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# *Minority Opinions and their Role in Hora'ah*

## *I. Introduction*

IN TRANSITIONING from the abstract and theoretical learning of the beit medrash, Halakhah and its practitioners are called upon to narrow the various possibilities of legal decision and issue normative rulings. The plethora of opinions and possible choices, while stimulating and reflective of the polyphonic nature of the system, often needs to be systematized and formalized in order that there not be chaos, or in the language of the rabbis, *shelo yehei ke-shtei torot be-yisrael*.

Any student of rabbinic literature, while nurtured on the ethos of *eilu ve-eilu divrei Elokim hayyim*,[1] is aware that in the practical realm the narratives of R. Gamliel coercing R. Yehoshua to present himself in the court on the day R. Yehoshua felt was calenderically Yom Kippur seem to be determinative. Furthermore, the upshot of the celebrated *sugya* in *Bava Metzia* (59a-b) of *tannur shel akhnai* is that the majority view of the rabbis on earth is what determines normative practice. Majority rule is a principle ingrained in the functioning of the Sanhedrin in Jerusalem and all lesser courts. Indeed, the rebellious elder (*zakein mamrei)* who tenaciously maintains his minority view and rules for others to follow in his footsteps is liable for capital punishment; a phenomenon that certainly gives pause to any notion that the minority voice retains operative status after the court has ruled.

Yet there still exists a number of areas in which the minority viewpoint is not only given an airing but has operative value and status. It is the intention of this essay to briefly examine a number of the realms in which the minority view maintains a degree of operant status and halakhic significance.

In concluding this short introduction, two caveats must be added. First,

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the discussion below is not exhaustive or comprehensive. Much work remains to be done to unpack fully the parameters of this important area of halakhic jurisprudence. Second, the discussion in this essay is primarily halakhic-juridic. It does not attempt to outline a historical template of the development of the concept of majority rule in halakha and the internal or external forces that may have possibly shaped the way those rules were understood and redefined in various eras. In addition, this essay does not address the underlying meta-halakhic and philosophic issues of our topic. Questions such as whether the halakhic system is a monistic or pluralistic one; is majority rule simply a procedural tool or does it approximate "truth" to the greatest extent possible are issues that have engaged many thinkers throughout the ages, both medieval and modern. They, however, have been treated elsewhere in great depth.[2]

## *II. The Definition of A "Majority" View and Its Binding Nature*[3]

The principle *halakhah ke-rabbim*[4] (the law is in accord with the majority view) is commonplace in discussions of Jewish law and seems to be accepted as a given in all of halakhic literature. A critical question though to examine at the very outset is the exact definition of a majority view in halakha and its binding status. Maimonides in his *Sefer Ha-Mitzvot* commenting on the biblical verse (Ex 23:2) "Follow after the majority" indicates that there is a biblical command to follow the majority view: "if there is a difference of opinion among the sages regarding any of the laws of the Torah. Similarly, if in a private lawsuit . . . a difference of opinion should arise among the judges of the litigant's city . . . we have to accept the majority."[5] In this passage Maimonides indicates that the biblical principle of majority rule applies both in a dispute amongst the sages regarding interpretations of Jewish law as well as any court adjudicating the claims of two litigants. What is unclear in the Maimonidean formulation is to which "sages" he is referring: is it only to those who formulated the basic substructure of Jewish law in the period of the Sanhedrin, the great court in Jerusalem, to all of the rabbis of the talmudic era or even to all subsequent Jewish scholars across the ages? In addition, this formulation does not clearly address the question whether the majority principle also applies to disputes across historical periods or only to scholars who debated "face to face" directly? R. Shlomo B. Aderet (Responsa, *Rashba*, Vol. 2:104) in an important responsum (that is surprisingly not cited in many discussions of this topic) argues forcefully that the principle of majority (*rov*) in the context of a court adjudicating a court dispute between two

litigants is only applicable "when the those who find guilty or those who find innocent are more numerous in the context of debating the issue amongst all of them—*masah u-matan shel kulam*— . . . but a majority that is separated from the entire totality of judges . . . is not valid". This limitation, articulated by *Rashba* in the context of a court case, is made explicit by many later authorities, such as R. Yosef b. Haviv in *Get Pashut*, *Kelal* 5 and R. Yeshayahu Karelitz in his *Hazon Ish*, *Kelaim*, Section 1 as applying to disputes of Jewish law amongst the rabbis outside of court cases as well. According to these authorities only when the decision as to the point of law was actually debated by the rabbis "face to face" and a vote was cast—*amdu le-minyan*—do we say that the majority view is binding and the minority opinion is no longer valid.[6] A majority opinion that is derivative of a conglomeration of the views of various authorities or works over the course of decades and centuries would not be accorded the status of a real majority view on a biblical level.[7] At the same time, it is clear that though the actual biblical status of majority may not be applicable to the typical debate found in the *poskim* that cuts across centuries and geographic locations, traditionally following the majority view has been seen as a dominant principle of adjudicating disputes of halakhah amongst the *geonim*, *rishonim* and *aharonim*. The greatest representative of this approach in the history of halakha is, of course, R. Yosef Karo, who in his monumental code, *Shulhan Arukh* laid down his famous principle of following the majority voice amongst the three pillars of *horaah*, Rif, Rambam and Rosh in deciding normative Jewish practice. It must be noted, though, that there were prominent halakhists who took strong issue with this entire approach, even if in the end their view did not remain the dominant one in much of subsequent halakhic discourse. Prominent among these decisors was R. Shlomo Luria who in unequivocal terms argued for the primacy of deciding disputes between *rishonim* and ambiguous cases based upon compelling Talmudic evidence, cogency of the arguments, and logic and autonomy of the judge to rule using his halakhic intuition.[8] Throughout the generations these two approaches have continued to be reflected in the approaches of various schools of *psak*, such the Lithuanian *poskim* who were influenced by the independent minded course of the Vilna Gaon, were more likely to challenge rulings of the *Shulhan Arukh* and "consensus" views in halakha versus the Hungarian *poskim* who were much more wedded to strict adherence to the rulings of the *Shulhan Arukh* and the majority of the prominent *aharonim*.

A secondary issue that arises in trying to determine what is the majority or minority position is a practical one. In an ironic twist of history both R. Yonatan Eibeshitz in *Kitzur Tekafo Kohen*, section 123, and his arch

nemesis, R. Yaacov Emden in Responsa *Sheilat Yaavetz*, 157 raise the concrete dilemma as to how can we be sure that we have indeed seen everything that has been written on this topic and catalogued every rabbinic voice that has ever proffered an opinion. Do we truly know the views of the dozens or hundreds of scholars who lived in the era of the R. Alfasi or R. Shabbtai ha-Kohen but did not commit their positions to writing or did but whose writings were lost to history through dislocation, confiscation or were destroyed in anti-Jewish rampages throughout the ages?[9]

In a similar fashion to what was mentioned at the close of the previous section, though these theoretical objections to the binding nature of majority rule were raised by various authorities throughout the ages, in practice, the normative principle of deciding disputes amongst the *poskim* via adoption of the "majority" view remained one of the consistent rules used by many rabbinic scholars.

A critical issue in determining the scope and power of the "majority" view is the relative status of the scholars disputing the point of law at hand. *Sefer Ha-Hinukh* in *Mitzvah* #78 writes that the principle of majority rule only applies in situations where the rabbinic disputants are of equal stature. However, in instances where the minority position is held by a scholar who is "greater" than the scholars of the majority, his view is not discounted. This view argues that the debate must be between scholars in the same league before the principle of majority rule can be applied. The view of a scholar of great stature who brings with him an intimate and wide knowledge of halakha cannot be discounted simply as a result of a mechanical numerical majority of second or third tier scholars who take issue with his ruling. *Minhat Hinnukh*, commenting on that passage, argues that the source of this insight of *Sefer Hinnukh* is an explicit line from the celebrated passage in *Yevamot* 14a regarding the long-running disputes between the houses of Hillel and Shammai. The Talmud in *Eruvin* 13a states that after years of debate, a heavenly voice came down and declared "the law is in accord with the rulings of the house of Hillel." In *Yevamot* 14a the Talmud attempts to explain why there was a need for a heavenly voice if one assumes that, in any case, they were in the majority. The Talmud suggests that one follows the majority when they are "equal" but since *mehaddei tefei*—"the rabbis of *Beit Shammai* were sharper" there was a need for heavenly intervention. *Minhat Hinukh* argues that the meaning of this phrase is that *Beit Shammai* were of greater stature in learning than *Beit Hillel* and thus if not for the heavenly voice, the rule of majority rule would have been discarded in this instance. This approach has been echoed by other authorities in varying permutations throughout the ages,[10] though it should be

noted that a number of prominent *aharonim* did not make these distinctions and simply argued for following numerical majority without weighing the stature or scholarship of the disputants.[11]

A final issue that is treated in some of the literature is the question of the role of weighing the relative cogency of the respective arguments of the minority and the majority in determining law. In other words, can a *posek* who is convinced that the arguments of the minority view are more convincing in this instance ignore the view of the majority? R. Menachem Kasher *zt"l* notes in his magnum opus *Torah Sheleimah*[12] that the Babylonian Talmud records six instances in which there is a dispute amongst *tannaim* between the majority and the minority. In these cases, the Talmud explicitly states that the law is in accord with the majority and the Talmud then asks why is necessary to state this given the principle that the law follows the majority view. To this query the Talmud responds that one might have thought that *mistaber ta'amei* or *nimuko imo*—the argument of the minority is more cogent and convincing, and thus is necessary to state that despite this fact we rule with the majority. R. Kasher notes that there are at least three other passages in the *bavli* in which the Talmud rules like the minority view in the face of the majority position. Why is this so? The simple understanding appears to be that in these instances the logic of the minority view is so overwhelming that it trumps the principle of *halakha ke-rabim*. In at least one of these three instances, the important geonic work *Sheeltot*[13] explicitly reads the Talmud as stating that the ruling is in accord with the view of R. Yosi because his logic is more convincing. As R. Kasher and others note, this may in fact be the plain meaning of the line in the passage in *Yevamot* 14a we cited above. In this reading the term *mehaddei tefei-* means that the rabbis of *Beit Shammai* had more convincing arguments and thus the law should have been in accord with their view if not for the heavenly voice. If that is indeed the meaning of this passage and not that *beit shammai* were of greater stature, one would have another talmudic source for the principle of adopting the minority read in cases where there arguments are more cogent. It is clear that in a number of instances, major *rishonim* were willing to rule like the minority view in a *tannaitic* or *amoraic* dispute that had not been resolved in the Talmud based on the greater cogency of the minority's arguments, though some expressed reservations as to whether there was anyone worthy of making such in assessment in our generations.[14] Regarding post-talmudic disputes amongst the *poskim*, it would appear that here too different schools of *pesak* adopted differing attitudes as to the legitimacy of using the criteria of *mistaber taamo shel ha-yahid* to sway their decision-making.

## *II. Minority Views and their Role in Overturning Previous Rulings*

The celebrated *mishnah* in Tractate *Eduyot* (1:5) is the *locus classicus* to begin any discussion of the role and place of minority opinions in the halakhic system.

The *mishnah* famously inquires: "Why does [the *Mishnah*] preserve the opinion of an individual against that of the majority, seeing that the adopted ruling is in accordance with the majority? This is so that if a court favor the view of the individual, it may rely upon him, for a court must not annul the view of another court unless it excels it in wisdom and number".[15] In understanding the import of the answer of the *mishnah*, a number of suggestions are offered by the medieval commentaries on the spot.[16]

Looking at Maimonides' comments to that *mishnah* seems to yield a fairly narrow reading. Maimonides contends that the meaning of the *mishnah* is that a previous court that ruled in a specific direction based upon its adoption of a minority position cannot be overturned by a subsequent court unless that new court is greater in number or wisdom. Read in isolation, Maimonides' comments seem to give weight to the minority view but only if it is adopted by a previous court. One could interpret this to mean that the "minority view" carries weight because though it began as a solitary view, it was transformed into something more when it was endorsed by a majority in the formal context of counting votes in the court. A view that began as a purely minority voice was given the imprimatur of the judicial system represented by the court of that time, removing it from simply being a solitary view. It should be noted, however, that Maimonides himself in a comment in his *Introduction to the Commentary to the Mishnah* adds another dimension to his understanding of this *mishnah*. In the middle of that text after his celebrated division of the content of the Oral law into five parts, he refers to the *mishnah* in *Eduyot* and states: "However the reason it was necessary to record both the position of the minority and the majority is because it is possible that the halakhah should be in accord with the minority view, and thus it comes to teach us that if the logic of the minority view is correct and clear, one listens to his opinion even though majority take issue with him". Maimonides here seems to take the import of the *mishnah* in *Eduyot* to be highlighting an obvious but important point: halakhic truth is not determined by majority. While ruling in favor of the majority is often a practical guideline that helps us in the practical realm, there is no guarantee that the majority has willy nilly hit the mark in getting the decision "right". In fact in many instances, the logic and weight of argument may favor the view of

the minority and thus it is fully legitimate for the court to adopt that position. A subsequent court that hopes to overturn that *psak* needs more than just a simple majority but a whole phalanx of conditions to allow it to supercede the previous ruling, even if it has the majority on its side.

More significant on a practical level are the readings of R. Abraham ben David of Posquieres (*Ra'avad)* and R. Shimon of Senz (*Rash Mi-Shantz*). Both of these *rishonim* understand the *mishnah* in more radical terms. In their reading of the text, the *mishnah* is teaching us that the existence and citation of the minority opinion indicates that the halakhic system still views that position as a "live option". Under normal circumstances, a later court cannot overturn or rule in contradiction to a previous court unless it is greater than it in numbers and wisdom. However, if the second court is relying on an opinion listed in the *mishnah* that is of minority status, it can overturn a ruling of a previous court even if it is of inferior status in numbers and wisdom. Indeed, both these authorities understand that the ability of the *amoraim* to contest rulings of the *tannaim*, though they were considered of inferior status is often rooted in this very technique of deciding in favor of the alternative view in the *tannaim*, though it may only be a minority voice. In explaining the deeper rationale behind this framework, *Rash Mi-Shantz* writes: "And it is upon this basis that we can rule like his [the minority's] view for the Torah has already stated: 'Follow the view of the majority' and though the view of the minority was not accepted in earlier times, in another generation when the majority will agree with that view the law will be in accord with that position for the Torah was given to Moses with [forty-nine] potential readings to rule a situation impure and [forty-nine] potential readings to rule a situation pure and when it was asked of him 'until when will we then be able to come to a resolution?' and he told them Follow the majority, however, these and these are the words of the living God". Here *Rash Mi-Shantz* is directly expressing the deep rooted notion of halakhic pluralism embedded in the concept of *elu ve-elu* as understood by many medieval commentaries.[17] The minority opinion in this case is one of the legitimate potential readings of the halakhah and thus has validity, even if at a specific juncture of history it does not enjoy normative status.

The commentaries cited above speak in terms of *amoraim* dissenting from rulings of the *tannaim* and do not directly address whether the same would hold true for subsequent generations relating to previous rulings of the *amoraim* or the *geonim*. In relation to the *amoraim*, this discussion may be moot as it may have been short-circuited by the acceptance of the Talmud as the final authority in Jewish law by the Jewish people (or at least

their scholarly elite).[18] The issue, however, would remain live in relation to the rulings of the *geonim* or any subsequent era of scholars who had come to a consensus. What is striking is that in this reading the subsequent court or possibly even an individual *posek* can reach back to the previous opinion, even without any aspect of *sheat ha-dehak* or pressing need playing a factor.

## *III. Using Minority Views In Times of Pressing Need*

The Talmud explicitly lays down an important principle in the area of halakhic decision making in *Berakhot* 9a when it states: "Rabbi Shimon is a great enough authority to rely upon in cases of emergency/pressing need—*sheat ha-dehak*." This means that in cases of *sheat ha-dehak*, one may rely even upon a minority opinion against the stringent majority view and rule leniently.

The first mention of this principle can be found in the *tosefta* to *Eduyot* (1:5) and possibly the parallel *mishnah* itself, which was cited above. The *tosefta* states: "The halakhah is always in accord with the majority view. The views of the minority were only mentioned amongst the views of the majority in case there may arise a time when there is a need to rely upon them" The text of the parallel *mishnah* (1:5) is more unclear: "Why do we mention an individual opinion alongside the majority, thought the halakhah follows the majority? So that a court may (in the future) approve the position of the minority and rely on it, for a court cannot overturn the decision of its fellow court unless it is greater in wisdom and number. If it was greater than it in wisdom but not in number, in number but not in wisdom—it cannot gainsay its decision, only if it exceeds it in wisdom and number." R. Abraham of Posqueires in his commentary to this *mishnah*, in his first explanation, explicitly links this *mishnah* to the *tosefta* cited above and reads them as being identical.[19]

From these *tannaitic* and *amoraic* sources it thus emerges that it permissible to rely upon a minority view in extreme situations, though the halakhah has formally been established according to the position of the majority. The *tosefta* and *mishnah* (as read by those authorities cited previously) maintain that a subsequent *Beit Din*[20] can rely upon a minority view to upend a stringent ruling of a previous court. In the *Bavli* (*Niddah* 9b), however, the Talmud limit's the principle of "R. Shimon is great enough to rely upon in an extreme situation" to situations where "the halakhah has not yet been stated explicitly—*lo itmar hilkhita*". However in situations where the halakhah has been explicitly decided in accord with the majority, one is not permitted to rely upon the minority view in any situation.[21]

This important caveat of the *Bavli* raises critical questions such as what is defined as "*itmar hilkhita*". Does it refer only to the formal decisions of the Sanhedrin in Jerusalem or does it include subsequent rabbinic decisions such as the consensus rulings of the *aharonim* in our day in age? In a word how far do we stretch the notion of *itmar hilkhita*? Let us present here a short overview of the key views on this topic from the most liberal and expansive to the most conservative and restrictive.

**1. Only an Explicit Psak, Not a Psak Derived from Rules of Decision-Making is Defined as *Itmar Hilkhita***

In *Sukkah* 31b, the Talmud cites a *tannaitic* debate between *Tanna Kama* and R. Yehuda as to whether a dried-out *lulav* is acceptable for use in fulfilling the mitzvah of taking the four species. *Tanna Kamma* posits that it is invalid while R. Yehuda allows its use. The *mishnah* at the beginning of the third chapter only cites the stringent opinion and thus based on the principle of *stam mishnah ke-tanna kama*, the consensus ruling of the *geonim* and *rishonim* is that a dried out *lulav* is invalid. R. Yitzhak Or Zarua in his novellae writes, however, "that in a situation of great need—*sheat ha-dehak*, that one cannot find a kosher *etrog* or *lulav,* one is allowed to recite the blessings on a rotten *etrog* or an *etrog* that has another invalidation such as a dried out *etrog* or a dried out *lulav*, for R. Yehuda is a great enough authority that one may rely upon him in times of great need. For though, in a dispute between the majority and the minority the law is in accord with the majority, since in this case it has not explicitly been ruled against the view of R. Yehuda, we rely upon him in times of great need."[22]

According to this view, *itmar hilkhita* is defined as only when the Talmud itself has explicitly ruled in favor of one of the sides in the debate. However, when the normative decision is arrived at by reference to standardized rules of *psak* such as "*yahid ve-rabim*, *halakha ke-rabim*; *halakha ke-stam mishnah*; *halakha ke-rav be-isurei*", though these principles are normative and binding, there remains the possibility of making use of the minority view in cases of great need. This view is also maintained by *Raavyah* in *Hilkhot Lulav* (Section 697 as well as other medieval authorities).[23]

In subsequent generations a number of prominent *aharonim* also accepted this far reaching position. For example, the *stam Mishnah* at the end of the third chapter of Tractate *Orlah* explicitly states: "*Hadash* (the new wheat which was harvested before Passover and the second day of Passover has not yet passed) is forbidden to be eaten biblically in all locales" This expansive ruling is also the view of R. Eliezer in the *Mishnah*, *Kiddushin* 37a, as interpreted by the Talmudic *sugya* on that *mishnah*. In

contrast, the *Tanna Kama* of the *Mishnah* in *Bavli Kiddushin* 37a, R. Shimon B. Yohai cited in the *sugya* in *Kiddushin* and others maintain that *hadash* is only forbidden in the Land of Israel and is permitted to be eaten in the Diaspora.[24] According to the standard rules of halakhic decision making (*halakha ke-stam mishnah*) one should privilege the uncontested ruling of the *mishnah* in Orlah and rule that *hadash* is forbidden to be eaten throughout the world. This ruling, of course, would have created an enormous practical and economic burden for the Jewish communities of the middle ages where much of the wheat, the staple of both the eaten diet, the base of the beer generally drunk with meals (as clean water was generally not available for drinking) was in fact *hadash* wheat. R. Yitzhak Or Zarua[25] citing these factors once again rules that because it is "a pressing need" one can rely on the minority view. This also is a major part of the celebrated lenient ruling of the author of the *Taz* which reflects the standard Ashkenazi practice of many centuries that continued into our day and age.[26]

In a similar fashion, in the early modern period, R. Zvi Ashekenazi, author of Responsa *Hakham Zvi*, maintained that the concept of *itmar hilkhita* limiting the flexibility to rely on minority opinions in cases of great need applied to explicit rulings of the Talmud. In a case of *sheat ha-dehak* he rules in accordance with the position of the *Rambam* that the restrictions of mourning do not apply even in private on a holiday against the ruling of R. Yosef karo in the *Shulkhan Arukh*. In explaining his reasoning, he notes that "It is clear that a ruling of the Talmud is in no way similar to a ruling of R. Yosef Karo, for a number of those who came after him argue with his rulings, and he himself only ruled this way because the majority was against the view of Rambam".[27]

In the modern area this view was also adopted by the leading posek in America, R. Moshe Feinstein *zt"l* as well. R. Feinstein in an early responsum, addresses the question of the permissibility of selling a synagogue for the purpose of building a *mikveh*. The Talmud in *Megilah* 27b cites the position of R. Yehuda that one is permitted to sell a synagogue for the purpose of making a courtyard and the buyer can do with it as he wishes. The rabbis in the *mishnah* take issue with this position. However, since the Talmud never explicitly rules in their favor, "the minority view is of sufficient weight to rely upon it in times of great need in areas of rabbinic proscriptions as is explicit in the commentary of *Shakh* [*Yoreh Deah*, end of section 242]. And one should not say that the ruling found in the *poskim* is as if it has been explicitly rules that way, for the *poskim* did not decide this on their own as they do not have the authority to decide debates between the *tannaim* or *amoraim*, rather they recorded the halakhah as being in accord with

the rabbis based on the principle that majority opinion rules. And this is not equivalent to an explicit ruling of the Talmud, for there the sages of the Talmud decided that the opinion of the other rabbi is null and void and one should not rely upon it even in cases of great need. However, the rulings of the *geonim* on the debates of the sages of the Talmud are not decisive, and they are not considered as *itmar hilkhita*."[28]

**2. One Cannot Rely Upon a Minority Opinion Against a *Halakha Pesukah***

In sharp contrast to the view outlined above, *Hazon Ish*, took a sharply different tack. *Hazon Ish* maintains that in situations where there are Talmudic disputes and "the majority of *poskim* have agreed to one position, one cannot rely upon the minority view even in cases of *sheat ha-dehak*. And certainly when there is no dispute amongst the *aharonim*, so that for example if in Maimonides time there was a dispute, and the Rosh and Ran agreed to one view or if it was decided by the *Shulkhan Arukh* and the *aharonim* in accord with one view—this is considered *itmar hilkhita*."[29] He then proceeds to take issue with the position outlined by *Hakham Zvi* cited above. For this reason, for example, he rejects any attempt to use the views of *Ra'avad* or *Ba'al ha-Maor* who maintained that the sabbatical year is not in force, in our day and age, neither biblically nor rabbinically, as part of a leniency to sell the land of Israel to non-Jews in our day and age during the sabbatical year.[30]

It would appear to this writer that a number of the contentious halakhic debates of the last four decades partially revolve around the question of where one draws the line of settled halakhic law that does not allow for use of bold leniencies and reliance on minority opinions in cases of *sheat ha-dehak*. It is my impression that in certain circles in the Torah world, not only have the rulings of the *Shulkhan Arukh* taken on the status of settled law but even the more recent rulings of the *Mishnah Berurah* or the *Hazon Ish* himself have attained that coveted perch!

**3. Use of the Principle in Biblical or Rabbinic Laws?**

The *sugya* in *Berakhot*, in which the first mention of the principle of "R. Shimon is of great enough stature to rely upon him," deals with the proper time for the recitation of the *Shema* whose obligation is biblical. Similarly, the use by the *rishonim* mentioned above of this principle in allowing the shaking of a dried out *lulav* relates to the fulfillment of a biblical commandment. At the same time it is not clear from those sources that one can make the leap and take a lenient approach when confronted with an issue involv-

ing not only a positive biblical commandment but the potential violation of a negative biblical command.[31] Once, however, we move to the world of permitting *hadash* in the Diaspora as articulated by *Or Zarua* and *Taz*, we have clearly taken the position that this leniency also applies to biblical prohibitions. Indeed, R. Shabtai ha-Kohen in his *Nekudat ha-Kesef* on the spot in *Yoreh Deah* rejected the leniency of *Taz* precisely for this reason. Similarly, *Shakh* in his celebrated outline of principles of halakhic-decision making laid out at the end of *Yoreh Deah* Section 242 explicitly rules that one can only make use of this principle when dealing with rabbinic prohibitions.[32]

## 4. Upon Whom Is One Allowed to Rely Upon

In interpreting an ambiguous passage in a responsa of R. Shlomo B. Aderet (*Rashba*)[33] that we will later rely examine more carefully, R. Joel Sirkes (*Bakh*) argues that *Rashba* held that there is a distinction between relying on a minority view when they are of similar stature versus reliance of a lower echelon authority against one of greater stature.[34] *Bakh* argues that in the case of minority versus majority one can rely on the minority view in cases of great need. In contrast, in a situation where the minority view is held by a lower echelon authority, one cannot rely upon his view against the position of the higher level authority (*katan neged gadol*) even in instances of great or pressing need. From a conceptual viewpoint, one can readily explain this distinction. In a case where the actors in the dispute are all of equivalent stature, the minority view exists and is valid. However, there is a practical need to make a decision as to how to act. In that instance, in cases of pressing need, his view can be retrieved and made use of. In situations where the disputants are of unequal stature, it can be argued that the view of the lower level authority is not only rejected practically, but is treated as if it is null and void and has no standing in any subsequent discussion, even in situations of great need.

*Shakh*, in his discussion cited above, vigorously rejects the interpretation of *Bakh* and maintains that *Rashba* saw no distinction between debates between authorities of equal stature and those *of katan neged gadol*. In both instances, one can rely upon the minority opinion in instances of pressing need. This also seems to be the simple reading of the words of *Remah* in *Hoshen Mishpat* 25:2 and numerous *aharonim*.

## 5. What Defines "Pressing Need"?

The responsa of the *Rashba* previously cited above introduces the notion that pressing need requires an element of *hefsed merubeh*—great financial loss, to allow for the lenient reliance on minority opinions. This element

seems to be based on *Rashba's* focus on the language of Talmudic *sugya* in *Bavli Niddah* 9b (the details of which need not detain us here) as determinative in defining *sheat ha-dehak*. This definition is also adopted by *Remah* in the section cited above in *Hoshen Mishpat*. In contrast, other *rishonim* do not add that element in their basic definition of the concept of *sheat ha-dehak* and indeed *Shakh* notes that fact in his comments in *Yoreh Deah*. In fact, *Hazon Ish* in the section quoted above notes that "the very issue that one requires both pressing need and great financial loss does not have any source at all". It is clear to this writer from a random perusal of the response literature throughout the ages and certainly that of the contemporary age, that a large number of prominent *poskim* did not consider the technical issue of financial loss as critical for the application of the principle of "R. Shimon is of great enough weight to rely upon in times of pressing need".[35]

## *IV. Minority Views and the Role of the Mara de-Atra*

The Talmud in *Shabbat* 130b records a *tannaitic* dispute regarding which aspects of the performance of a circumcision push aside the Sabbath restrictions. R. Akiva maintains that only actions that could not be prepared before the Sabbath are permitted to be done for a circumcision on the Sabbath. In contrast, R. Eliezer posits that one may even chop wood on the Sabbath to prepare coals necessary to later fashion the knife for the actual incision. The halakhah is in accord with R. Akiva and yet the Talmud notes, quite positively in fact,[36] that "In R. Eliezer's locale they would chop wood on Shabbat to make coals to fashion iron instruments (for circumcision)." In a similar fashion, the Talmud mentions the dispute as to whether the rabbis extended the prohibition of eating milk and meat beyond the biblical parameters. The majority view that became normative halakhah is that the co-mingling of chicken and milk was forbidden by the rabbis as a protective fence. In contrasts, R. Yosi the Galilean rejected this extension. The Talmud thus states: "In the locale of R. Yosi the Galilean, they would eat chicken and milk together". The Talmud thus affirms that though the majority and even consensus *psak* amongst the Jewish people had ruled in a certain issue in one fashion, the inhabitants of the locale of a dissenting authority were fully entitled to continue to maintain and practice their lenient behavior. This Talmudic statement is a sharp affirmation of the power of the local authority, the *mara de-atra* to have full control and autonomy over the halakhic practices and customs in his bailiwick.[37]

This Talmudic statement is cited and expanded in a number of responsa literature of the middle ages. *Rashba* in the responsa cited earlier, makes

it clear that the Talmudic statement as to locale should not be understood restrictively to those actually alive at the time of this authority's life or who actually live in the locale of that particular rabbi. *Rashba* mentions that any community that has consistently adopted for itself the rulings of a specific authority, such as the rulings of R. Yitzchak Alfasi or Maimonides is fully entitled to continue following those rulings even when they fly in the face of majority or consensus practice that is common amongst the rest of the Jewish community. This ruling of *Rashba* moves the concept beyond the limitations of specific time and place and makes the ideological and halakhic affiliation with a particular authority's rulings at the center of the mandate. One can plausibly extend this concept beyond the boundaries of any reference to geographic area as well. Once one claims that the concept of following the view of an individual scholar extends beyond his death or his actual place of domicile, the road is clear to an expansive reading of this notion.[38] Thus, a Belzer Chasid who lives in Capetown, South Africa or a transplanted Washington Heights *yekke* who was a member of Kehillath Adath Jeshurun and was now living in San Jose could continue to follow the practices and *psakim* that they felt loyalty to in their day to day life.[39]

It is important to note that there were and continue to be dissenting voices who took issue with the broad ruling of *Rashba* and sought to limit the role of reliance on solitary views of the local rabbi or one's *rav muvhak* in post-Talmudic settings. R. Yosef B. Lev, for example in a responsum explicitly claims that "This principle was only operative in their era when each city and city had one rabbi who taught them all of their Torah . . . thus each city was obligated in the honor of their rabbi. However, in our day and age, all the various rabbis and *poskim* from whose waters we drink are considered our rabbis, and thus we must follow the stringent view in area of dispute in biblical law".[40]

It is interesting to note that the rationale given by R. Yosef B. Lev for the principle of relying on the *mara de-atra* is respecting "the honor of their teacher—*kevod melamdam*". If one bases the entire structure of the authority of *mara de-atra* on that logic, it would appear that there is great room to limit its application when indeed Jewish society is at a point when a plethora of rabbinic tomes have been written and are accessible to rabbis and laypeople throughout the world. Respect for rabbinic authority and the views of the bearers of the tradition should extend beyond the orbit of one's local authority to encompass a wide swath of *poskim*.[41] It would appear, however, the rationale for the authority of and the license to rely upon the view of one's *mara de-atra* is rooted in much broader grounds. First, it is questionable if the conflict between the view of a local authority and others rabbinic

voices, contemporary or not, really rises to the level of a "majority versus minority" debate. *Hazon Ish*, following in the footsteps of previous rabbinic authorities, claims that given that in most circumstances the *mara-de-atra* and those who took a differing viewpoint did not engage in dispute face to face, there is no issue of majority rule:

> There is no concept of majority and minority when the scholars debating an issue are from differing eras or [are contemporaries] living in different locales. In a country where most of their Torah is based upon one rabbinic authority and his students and their students, they may follow the view of their rabbi even if the majority disagree with them. And in later generations when specific books of the rabbis took up the lion's share of the work of passing on the Torah to the present generations . . . they became the *rabbanim hamuvhakim*—primary teachers—of the generation and in any area where there is a dispute, it was left to each scholar to determine whether to be stringent or to rely on certain well-known specific minority voices and follow them.[42]

Secondly, it would appear that the more cogent explanation for the authority of *mara-detra* is not based solely upon *kevod melamdam* but rather on the notion of *haskamat ha-tzibur* or *yahid*—the acceptance of the binding nature of this rabbi's authority by the community or the individual. *Kesef Mishnah* in a celebrated passage in *Hilkhot Mamrim*[43] points to this concept as the basis for the unique authority of the Talmud throughout the entire Jewish people. Similarly, one can argue that this is the basis for the concept of one's obligation and license to follow one's *mara de-atra*, broadly conceived, both stringently and leniently. Indeed, *Rashba* in the responsa cited earlier speaks of the countries that follow the rulings of the Rif or Ramabam as "*asu gedolim eilu kerabam*," which implies the notion of acceptance of the authority as the key underlying the principle.[44]

A final point which requires more exploration is the possibility of having more than one authority upon whom one relies upon for *psak* in various areas of Jewish law.[45] *Rashba* and others clearly speak of "a place where they are accustomed to do *all* their actions based upon the rulings of one of the great *poskim* . . . places which are accustomed to do *all* their actions based upon the writings of the Rambam" indicating that one has committed himself to following the rulings of this authority consistently.[46] At the same time, it can be argued that there still would room for multiple sources of authority each having its own independent claim of adherence based on the model of *haskamat hatzibur* or *yahid*. This move is predicated on comparing the notion of the adherence to one's authority or the

concept of *mara de-atra* to the notion of the special respect due the *rav muvhak*—one's primary teacher. In defining the category of *rav muvhak* and the concomitant honor due him, Maimonides and others speak of "*rabo shelimdo rov hokhmato*"—the teacher who taught him most of his knowledge. R. Yosef Karo in *Yoreh Deah* (242:12) discussing the halakhah that a student must receive permission from his teacher before assuming the mantle of *horaah* speaks of the requirement to receive permission—"*mikol rabotav hamuvhakim*"—from all his primary teachers" *Remah*, on the spot, is troubled by this formulation and writes "the term here *muvhakim* should not be construed to mean [as it does elsewhere] 'the teacher from whom one learned most of his knowledge' for it is impossible that one can then have multiple *rabanim muvhakim*!" R. Shabtai Kohen in his comments there takes sharp issue with *Remah* and writes: "What *Remah* has written that one cannot have multiple "primary teachers" is incorrect for we find that *Rashi* at the close of the second chapter of *Bava Metzia* interpreted the phrase—*rov hokhmato*—'whether referring to his teacher in Bible [from whom he learned most of his biblical knowledge], whether referring to his teacher in *Mishnah* or his teacher in Talmud' . . . thus one can say that this person acquired most of his biblical knowledge with one teacher, and most of his knowledge of *Mishnah* with another person, and most of his knowledge of Talmud from another person, and most of his knowledge of *Midrash* and *agaddot* from another, and most of his knowledge of *Kabbalah* from another". *Shakh* writes explicitly as to the reality of having various primary teachers in distinct areas of Jewish learning. Logically, there should be no reason not to extend this concept to having various primary teachers in distinct sub-sections within one general area of Torah. Thus one might have a primary teacher for the practical study of *Hilkhot Niddah*, while having had a different primary teacher for the analytical study of Talmud or issues dealing with writing *Gittin*. If that be the case, there certainly would be room to see a community or an individual taking upon themselves a multiplicity of authorities with regards to various areas of halakhah in which they needed direction and guidance. Choosing the various authorities might be based upon the recognition that different scholars have different areas of expertise. Moreover, depending on the circumstances various halakhic decisors may have greater or lesser appreciation of the unique circumstances of that community share in the world-view and realty of that community or individual or be otherwise more qualified to rule in a particular subset of halakhah.

## *V. Possible Exceptions in Halakhah to Majority Rule*[47]

While majority rule is a standard principle that is used in resolving many halakhic disputes there are specific areas of halakhah in which this rule may not be operative and in the view of many authorities the minority view carries the day. Below is a very brief outline of a number of those areas in which the minority view may retain operative status. The exact scope, purview and details of the normative force of the minority view in each and every area listed below (e.g., does it relate to disputes of *tannaim*, *amoraim*, *rishonim*, or even of *aharonim*; do these leniencies apply in all situations of this area of halakha or only limited cases, etc. ?) is a matter of some dispute, but far beyond the scope of this short survey of the issue.[48]

*1. Aveilut*—the Talmud in *Bavli Moed Katan* 18a explicitly rules that *halakhah ke-divrei hameikel be-aivel*—one always follows the lenient ruling in areas of the laws of mourning. This rule is understood by many decisors to mean that in any dispute not explicitly ruled upon by the Talmud, i.e., a dispute amongst the *rishonim* or *aharonim* a *moreh horaah* should opt for the lenient ruling, even if that view is a minority one.[49] The very existence of the debate creates a situation of doubt and one is thus entitled to follow the lenient view.

*2. Eruvin*. The Talmud in *Bavli Eruvin* 46a posits: *halakhah ke-divrei hameikel be-eruv*—the law is in accord with the more lenient position in a dispute concerning *eruvin*. While a minority of authorities view this rule as limited to the area of *eruv techumin*, most authorities see this as a universal principle applicable to all types of *eruvin*.[50] In this context, *Dagul Meirevavah* (*Orah Hayyim* 394) and others explicitly state that this principle is applicable even to the point of ruling in favor of a minority opinion in opposition to the majority view. Most classical *aharonim* use this principle in numerous responsa and apply it broadly to include even disputes among later *aharonim* as well.[51]

*3. Mitzvot ha-Teluyot Ba-Aretz* (Laws such as *Orlah* that are dependent on the Land of Israel) in *Hutz La-aretz (*Outside the Land of Israel). The Talmud in *Berakhot* 36a formulates a wide-ranging principle: *kol ha-meikel ba-aretz, halakha kemoto be-hutz la-aretz*—"(In the areas of laws dependent on the land of Israel such as *orlah*, *maaser* and *kelaim*) outside the land of Israel one follows any lenient view that had been advanced in this connection (regarding *orlah*, etc.) in the land of Israel". In other words, in a dispute regarding a point of law regarding certain details of the laws of *orlah*, for example, in which there is a stringent and a lenient opinion, if a simi-

lar issue arises with regards to *orlah* fruits that grew in the Diaspora (where *the laws of orlah* are binding either on a rabbinic level or based on a *halakha le-moshe mi-Sinai* and not an explicit biblical text) one can adopt the lenient position, ostensibly even if it is only a minority view. What is the basis for this principle? Rabeinu Nissim in his commentary to R. Alfasi's commentary to *Bavli Kiddushin* (15b, *garsinan*) makes reference to the Talmudic statement in *Bavli Kiddushin* 39a-b as to whether the rules of *orlah* are applicable outside the land of Israel either on a rabbinical level or based upon a *halakha le-moshe mi-sinai*. *Rabbeinu Nissim* then comments: "For here it is coming to permit a situation in which any [even miniscule] doubt has arisen, though such a doubt would not have been enough to rule leniently in other areas of halakhah, for this is the reason that it states in *Berakhot kol ha-meikel ba-aretz, halakha ke-moto be-hutz la-aretz* that even in a case of a halakhic dispute of minority against the majority [we rule like the minority], that even any small doubt, even it is almost sure that the stringent position is correct . . . it is still permitted."

*4. Mamzerut:* The Talmud records the principle that in forbidding a *mamzer* from marriage into the Jewish community, we only restrict one who is defined as a *mamzer vadai, ve-lo mamzer safek*. Only one whose status is fully defined as a *mamzer* without any doubt as to his classification falls under the restrictions of the law. In this context, numerous authorities have taken the position that in situations where there are halakhic disputes as to the status of the individual in question, even if there is a majority view that would rule the individual as being a *mamzer* against a lenient minority opinion, the very fact that the minority opinion exists, creates a situation of "doubt", even if it is not a *safek hashakul*. This thus renders the individual only a *safek mamzer* who is by definition not under the restrictive definitions of *mamzer*.[52]

*5. Kim Li* in Areas of *Hoshen Mishpat*. In the thirteenth and fourteenth centuries a number of *ashkenazi poskim* begin to put forward a novel concept in the area of Jewish civil law. In contrast to other areas of Jewish law, these authorities maintain that the defendant in a civil dispute who is being asked to forfeit funds in accord with the majority positions in the Halakha can claim that he believes that the minority view is correct and thus at best there is a case of doubt which undermines the ability of the *beit din* to coerce him to hand over money to the plaintiff. Given that reality, the defendant would not be required to pay out monies either based on the principle of *ein holkhin be-mamon ahar ha-rov* or some other legal principle that allows the *muhzak*, the one in original possession of the monies to hold on to his funds unless a high threshold has been crossed to remove it from his possession.[53]

In his essay on *Bankruptcy in Jewish Law*, Prof. Steve Resnicoff has nicely outlined the basic parameters of this concept in a case involving a bankruptcy issue:

> In Jewish civil law, where a plaintiff is attempting to collect money from another, the plaintiff ordinarily bears the burden of proof, and the party from whom an asset is sought to be extracted is considered the muhzak. Thus, a Jewish creditor who goes to a *beit din* to collect from a debtor who has received a bankruptcy discharge, may bear the burden of proving his halachic right to collect. The defendant will presumably raise *dina d'malkhuta dina*, based on the *Rema*'s view[54] as a defense. If the *beit din* is composed of members who agree with the defendant, the defendant should prevail. But what if the members of the *beit din*, while agreeing that *dina d'malkhuta dina* applies to bankruptcy discharge law according to the *Rema*, feel that the majority rule among halakhic authorities is in accordance with the *Shakh*? Does this mean that the defendant necessarily loses? Not necessarily.
>
> Where there is a significant dispute among halakhic authorities on a particular issue, under certain circumstances a defendant may assert that he believes ("*kim li*") that the halakha is in accordance with one side of the debate, even if the side he selects is the minority view. If the defendant is indeed entitled in a particular case to make this assertion, the plaintiff can only win if he proves his case according to the view chosen by the defendant.[55]

One caveat does need to be added before we close our discussion. While the concept of *kim li* is used extensively in halakhic literature, it is important to note that as time went on discomfort with the principle and its potential for undermining any consistent application of Torah law in civil matters weighed heavily on the mind of many halakhists. Thus, throughout the period of the *aharonim* one finds numerous authorities who limit its scope and purview. Examples of this include the view of R. Yonatan Eibeschitz that *kim li* cannot be used in opposition to a view explicitly adopted by the *Shulkhan Arukh*;[56] the suggestion of a number of authorities that *kim li* may only be used when one has a least two authorities supporting his position[57] as well as the discussions concerning who is the minority view that is considered worthy of being counted as a legitimate perspective.[58]

## *VI. Minority Views As Creating a Halakhic Sefek Sefeka*

The final area we will briefly explore is the notion of two minority views being used in conjunction to create a halakhic *sefek sefaka* (double doubt)

thus yielding a lenient conclusion, though each alone would not carry normative weight. In a number of halakhic works this is also known as the mode of *tziruf ha-shitot*—combining opinions to create a halakhic double doubt. The classic definition of *sefek sefeka* as found in the Talmud relates to doubts regarding the actual case and not legal disputes. For example, the Talmud in *bavli Avodah Zarah* (70a) rules in a certain case of a casket of wine opened that it is permitted for a Jew to drink it as we have here a double doubt: a) It is unclear whether the casket was opened by an idolater or a Jew b) Even if it was opened by the idolater it is unclear whether he only opened the casket or whether he also handled the casket/wine thus rendering it halakhically problematic. In the middle ages, the principle of *Sefek Sefeka* was extended by numerous authorities to include situations where one of the doubts relates not to factual concerns but to a dispute around a point of law. A classic example of this type of case is the question raised by *Terumat Hadeshen*[59] regarding if one who cannot recall whether he counted the *omer* on previous evening can continue counting the *omer* on subsequent nights with a blessing. Normative halakha rules that if one forgot to count one evening and day, one may not continue to count with a blessing on subsequent nights. This is based on the celebrated dispute between *Behag* and *Rambam* as to the nature of the commandment to count the *omer*. *Rambam* maintains that each and every evening is a separate mitzvah and thus if one forgot to count one evening he may still continue to count on subsequent nights with a blessing. In contrast, *Behag* maintains that the mitzvah is one long continuum, rooted in the concept of *temimut*, demanding that each night be remembered or the entire mitzvah has not been fulfilled. In addressing our case, *Terumat Hadeshen* rules that we have a *sefek sefaka* situation: a) It is unclear whether the person did or did not count on the previous night b) even if he did not count, maybe the law is in accord with the view of *Rambam* who maintains that one continues to count with a blessing.

While this ruling introduces the notion of a legal dispute into the mix, it retains one of the doubts as being in the realm of what actually took place, along the lines of the Talmudic source.

In later generations, the concept of *sefak sefaka* has taken on an even broader use in the writings of many *aharonim*. In the opinion of these writers, *sefek sefaka* can even be used by putting together minority positions, which independently would not be normative but in conjunction create a halakhic double doubt allowing one to be lenient. In our day and age, Rabbi Ovadyah Yosef is the greatest advocate of such halakhic jurisprudence and uses this technique to render lenient rulings in hundreds of his responsa scattered throughout his voluminous writings. It should be noted, however,

that this mode of *psak* predates *Hakham Ovadyah* and is to be found in the writings of both classical ashkenazic and sefardic *aharonim* of the first rank. A full treatment of the use of this technique as well as the opposition or reticence to employ it expressed by some halakhic decisors is beyond the scope of this essay and must wait for another day.

## *NOTES*

This essay will appear in a forthcoming jubilee volume, *Mishpetai Shalom*, in honor of Rabbi Saul Berman. I would like to thank Rabbi Professor Daniel Sperber, Rabbi Yair Kahn, and Rabbi Aryeh Klapper for their comments on earlier drafts of the essay.

1. *Bavli Eruvin* 13a.
2. For example see the important essay by *mori ve-rabbi*, R. Aharon Lichtenstein, "Torat Emet and Torat Hesed" in *Leaves of Faith*, Vol 1, pp. 61-88.; A. Sagi, *Elu ve-Elu Divrei Elokim Hayyim* (Israel, 1996) R. Michael Rosensweig, "*Elu Ve-Elu Divrei Elokim Hayyim*" in *Rabbinic Authority and Personal Autonomy* (Northvale, 1992) pp. 93-122.
3. For a good discussion on this and other topics relevant to our essay see R. Elisha Aviner, *Kelalei Hora'ah be-Halakhot Mesupakot" Maaliyot* 19, pp.145-167. See also *Yehave Da'at* Vol 5:58 in the footnote.
4. See *Berakhot* 9b.
5. Positive Commandment #175.
6. See the language of *Tosafot*, n.b. *Kamashmalan, Bava Kama* 27b—*Gabei Dayanim shanee, de-hashiv miut dedhu ke-misheino.*
7. It is this very fact, claims *Hazon Ish*, that allows for many of the leniencies of relying on the minority view in various circumstances, circumstances that are explored in the body of this paper. Similarly, argues, *Maharam Haviv* in the source cited in the text, in a debate amongst the *poskim* in which the majority rule leniently and the minority view is stringent, the fact that the majority in many rabbinic disputes is not a "real" biblical majority as the rabbis did not debate each other face to face, should lead us to be stringent *le-hathila* for the position of the minority view unless the custom has spread to be lenient or the lenient position has more cogent prooftexts or the lenient position is supported by *poskim* who are "the pillars of *horaah*". In the formulation of *Maharam Haviv* one hears a precursor of the modern-day *Brisker* approach to halakhic practice that attempts to create a practice that incorporates even minority stringent views in the *rishonim* that have not been adopted as normative halakhah. As the majority does not have full-binding status in the classic sense of the word, the debate and doubt as to the final halakha is still in affect. Thus, the prudent course of action for the Jew in this model is to be as careful as possible in his or her approach to fulfilling the dictates of the law.

8. See Introduction to *Yam Shel Shlomo* to *Bava Kama* and *Hullin*. In a similar vein, *Hazon Ish* writes in the passage cited above that "our teachers have taught us not to abandon the use of logic [in adjudicating disputes among the *poskim*]", though he notes that "due to the diminution of the ability of many souls to decide based on logic, we sometimes take the power of the numerical majority alongside the use of [logic]."
9. *Hazon Ish* raises this point as well in his discussion.
10. See for example *teshuvot geonim* cited by *Hiddushei Ramban* to *32a; Responsa Maharshdam, Orah Hayyim #37*.
11. See *Enzeiklopedia Talmudit* 9: 262-3. A thorny practical issue is, of course, how one would/could evaluate the relative stature of leading *poskim* and what criteria if any could be agreed upon to make such a difficult if not perilous evaluation. See the interesting remarks of R. Menahem Meiri in his *Beit ha-Behirah* to the passage in *Yevamot* who understands the advantage of *beit shammai* as being in the realm of *sevara*—sharper logic.
12. *Mishpatim*, Vol 18:162, note 37. My thanks to Rabbi Prof. Daniel Sperber for directing my attention to this important source. See further R. Sperber's *Darkah Shel Halakhah* (Jerusalem, 2007) pp 217-222.
13. Cited in the note by R. Kasher mentioned previously.
14. See the sources cited in *Enzeiklopedia Talmudit* 9:259, footnote 263.
15. The exact definition of this term "greater in number and wisdom" is the subject of a major dispute amongst the *rishonim*. The exact details need not detain us here as they do not impact on the specific issue dealt with in the body of the essay.
16. We will deal with *Raavad's* second interpretation of the *mishnah* in a latter part of the essay.
17. See for example the strikingly similar comments of "the French Rabbis" cited by *Ritva, Eruvin 13a*. A full treatment of the topic of *eilu-vaeilu* is beyond the scope of this essay. In this context see the important comments of *mori ve-rabi*, R. Aharon Lichtenstein in *Leaves of Faith*, Vol 1:170-172.
18. The reason for the acceptance of the *Talmud Bavli* as the final authority is still clouded in mystery and is the subject of great disputes amongst medieval and modern commentaries. It is important to note that this acceptance was not as widespread in the early stages as we sometimes imagine. Perusing the evidence from the Cairo Genizah, numerous comments of the *rishonim* and other documents clearly indicates that in various locales such as Italy, *Eretz Yisrael* and selected parts of Europe many communities did not see the *Bavli's* rulings as authoritative. In time of course, the hegemony of the *Bavli* overtook even these pockets of independent traditions.
19. This is also the reading of the *Or Zaruah* as well as R. Shimon of Sirleon as cited by *Melekhet Shlomo* on the spot.
20. In context of *Eduyot*, Ch. 1 this clearly refers to the Sanhedrin, the great court in Jerusalem that legislates and interprets law.
21. It is interesting to note that the medieval commentaries did not take note that this straightforward ruling of the *Tosefta* (and possibly the *Mishnah*) directly contradicts the formulation of the *Bavli* that once the "halakha has been clearly stated-*itmar hilkhita*" there is no room to rely upon a minority view even in times of *sheat ha-dehak*. There can be no greater manifestation of *itmar hilkhita* in the halakhic system than the ruling of a court. A possible distinction may be that while a subsequent *Sanhedrin* was indeed allowed to rely upon a minority opinion to rule

leniently against settled law, that privilege was not extended to other bodies, groups of scholars, or individual *poskim* in subsequent generations acting outside of the unique powers enjoyed by the *Sanhedrin ha-gadol* in Jerusalem. The *Tosefta* would then only allow for a subsequent Sanhedrin to engage in this kind of action.

22. Section 2:306
23. See for example *Hagahot Ashri*, beginning of third chapter of *Sukkah*; *Hagahot Maimoniyot to Hilkhot Lulav,* Ch. 8: Note 100.
24. For a summary of the various opinions see *Enzeiklopedia Talmudit* Vol. 12, "*Hadash*" pp. 686-687.
25. Section 1: 328.
26. *Yoreh Deah* 293:2.
27. Responsa 11. R. Ashkenazi here is, of course, referring to the fact that many did not accept the binding nature of the rulings of the *Shulkhan Arukh*. For more on this see, M. Elon, *Ha-Mishpat ha-Ivri*, Vol 2: 1139-1180.
28. *Igrot Moshe* Vol 1:51: section 1. It must be noted, however, that R. Feinstein was not willing to use any and all minority opinions even in difficult circumstances. In a responsum dated 25 *Tammuz, 5734 (*1974) (*Even ha-Ezer Vol 4:83:1)* R. Feinstein discusses a case of a woman who was married in a halakhic ceremony to a man, has children with her, and later divorces her civilly without a *get*. The man later admits to her that he had converted to another religion before he had married her. The rabbi who addressed the question to R. Feinstein had ruled that the woman was permitted to remarry without a *get* relying upon the minority position cited in Tur, *Even Ha-Ezer* 44 and adopted by the author of *Responsa Maharshadam* (*Even ha-Ezer* –Vol. 1:10) that the *kiddushin* an apostate is null and void and never were valid. R. Moshe strongly argues against this ruling stating that this minority position had been rejected by the "*poskim ha-mefursamim*" and contravened the plain sense of the Talmud. Thus in the opinion of R. Feinstein one should not consider this a valid opinion to support building a leniency—"*ein le-hahshiv zeh le-shitah af le-inyan tzeiruf*". R. Feinstein does not give clear cut parameters how extreme a position has to be or how "not accepted" in halakhic history it must be for it not to have any status at all. It is also unclear if the fact that we are dealing here with a biblical prohibition of adultery and other concerns leads R. Feinstein to this more restrictive ruling. It is an open question whether he would apply similar criteria in a case dealing with proscriptions of a purely rabbinic nature.
29. *Hazon Ish, Yoreh Deah* 150.
30. In contrast, R. Yitzhak Ha-Levi Herzog did explicitly use these opinions as the foundation of his endorsement of the famed *heter mekhirah*. See *Tehumin* 7: 16-17.
31. One may argue of course that if one takes the view that the prohibition to recite an unnecessary blessing with God's name is a violation of the second commandment in the Decalogue and one posits that the *rishonim* who permit the shaking of the dried out *lulav* would also permit the recitation of the blessings, we would then have a clear indication that this leniency can even affect biblical proscriptions.
32. For further discussion see *Get Pashut, kelalim* 6; *Sdeh Hemed, Kelalim Maarekhet Kaf, Kelal* 109.
33. Vol 1:152.
34. *Bakh* on the Tur, *Yoreh Deah* 242.
35. See for example Responsa *Ahiezer* 3:109; *Melamied Le-Hoeel* Y.D. 31; *Igrot Moshe Even Ha-Ezer* 1:43. In a similar vein I vividly recall a close student of R. Soloveitchik *zt'l* from the 1960's and 1970's describing how the Rav had insisted

that in situations involving youngsters and teen agers who were becoming more observant, all leniencies should vigorously be utilized in *Hilkhot Shabbat*, and the like to ensure that the youngsters could remain at home with their non-observant parents and that families were not torn asunder by the growing religiosity of the children.

36. The Talmud later notes that the townspeople who followed the ruling of R. Eliezer, their local authority, lived long lives.
37. The Talmud here nor in the parallel sugyot does not explicitly discuss the relationship of this concept to the halakhah of *zakein mamrei* which severely limits the autonomy of the individual authority. It would appear to this writer that the concept here of the full autonomy of the *mara de-atra* exists in the absence of any formal ruling by the Great Court in Jerusalem one way or the other. In instances when that court had definitively ruled on a subject their would be no room for the individual authority to continue to preach and advocate the practice of his contrary ruling. In the absence, however, of that specific body ruling on the subject the individual authority and the inhabitants of his locale would be fully entitled to continue following his rulings even in the face of consensus or the explicit statement of the Talmud to the contrary.
38. See the remarks of my revered teacher, R. Aharon Lichtenstein, *Leaves of Faith*, Vol 2: 286-292. It is interesting to note that R. Ovadyah Yosef uses the expansive concept of *mara de-atra* as articulated in the passage in Shabbat (130b) and *Rashba* to buttress the binding nature of the *pesakim* of R. Yosef Karo upon all *sefaradim* and on all inhabitants of *Erez Yisrael*. See for example his comments in *Yehave Daat*, Vol. 5: 213-214.
39. It would seem, however, that public manifestations of a practice that fly in the face of the accepted custom of a specific town or in our contemporary contexts, synagogue, would not be sanctioned. Such actions would contradict the principles outlined in the fourth chapter of *Pesahim* that require one who moves to a new locale to accept the public practices of the community that one is now residing in, especially when public actions to the contrary would cause discord and strife.
40. Responsa *Mahari B. Lev*, Vol 1:75
41. The more one builds the concept of *mara de-atra* of the concept of *kevod melamdam* there would great room to limit the license to rely on his solitary rabbinic voice only to his lifetime.
42. *Hazon Ish, Yoreh Deah*, 150:8. For further discussion see R. Aviner's essay cited above, pg. 158-162.
43. Ch. 2.
44. One can argue that in a case when the actual rabbi is alive and we are speaking about an actual townsperson both the concept of *kevod rabo* and the notion of tacit acceptance of is authority is in play, while after his death or the more expansive notion is operating only on the premise of acceptance of his authority. This nicely explains *Rashba*'s later comment in that responsa that if a later scholar in a subsequent generation, who is worthy of deciding halakhic matters, rules against the practice of that community that had been based on the rulings of R. Alfasi or Rambam, for example, they should follow the ruling of the contemporary *psak* "for the scholars[ upon whom they relied upon] are not their actual teacher, for in the face of their actual rabbi, if they did not follow his ruling, they would be showing disregard for his honor".
45. See the essay by R. Aviner, pp. 163-165.

46. How far this notion of consistency applies is a bit of an open question, see for example the important remarks of R. Lichtenstein, *Leaves of Faith*, Vol 2:286-292.
47. On this entire section see; R. Hershel Schacter, *Beikvei Hatzon*, # 11 and 38.
48. See the detailed presentation in *Enzeiklopedia Talmudit* 9:267-272
49. Of course if the decisor is convinced of the correctness of the other position based upon halakhic argumentation and the weight of evidence, he would be fully entitled to rule in whatever fashion he felt was appropriate. The discussion in the text refers to a situation in which the decisor does not have a clear-cut view and he is evaluating the *makhloket ha-shitot* as both having equal merit.
50. See *Biur ha-Gra, Orah Hayyim 358:5* and *Noam* Vol. 1:214-215.
51. See for example *Shvut Yaakov 2:7, Hatam Sofer 6:82 and Maharsham 4:105.* For a dissenting and more limited view of the scope of this principle see *Hazon Ish Orah Hayim* 112:10
52. See *Shev Shmateta, Shemata* 1 and *Kovetz Hearot* 58.
53. For a discussion of the historical and analytical elements of this principle see, H. Ben Menahem, "Doubt, Choice and Conviction : A Comparison of the "Kim Li" Doctrine and Probabilism" *Jewish Law Annual* 14:4-28; M. Elon, *Ha-Mishpat Ha-Ivri*, Vol 2, pg. 1062-1063
54. *Rema* limits the purview of *dina de-malkhuta dina* to laws enacted for the welfare of the state and not to all civil laws.
55. *Journal of halakhah and Contemporary Society* 24:43-46.
56. See *Sefer Tumim*, 25, *Kitzur Tekafo Kohen*, #124.
57. See the lengthy comments of *Pithei Teshuvah*, at the end of *Hoshen Mishpat*, 25 and *Knesset Ha-Gedolah*, *Hoshen Mishpat* 25, *Get Pashut*, *Kelalim*, #1
58. Ibid.