaNassi) lifetime. Everyone left Mishna and pursued Gemarah. As a reaction to this they were subsequently taught to pursue the study of Mishna more than Gemarah.

Rabbi Yochanan's remark that the pursuit of Gemarah more than Mishna was 'taught' during Rebbi's time indicates that in fact Rebbi's policy was to encourage the study of Gemarah more than that of Mishna. This is clear from Rashi's commentary which says that Rebbi's policy was to encourage people to study the reasons underlying the Mishna. This seems at odds with the popular conception of Rebbi as a codifier, or, to put in one scholar's words "a transmitter of law in apodictic form"<sup>74</sup>.

In fact the opposite seems true. Rebbi took laws which heretofore had been transmitted without explanation and sought to find their underlying reasons. In essence, if we are to understand that Gemarah is the elucidation and explanation of Mishna, as it is generally understood, then Rebbi was not the originator of Mishna but of Gemarah. It was only after people took reason too far, as the Gemarah tells us, that it was subsequently taught (presumably not by Rebbi but after his lifetime) that the study of Mishna should be reemphasised, even more than that of Gemarah.

The Yerushalmi resolves the contradiction in the Baraita in a different manner:

Rebbi Yossi the son of Rabbi Bun teaches that the statement (which says to pursue the study of Mishna more than that of

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73 Shabbat chapter 16 halakhah 1 (79b).

74 See Halivni, D. (1986) *Midrash, Mishnah, and Gemara* Harvard University Press; Cambridge and London pp. 54-59.

Gemarah) was said before Rebbi incorporated ('sank') most of the Mishnayot (in the Gemarah). However, after Rebbi incorporated most of the Mishna (in the Gemarah) one should always pursue Gemarah more than Mishna.

There is a tremendous difference between the Bavli's and the Yerushalmi's reading of the Baraita. The Bavli maintains that the Baraita was composed in historical sequence; the first part constitutes Rebbi's policy of encouraging Gemarah as opposed to Mishna whereas the second part is a 'reaction' to Rebbi's first policy and restates the importance of Mishna to reduce the imbalance.

The Yerushalmi, however, reads the Baraita in reverse historical order. According to the Yerushalmi the Baraita's first statement refers to the era after Rebbi incorporated Mishna into Gemarah, while the second part refers to a previous era before Rebbi incorporated Mishna into Gemarah.

While the two Talmuds differ on the precise reading of the above Baraita, they are nonetheless in accord with the fact that Rebbi's role was to encourage the study of Gemara. In the language of the Yerushalmi Rebbi "sank" the Mishna in the Gemara.

This understanding of Rebbi's role in initiating the 'interpretation' of Mishna through Gemarah is corroborated by what Rav Sherira Gaon says in his famous epistle<sup>75</sup>:

Perhaps you will ask why Rebbi Chiya composed [the Tosefta] and not Rebbi? [The answer is that] if Rebbi would have recorded everything that was taught it would have been too lengthy. Rather Rebbi recorded the main things such as general rules in covert short phrases so that from one word are derived fundamental and unbelievable reasons and piles upon piles of laws....

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75 Page 36.

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The language of Rav Sherira Gaon is taken here from the Talmud in Menachot 29b which says that God told Moshe Rabbeinu:

There is a certain person who will live in the future [at the end of] several generations and his name is Akiva ben Yosef who will expound on each point (or each letter) piles upon piles of laws.

Rav Sherira Gaon's usage of the phrase "expounded upon each point piles upon piles of laws" is a clear reference to Rebbi's replacement of the exegesis of Scripture with the exegesis of Mishna. This was to become the principle mechanism of the halachic process until the redaction of the Talmud in the fifth century by Ravina and Rav Ashi.

### **The Abandonment of Creating Halacha through Scriptural Exegesis**

Rav Sherira Gaon<sup>76</sup> writes that during the period of the Second Temple, before the emergence of Rebbi's Mishna, the laws were studied through exegesis of Scripture similar to the laws of Midrash Halacha that we find in the *Sifra* and *Sifrei*.

It is not clear when the shift from Midrash Halacha to Mishna took place, but from Rav Sherira's letter it appears to have been no later than at the end of the Second Temple period.

In addition, the Gemarah<sup>77</sup> implies that by the time of the Amoraim this methodology of generating new laws was invalidated:

Rabbi Yochanan said to Reish Lakish, 'I saw Ben Pedat who was deriving laws from Scripture like Moshe did through hearing the Divine Voice!' He (Reish Lakish) responded, 'Those are not his exegeses, but rather they are to be found in the Torat Kohanim (Sifra)'."

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<sup>76</sup> Page 39

<sup>77</sup> Yevamot 74b.

The passage seems to suggest that already by the time of Rabbi Yochanan (who was among the first generation after the Tannaim) the Amoraim were not entitled to derive original laws from Scripture. All halachic exegesis was already encoded within the Tannaic Midrash Halacha.

When was the authority to derive laws from Scripture curtailed? It would appear that since the final editor of the *Torat Kohanim (Sifra)* was Rav, who lived in the generation after Rebbi, the cessation of original exegesis must be located during the generation of Rebbi.

On the basis of this, we propose an added historical interpretation to the first part of the Baraita from Bava Metzia cited above:

‘Those who occupy themselves with the study of Scripture are engaged in something which is only partially worthwhile; while those who occupy themselves with the study of Mishna are engaged in something entirely worthwhile and will receive reward for it.’

The deeper meaning of the phrase ‘those who occupy themselves with the study of Scripture’ is ‘those who study and derive laws through exegesis’. The Talmudic statement in the Bavli that ‘this Baraita was taught during the lifetime of Rebbi’ can now give meaning to the entire Baraita. Rebbi initiated the era of developing law through the Gemara’s interpretation of Mishna. Therefore he first discouraged use of the old system of deriving law through exegesis. Those who are engaged in the study of Scripture in order to derive laws are engaged in a type of study which is of very ‘limited’ worth. It is better for them to engage in a study which is not directly Scripture-based - either Mishna or Gemarah (depending upon whether one follows the Bavli or Yerushalmi’s version of events).

As we have shown, Rebbe not only discouraged Scriptural exegesis as a methodology but also ended its authority. The Amoraic Sages after Rebbi only used verse to derive already established laws, but not to generate new ones. Hence Rav, one generation after Rebbi, put

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together the final compilation of Midrash Halacha which would forever provide an authoritative exegesis of verses for all future generations.

To summarize, the revolution engineered by Rebbi was the abandonment of deriving new laws through scriptural exegesis and its replacement by Gemara which derives new laws through interpretation of Mishna. As a consequence, Rebbi inaugurated an entirely new style of halachic process for the next era or Amoraim.

### The Emergence of the Tosefta

The historical circumstances surrounding the compilation of the Tosefta is in certain ways analogous to those relating to Scriptural exegesis outlined above. While the Tosefta is generally viewed as a 'commentary' on the Mishna, an analysis of both the relevant sources and the text itself of the Tosefta reveals a more complex body of law.

Rav Sherira Gaon in his above quoted letter writes;

And should you ask why Rebbi Chiya composed the Tosefta and not Rebbi? – Because if Rebbi had incorporated everything that had been taught, it would have been too lengthy. Rather, Rebbi limited the Mishna to essential laws and used abbreviated language so that one could derive piles upon piles of laws from even one word.... Reb Chiya then came along and incorporated into the Baraita details of the basic laws. Most laws in the Tosefta can be derived from the Mishna, and this can be seen from the story of Ilfa (Taanit 21a) who tied himself to the mast of a ship and declared that if there is a halacha that appears in the baraita of R' Chiya and R' Oshiya which he cannot derive from the Mishna then he will jump and drown in the sea.

The above passage shows that the Tosefta is not a direct commentary on the Mishna but contains detailed Halachos which are not explicitly found in the Mishna.

Rav Sherira Gaon appears to contradict himself when he writes<sup>78</sup>:

There is no doubt that after the Mishna was composed, the Tosefta was composed, and the laws of the Tosefta were taught as a commentary on the Mishna.

This latter passage indicates that Tosefta was composed as a commentary on the Mishna. The resolution of this apparent contradiction is that even though many of the detailed laws of the Tosefta were not original commentaries on the Mishna, nonetheless they were incorporated into a Tannaic corpus which was taught in conjunction with the Mishna. This is what Ilfa means when he says that he can derive the laws of the Tosefta from the Mishna. Even though the laws were not originally derived from the Mishna, they can be interpreted as implicit within the Mishna.

In a third passage Rav Sherira Gaon writes<sup>79</sup>:

Where Rabbi Chiya in his Baraita argues with Rebbi we disregard his opinion. When Rebbi wrote a halacha anonymously in the Mishna, even though originally there was a dispute, Rabbi Chiya often argues by citing the original dispute in his Tosefta.

This passage implies that there are laws in the Tosefta which were written either in order to directly dispute laws of the Mishna or to offer possible alternative views.

The above passages of Rav Sherira Gaon's letter imply that there are two distinct functions of the Tosefta. On one hand the Tosefta contains numerous Tannaic laws which were not incorporated into Rebbi's Mishna but are consistent with it. On the other hand, Rabbi Chiya's Tosefta is a work which argues on Rebbi's halachic decisions by presenting original disputes in places where Rebbi recorded his decision as an anonymous law.

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As a consequence we find two different literary forms in the Tosefta:

1. Details which are not explicitly found in the Mishna but which are consistent with it.
2. Direct commentaries on the Mishna which either offer alternative halachic points of view or limit the Mishna.

Many scholars question the classic understanding of Tosefta as interpretation of the Mishna because it contains much material that clearly preceded the Mishna<sup>80</sup>. However, after a close analysis of the medieval commentaries upon whom they base themselves, this view is mistaken. We have already discussed the opinion of Rav Sherira Gaon. Now we will look at Rambam's opinion of the purpose of Tosefta.

Rambam states in his Introduction to the Mishne Torah:

“Rabbi Chiya composed the Tosefta in order to elucidate (*be'er*) matters of the Mishna”.

Rambam here uses the term *be'er* as opposed to a similar term *perush* which he uses in the beginning of that same introduction:

“All of the commandments that were given to Moshe were given with their *perush* (commentary)”.

The Oral law given at Sinai is not the *bi'ur* of the commandments, but is rather their *perush*. The distinction between the two terms is as follows: *Perush* refers to a commentary which at the time of its composition was written with the explicit intention of interpreting and explaining something. When Moshe received the Torah, of necessity he received the *perush* with it, which explained God's intentions and meanings.

*Biur*, however, is to take an previous composition or tradition and attach it to a text to create a commentary. The important difference

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<sup>80</sup> See Friedman *Tosefta Atiqta* introduction.

between *biur* and *perush* is that in the case of the *biur*, the original work was not composed with this intention but is being used by a later authority as the basis for commentary. In other words, the text originally existed independently of the commentary. Conversely, *perush* provides the original intention of the text or tradition, and originated at the same time as the original. Without the *perush* the text is either meaningless, or subject to misinterpretation.

With this distinction in mind we can better understand how Rambam viewed the Tosefta. The entire passage reads as follows:

Rav compiled the *Sifra* and *Sifre* to explain (*be'er*) and make known the main parts of the Mishna. Rabbi Chiya compiled the Tosefta to explain (*be'er*) the matters of the Mishna. Rabbi Hoshea and Bar Kappara compiled Baraitot to explain (*be'er*) the words of the Mishna.

The exegeses of that Rav used in his *Sifra* and *Sifre*, as we have proven, must have been composed prior to the Mishna. Nonetheless, Rav adopted them as providing exegetical proof for the laws of the Mishna. In what is clearly a parallel statement, Rambam makes the same claim about the Tosefta. Statements which were originally made in other contexts were put together as a type of 'commentary' by Rabbi Chiya to give *biur* (as opposed to *perush*) to the Mishna.

When Rambam describes the purpose of the Talmud as the “*perush* of the words of the Mishna and the *biur* of its depths”<sup>81</sup> he is describing two ways in which the Talmud understands a Mishna. The Talmud either tries directly to interpret a Mishna, which is *perush*, or it uses some statement by a certain Tanna which was not originally referring to the Mishna as a *biur* of the Mishna.

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81 *ibid.*

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### The Problem of Tosefta

The often opposing viewpoints taken by the Tosefta and the Gemara have been extensively discussed both by the classical medieval Talmudic commentators and by modern scholars. In his classic compendium *Rabbeinu Asher (Rosh)* writes in *Tractate Chulin*<sup>82</sup>:

It makes more sense to say that the redactor of the Gemara did not want to bring laws which are taught in the Tosefta etc to resolve this issue for he was of the opinion that [this law] was not taught by Rabbi Chiya and Rabbi Oshiya and one should therefore only rely upon something which was known by the redactor of the Gemara. It also makes sense to say that the entire Tosefta was not made accessible until after the final redaction of the Gemara and is therefore not authoritative; it can be assumed that since the Sages desired to put together an authoritative legal corpus, they investigated all works written by the Sages and selected those which were authoritative and used only those in the Gemara. Therefore we cannot rely upon the Tosefta since the Sages of the Talmud themselves did not rely upon it.

The Rosh's opinion is that the Gemara did not bring proof from the Tosefta because it did not consider it to be authoritative.

Ramban writes in *Torat HaAdam*<sup>83</sup>:

We find in many places that the Gemara could have brought a Tosefta as a support and didn't.... There are many examples of this.

It seems that the usage of the word 'authoritative' does not have to be understood as meaning that it is not 'authentic'. It may mean that the Sage of the Gemara did not view the Tosefta as the authoritative interpretation of the Mishna or in some other legal sense. For this

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82 Chapter 2 section 6

83 47: 3

reason the Gemara adopts its own interpretation and legal line of reasoning, in contradistinction to that of the Tosefta<sup>84</sup>. This is indicated by Ramban in Bava Metzia 65a who writes:

It is the manner of medieval commentators in general to say that a law in the Tosefta which contradicts the Talmud is 'inaccurate' (*meshubeshet*).

While it is true that there are classical commentators who write that the Gemara was not aware of certain laws found in the Tosefta, from our point of view this amounts to not being authoritative. For the lack of knowledge of parts of the Tosefta is a consequence of the fact that it was not viewed as a corpus of legal authority by the Gemara.

The inconsistencies between the Gemara and the Tosefta have been a central topic of modern scientific Talmudic scholarship. In his *Introduction to the Talmud* at the end of a long discussion of the Tosefta, Chanoch Albeck concludes:

There is no doubt that many statements of the Amoraic Sages come from the Baraitot. However, in the study halls they were unaware of this fact, and so they mistakenly attributed them to the Amoraim. We also see that the Baraitot in the Tosefta are often different from the Baraitot in the Talmud and many times contradict them. We therefore conclude from this that the redactors of the Talmud were not familiar with the Tosefta which we possess, but that it was edited at the end of the Amoraic period.<sup>85</sup>

An altogether different opinion is taken by Yosef Nochum Epstein in his *Introduction to the Mishna* where he concludes:

Our Tosefta is therefore a compendium of old and new Mishnas. Some of them fill in our Mishna (either

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84 See also Rif Chulin chapter 3: 764; Rabbeinu Yonah cited in *Shita Mekubetzet* Ketuvot 21b, *Ohr Zarua* volume II: 368

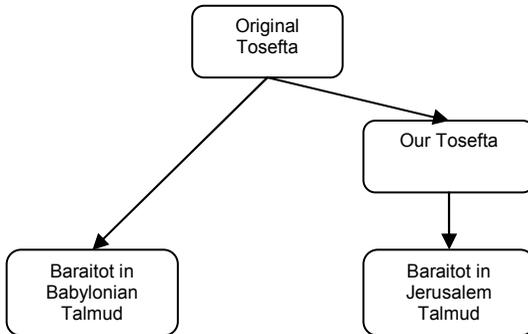
85 p. 137

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intentionally or unintentionally) or take issue with it. Some bear no relationship to our Mishna, and their order is not always parallel to that of our Mishna. Rather in many places the order of the Tosefta appears to follow that of a Mishna which predates our Mishna: a more original and more logical order.<sup>86</sup>

With regard to the relationship between our Tosefta and the Gemara, he writes:

The relationship [between our Talmud and the Tosefta] therefore is that there is an original, proto-Tosefta which gave birth to two progenies: the Baraitot of our Talmud and our Tosefta. The Baraitot which are quoted in the Jerusalem Talmud are often from our Tosefta.



*Diagram of Tosefta according to Epstein*

While the historical details of the theories of Albeck and Epstein differ, their common position is that the Babylonian Talmud, at least, operated without knowledge of our Tosefta.

Traditional Judaism cannot, however, accept this opinion. The claim that the Tosefta was compiled after the Gemarah negates the

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historical testimonies of the medieval authors<sup>87</sup>, and also contradicts explicit statements in the Gemara<sup>88</sup>.

In recent years a third opinion has been formulated due to S. Friedman and J. Hauptman. This opinion asserts that our Mishna used the Tosefta as its basis and is in fact, in many cases, a concise summary of it. The implication of this opinion is that the Talmud, where its interpretations of the Mishna differ from that of the Tosefta, is in fact arguing on it<sup>89</sup>.

This claim that the Mishna is a summary of the Tosefta therefore undermines the veracity of the Talmud's interpretation of Mishna, since it almost never seeks to understand Mishna in light of Tosefta.

## Two Rabbinic traditions

It seems to me that we can formulate a more traditional and comprehensive explanation of the nature and function of the Tosefta. Rav Sherira Gaon, cited above, asked why Rabbi Chiya wrote the Tosefta, or alternatively, why Rabbi rejected that collection of Baraitot which contained the Tosefta and opted for Mishna. Rav Sherira Gaon answered that Rabbi Chiya sought to record greater detail whereas Rabbi, by keeping the Mishna compact and terse, was creating a text from which the Gemara would be able to derive piles upon piles of Halachos through exegesis./z This dichotomy of Talmudic-like hermeneutics and source analysis describes the dual nature of the Tosefta.

By including more Baraitas R' Chiya sought to expand the database of sources, thus producing a more reliable and accurate account of Tannaic material, including that of the Mishna itself. On the other hand, Rabbi understood the constraint of source analysis and saw the

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87 Rav Sherira Gaon and Rambam cited above.

88 Sanhedrin 86a: "An anonymous Tosefta is the opinion of Rabbi Nechemiah".

89 Friedman, S. (2002) *Tosefta Atikta Pesach Rishon* Bar Ilan University Press; Hauptman, J. (2005) *Rereading the Mishna* Mohr Siebeck, Tubingen, Germany.

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Mishna as the basis of generating ‘Gemara’. He wanted future generations to make use of a technique which could produce new ideas which could be ‘derived’ from the Mishna, even though not explicitly stated.

We should not understand Rabbi Chiya’s Tosefta as overly conservative and undermining Rebbi’s approach of creating Gemara. Part of the Rabbinical process of hermeneutics is to preserve earlier materials as a type of ‘check’ on the theoretical process of Rabbinical interpretations.

The Mishna in the first chapter of Ediyot states that minority opinions were recorded in the Mishna to allow future generations to have halachic alternatives. In fact, the Gemara in Berachot<sup>90</sup> relates the historical event of an ‘uprising’ against Rabban Gamliel. The Talmud tells us that the doors of the study hall were opened, more students were admitted (even those whose fear of heaven was not on par with their intellectual processes) and all halachic debates were resolved. In addition tractate Ediyut was taught on that day.

The events of this day appear contradictory. Opening the doors of the study hall to everyone allowed for expanded halachic debate and consensus in resolution. Yet on the same day they recorded minority opinions and the testimonies of tradition which runs limits the development of halacha and appears to run contrary to expanded halachic debate.

Clearly both expansion and limitation are necessary for the development of Halacha with integrity. The minority opinions provide alternatives while testimonies act as checks and balances, ensuring the preservation of tradition alongside the growth and flexibility of the halachic system.

In a similar way we can understand Rabbi Chiya’s Tosefta. As Rebbi introduced Gemara – the technique of deriving new laws through

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original and creative interpretations of Mishna, Rabbi Chiya ensured that the original sources be preserved for future generations.

Based on the above principle we now have a new understanding of the Bavli's interpretation of the last part of the Baraita in Bava Metzia 33b:

This statement (that there is nothing more worthwhile than the study of Gemara) was taught during Rebbi's lifetime. Everyone consequently left Mishna. In reaction, they were subsequently encouraged to pursue more the study of Mishna than Gemara.

Rashi states that "it was Rebbi who encouraged people to study Gemara more than Mishna".

Who was it, then, who reversed the process and encouraged the study of Mishna? Perhaps we can venture to say that it was Rabbi Chiya, Rebbi's student, who by compiling the Tosefta put more of an emphasis on source study.

## **Appendix**

Based upon the above analysis, we arrive at a new appreciation of the Mishna, Tosefta and Raavad's commentary in the first chapter of Tractate Ediyut. Mishyanot 4 and 5 of chapter 1.

There is only one Mishna that speaks about the nature of Mishna. There is also only one Tosefta which speaks about its role. These are parallel pieces in the first chapter of Ediyut. Given that the Tosefta was intended to give halachic rulings, it would make sense if we see the Tosefta taking a more conservative position on overturning majority opinions. Conversely the Mishna which encouraged creative interpretation would be expected to take a more liberal view with respect to overturning earlier majority rulings.

4. Why are the views of Shamai and Hillel recorded only to subsequently be rejected? To teach future generations that one

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should not insist on maintaining this view. For we see that our forefathers did not insist on maintaining this view.

5. And why is the opinion of one individual included with the majority opinion – since the halacha is like the majority? In case a [future] court should examine the individual opinion and choose to rely upon it. For a court cannot overturn the position of a previous court unless it [the latter court] is greater in both wisdom and numbers.

The corresponding passage in Tosefta Ediyut, chapter 1, 1 and 2 reads as follows;

An incident took place when two weavers came through the Gate of Ashpot in Jerusalem and testified in the name of Shmaya and Avtalyon that a volume of three logs renders a mikva (ritual bath) unfit and their testimony was accepted. Why is the place [that they came through] and their professions mentioned? There is no profession lower than that of a weaver, and no place more disgusting than the Gate of Ashpot? To teach us that just as scholars in previous generations did not insist on maintaining their view in the face of oral tradition, how much more so should we not insist on maintaining our positions in place of oral tradition.

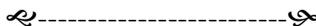
One should always rule like the majority. Minority (individual) opinions are recorded only because perhaps in times of need one can rely on them.

In his commentary on Mishna 5, Raavad points out the difference in language between the Mishna and Tosefta. He writes:

The language of the Tosefta is that should the court be in need of [the individual's] ruling for a short period of time and rely upon it. This is similar to the language [which we find elsewhere in the Talmud] that “the court of law cannot rely upon a minority opinion except in a time of need” (see Nidah

9)... it is possible to say that the reason given in the Tosefta is distinct from the reason given in the Mishna, for in the Mishna the latter court of law can examine the minority opinion and rely upon it, meaning to establish permanently that the law is like the minority opinion, just as we see often that 'later Amoraim (Talmudic Sages of the Gemara) will establish the law in accordance with minority opinion of previous generations, even though the majority argues on them. However, if minority opinions were not recorded they would not reject [the majority] opinions based upon their own reasoning for a later court cannot etc. but since the minority opinion is recorded along with the majority opinion, they can rely [permanently] upon the minority opinion. However the Tosefta offers another explanation as we explained above and this is the principle interpretation.

We see according to Raavad's second understanding of the Mishna and Tosefta, which he himself writes is the principle interpretation, that there is a fundamental methodological difference between the Mishna and the Tosefta. The Mishna advocates the permanent rejection of majority opinions by minority opinions by later generations of scholars in much the same way as we say the Gemara itself rules like the minority opinions. The Tosefta, however, accords far less power to future rulings. Minority opinions may only be relied upon temporarily. The power of future interpretations is vastly limited. This distinction clearly highlights the central thesis alone which was gleaned from the Talmud and the letter of Rav Sherira Gaon. The Mishna of Rebbi was constructed with the agenda of creating the basis of a new judicial hermeneutics which would grant ultimate halachic power to later interpreters of the Mishna. The Tosefta of Rabbi Chiya was redacted in order to curtail this power and rule more in accordance with previous sources and not novel interpretations.



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