

Dr. Woolf is Lecturer in Talmud at Bar-Ilan University and served as Executive Chairman of the Orthodox Roundtable.

THE PARAMETERS OF PRECEDENT IN *PESAK HALAKHAH*

Every individual rabbi, at some time in his career, is forced to render a decision on a highly sensitive or disputed question of Halakhah. In setting himself to this task, he will perform two concomitant tasks. First, he will review the relevant halakhic sources and, in the process, will consult with colleagues who either have relevant expertise or who may be able to direct him to sources of which he was unaware. Second, he will evaluate the particulars of the issue at hand to determine the most appropriate way of applying the results of his learning.¹

One aspect of the process of *pesak* which can prove quite thorny is the necessity of choosing between differing opinions among *poskim*, both contemporary as well as those of previous generations.² And, while it is true that where authorities have reached a consensus,³ it is probably not possible to disagree in the absence of absolutely compelling evidence, what of situations in which there is no accepted consensus, such that adoption of any given position would require disagreeing with great *talmidei hakhamim*?⁴

The answer to this question would appear to be that, since the role of binding precedent in Halakhah is circumscribed, significant room remains for individual decision-making.

In his commentary on the *Shulhan Arukh*, the Vilna Gaon observes that the right of a Rabbi to decide cases in accordance with his own convictions and not solely on the basis of precedent and authority is based upon a passage in the Talmud. The Gemara (*Bava Batra* 130b-131a) relates:

Rava said to Rav Papa and to Ravina b. R. Joshua: Should a decision of mine come before you, and you notice a flaw in it, do not tear it up until you have brought it to me. If I have an argument (i.e. in reply to the objection), I will tell you. If not, I will retract. After I die, neither tear it up nor learn from it. Do not tear it up, for perhaps if I were still alive I would have resolved the difficulty. Do not learn from it, because a judge must rely upon his own opinion (*en la-dayyan ela mah she-enav ro'ot*).⁵

Following the analysis of Rav Kook zt"l in reconstructing the Gaon's line of reasoning,⁶ this passage teaches that, faced with an objection to a teacher's opinion, one should not accept it blindly, due to that objection.

However, it is not initially clear whether, based upon one's own reasoning, a disciple is allowed to decide in contradiction to his teacher's (or any other established authority's) position.⁷

Rav Kook points out that Rashbam was sensitive to this more limited interpretation and rejected it. Commenting on the last line of this talmudic passage, Rashbam declares that the students were not to use their teacher's ruling "to base other rulings upon. Rather you should rule in accordance with your own opinions, for a judge has only his own mind."⁸ Thus, Rav Kook concludes, the Talmud itself establishes that in the presence of convincing arguments to the contrary, not only may one demur from one's teacher's opinion, but one may even issue a contrary ruling!⁹

In our own day, this passage from *Bava Batra* played a central role in discussions of the issue of rabbinic authority and independence by two leading authorities, one Sephardic and one Ashkenazic .

On one occasion, the present Sephardic chief rabbi of Tel Aviv/Yaffo, R. Hayyim David Halevi (an outstanding disciple of the late *Rishon le-Zion*, R. Ben-Zion Meir Hai Uziel), responded to a questioner as to the authority of precedent in Halakhah. R. Halevi wrote:

In reality, the concept of *en la-dayyan ela mah she-enav ro'ot* has a much deeper meaning . . . that a judge's decision must be based solely upon the depth of his understanding of the relevant Halakhah. . . . No precedent binds him, even if it is a ruling of a court composed of scholars greater than he, or even of his teachers. (R. Halevi now quotes the *Bava Batra* passage). . . . One concludes from this that Rava's disciples, in accordance with his own instruction, were allowed to decide contrary to his ruling in case they detected a flaw therein. . . . [And] *this is not merely a license which was given to disciples to differ from their masters; it is also an obligation* (emphasis added). And if he objects to a ruling of those who are greater than he . . . and he nevertheless rules that way, it is almost certain that this is a false judgment¹⁰

R. Halevi's opinion was confirmed, and (implicitly) endorsed, in a responsum issued fifteen years ago by R. Moshe Feinstein zt"l. R. Moshe was responding to a *talmid hakham* who wanted to settle in Bnei Brak, but feared to do so. He was concerned that in the course of his studies and *shi'urim* he might come to disagree publicly with Hazon Ish zt"l, who was seen as the *mara de-atra* of the city. This, he felt, would be a violation of the authority of Hazon Ish, aside from being presumptuous. In response, R. Moshe wrote:

I don't understand your concern. On the contrary, it is a tribute to him [i.e. to the Hazon Ish] that one cites his halakhic opinion and analyzes his words, even if the conclusion of the scholar differs from his. For it never occurred to the Hazon Ish zt"l, that there would never be *talmidei hakhamim* who would

disagree with him, nor is it possible that he would be a stickler on this point And, on the contrary, [this point is made] explicitly in *Bava Batra* (130b end) that Rava said to his students Rav Papa and Rav Huna, son of Rav Joshua, that if they were to have questions about a decision of his (i.e. Rava's, after his death) they must not rule in accordance with it, for a judge must rely on his own judgment (*en la-dayyan ela mah she-enav ro'ot*) and the same is true in their prohibitions. The only thing is that he (i.e. Rava) cautioned them not to tear up his decision in order to nullify its words, for if he had still been alive, perhaps he could have provided a cogent rationale for his words. And, on this last point, Rashbam adds "and perhaps you too will discover an answer to your objection." However, so long as they could not find a response *it was forbidden for them to rule in accordance with Rava, even though he was their Master! And if so, a fortiori and a fortiori again there is no reason to be concerned about objecting to the opinions and differing with the great Sages of our generations, even the greatest of the great as long as it is done with deference and respect . . .* (emphasis added).¹¹

R. Feinstein's position in this regard is unmistakable. Assuming that a Rabbi possesses the requisite scholarly skills, is thorough in his analysis,¹² pursues his study with sensitivity in a modality of *yir'at Shamayim*, and expresses himself respectfully, civilly and substantively, he is morally and halakhically obliged to follow the dictates of his analysis and legal convictions as to the proper path the Torah instructs him to take.¹³

This possibility of deciding in favor of the opinion of one authority over another is rooted in the awareness that while God is the source of all truth, and the Torah is the embodiment of truth,¹⁴ the human capacity to arrive at absolute halakhic truth is elusive at best.¹⁵ This conviction was clearly expressed by Ramban in the introduction to his defense of Rif from the strictures of the *Ba'al ha-Ma'or*, entitled *Milhamot Hashem*. He writes:

And you who look into my book, do not think that all of my replies to the master, R. Zerahiah, z'l, are all (in my eyes) convincing, compelling you to agree with them despite your own objections, with the result that you will boastfully refute one of them, or coerce yourself to dismiss my proofs. Such is not the case. For anyone who knows the way of our Talmud knows that there are no final proofs in the disputes among its commentators, nor are there generally absolute refutations. For in this science there is no clear proof, as is the case with algebra and astronomy.¹⁶

The sentiments of Ramban as to the interpretive freedom left for responsible halakhic scholars in every generation were echoed some seven centuries later by R. Moshe Feinstein in the introduction to the first volume of his responsa *Iggerot Moshe* (New York, 1959):

It seems correct, in my opinion, that the sages of later generations (*dorot aharonim*) were permitted, indeed required, to render rulings even if they would not have been considered qualified in the days of the Sages of the Talmud. For one might be seriously concerned that they might not arrive at the absolutely correct ruling as it appears to Heaven. However, as regarding legal truth (*ha-emet le-hora'ah*) it has already been stated that "It is not in Heaven."¹⁷ This means that it [i.e. the law] is as it appears to a scholar after he has properly analyzed in order to clarify the law in Shas and codes, according to his capacity and in a modality of seriousness and fear of God. [If at that point] it appears to him that such is the Law, this then constitutes halakhic truth and he is obliged to rule accordingly even if, in fact, before Heaven it is clear that his interpretation is incorrect. In such an instance his words too are those of the "Living God" since he is convinced of his interpretation and there is no contradiction to his words.¹⁸

The Torah therefore, by definition, allows for a definite latitude of interpretation and decision, as long as those decisions are based upon solid learning and individual conviction as to the correctness of a specific view. In such circumstances, a rabbi is certainly allowed to judge between competing authorities, even if the one he ultimately decides to follow represents a minority view.¹⁹

One possible limitation on this latitude of decision is found in a famous statement of Rosh. Rosh's remarks are aimed at those of Rabad which (ostensibly) severely limited contemporary decisors in disagreeing with earlier authorities.

And I say that it is certainly true that if someone erred regarding the rulings of the Geonim, of blessed memory, because he had not heard of their words (before), and when he was informed thereof, they appeared correct to him²⁰ then he is considered to be *to'eh be-devar Mishnah*. . . .²¹ However, if their words do not appear correct to him, and he cites proofs which are acceptable to his generation, then Yiftah in his generation is like Samuel in his.²²

The overall upshot of this passage confirms our major point that if, based upon convincing proof, one arrives at the conclusion that a specific Halakhah should be decided in a given manner, then the rabbi has a right to decide accordingly.

There is one caveat, however. By writing that the proofs need be "acceptable to his generation", it would appear that Rosh requires that the individual rabbi's interpretation be subject to the critique of his peers. This is an important point, as it highlights the importance of "peer review" in the halakhic process. "Peer review" allows the original writer to test the strength of his arguments, and tempers the audacity which may be perceived on the part of the rabbi in contesting the opinion of great scholars.

Thus, it ensures both the possibility of halakhic advance as well as deference to established *posekim*.²³ At the same time, "peer review" itself has its limits. First, as demonstrated by the passage from *Bava Batra*, unless egregiously in error, a rabbi's decision is not overturned by its later rejection by his colleagues.²⁴ Thus, he does not have to wait for reaction before implementing his decision. Second, the rabbi is, in most cases, deciding between the opinions of established *posekim*, (usually *Aharonim*) and he has the added advantage of their own scholarly stature to bolster his own ruling.²⁵

This statement of Rosh was accepted and endorsed by Rema in his glosses on the *Shulhan Arukh*. The context is the assertion by R. Joseph Caro that if a rabbi decides a case against the opinion of the established codes, then his ruling is null and void (*to'eh be-devar Mishnah*).²⁶ Rema demurs, and states:

However, there are those who say that if it appears to a judge and to his contemporaries, based upon compelling proofs, that the law is not in accordance with that stated by the various authorities, he may disagree, since it is not mentioned in the Talmud.²⁷

Rema's comment, while essentially reproducing that of Rosh, adds an important nuance. Rema appears to demand a higher level of persuasiveness for the proofs offered before established rulings may be overturned. He speaks of the need for proofs to be "compelling" (*makhrihot*), while Rosh only required that they be "convincing" (*mekubalot*), which could be seen as seriously restricting the freedom of the individual rabbi.²⁸ On the other hand, this difference may simply be due to the context of the discussion. Rosh is dealing with lone rulings of predecessors of unknown provenance, while Rema addresses the circumstances under which one may even overturn the explicit decisions of authorities which have spread "throughout most of Israel."²⁹

For our purposes, however, the difference is relatively minor. The essential fact is that a rabbi possessing the requisite scholarly skills is allowed (if not required) to follow his convictions and scholarship, even if they lead him against what appears to be the common practice (and, in outstanding instances, against established codes, with the exception of the *Shulhan Arukh* itself). This would certainly be the case regarding issues which are disputed (without resolution) either by previous or contemporary authorities.³⁰

The words of all of these great Sages should both caution and encourage rabbis of our generation. The process of halakhic decision-making requires great care, thoroughness of study, integrity of mind, respect for the opinions of great halakhic scholars, and a clear and abiding quality of *yir'at Shamayim*. At the same time, once he has reached his conclusions, a rabbi must have the courage to stand by and for his convictions as to the truth in the interest of the Torah "in which Truth is written."³¹ At the same time,

those who would differ with him must address the issues from an exclusively substantive vantagepoint, and only with civility and *derekh erez*. Anything less is out of consonance with the halakhic process as vouchsafed to us in the *Shulhan Arukh*. Furthermore, not only is it a violation of the search for truth, it is an impugning of the Torah itself, "all of whose paths are Peace."

I am pleased to express my appreciation to Rabbis Marc Angel, Saul Berman, Yosef Blau, Reuven P. Bulka, Nachum L. Rabinovitch and Jacob J. Schacter for their comments.

NOTES

1. The distinction between these two stages of the process of *pesak* are noted and defined by Hazon Ish in *Iggerot*, I (Tel Aviv, n.d), # 36 .
2. See Marc D. Angel, "Authority and Dissent: A Discussion of Boundaries," *Tradition* (Winter 1990): 18-27 and Jeffrey R. Woolf, "Halakhah in Transition: Rabbi Joseph Colon's Theory of *Halakhah ke-Batra'i*," (forthcoming).
3. According to the Vilna Gaon, the authority of consensus approximates that of an enactment of the Sanhedrin which was adopted by all of Israel (*Bi'ur ha-Gra, Hoshen Mishpat*, 25:7 citing *Avodah Zarah* 36a). At the same time, as noted by Rambam (Introduction to the *Mishneh Torah* s.v. *u-devarim halalu* and cf. *Hil. Mamrim* 2: 5-7), in our time such absolute consensus is exceedingly rare and is, at most, only regionally valid. See the discussion of R. Abraham Isaac HaKohen Kook, *Sefer Be'er Eliyahu, ibid*, 205-07.
4. There are issues involved in the process of arriving at a *psak* which go beyond the specific concern of this presentation. See Shakh, *Yoreh De'ah*, 242(end): *Hanhagat Issur ve-Heter* , and *Hoshen Mishpat*, 25, *passim*.
5. Cf. *Sanhedrin* 6b and *Niddah* 20b. See also Rashi, *Hullin* 52a, s.v. *ela im ken*. See *Bi'ur ha-Gra, Hoshen Mishpat*, 25:4.
6. *Sefer Be'er Eliyahu, ad loc*.
7. The two are not necessarily related. One can maintain an objection to the ruling of one's teacher without contradicting him. For example, a rabbi may demur and not render any decision. In this way he would remain true to his concerns, while not controverting the decisions of others whom he reveres.
 Regarding this question of the right of a disciple to disagree with his master, see the discussion in *She'elot u-Teshuvot Maharik, Shores* 169 and *Shulhan Arukh, Yoreh De'ah*, 242.
8. Rashbam, *Baba Batra* 131a s.v. *ve-lo tigm'ru*.
9. *Be'er Eliyahu, ibid*. Rav Kook goes on in this context and elucidates the full extent to which this dynamic is an integral part of the halakhic process.
 Ran (cited in *Shittah Mekubezet, ad loc*) notes that the only restriction to differing with one's master lies in the incapacity of the disciple to overturn the master's actual ruling based upon his objection in that specific case. However, this does not apply in any other instances which might come before the disciple, though they may be identical to that which was ruled upon by the master. The same comment is noted (*ibid*) in the name of Ra'ah.
10. R. Hayyim David Halevi, *Aseh Lekha Rav* II (Tel Aviv, 1989), # 61.
 Cf. Rosh, *Sanhedrin* IV:10; Rema, *Hoshen Mishpat*, 25:2 and commentaries.
 It ought to be noted that the various rules of deciding laid out and discussed by Rema (and by Shakh, *ibid*. and in *Yoreh De'ah* 242[end]) are applied mechanically only if the rabbi is not totally convinced of his stance. See *Be'er Eliyahu, ibid*, # 15.
11. *Iggerot Moshe, Yoreh De'ah*, III, # 88.
 The letter was written 11 Nisan 5737 [= 30 March 1977] and is addressed: "To a certain outstanding scholar (*le-gadol ehad*)". There seems to be, however, nothing inherent in R. Moshe's point which would necessarily restrict the applicability of his remarks to "out-

standing scholars." The issue of level of scholarship appears to relate to the question of possessing the wherewithal to differ with a scholar of the caliber of Hazon Ish, not of developing one's own position.

R. Moshe's remarks here recall the striking statement of R. Hayyim of Volozhin (*She'elot u-Teshuvot Hut ha-Meshulash*, #11(end; referring to a controversial ruling on a question of *pe-zu'a daka*): " So it appears to me both in theory and in practice. What is more, I am certainly aware that one who studies the literature will find support both for me and against me. However, this has always been my practice, insofar as God has bestowed upon me the intelligence to argue a position on my own. *And even if afterwards I discover a book which supports me, I consider myself lucky, and similarly if I discover in a book a different approach, whose path is contrary to me, it is not my way to cite his words and to refute them. For the true scholar will choose the path of truth, for in the Torah in which truth is written, our eyes are fixed on truth . . .* (emphasis added)."

Cf. also # 9(end) where he cites the Gaon as demanding that one not show any favoritism in judgment (though R. Hayyim has some conflicts about such a categorical statement). See also # 1(end) and 8(end).

The identical sentiments are formulated by R. Abraham Danziger in the introduction to his code, *Hayyei Adam*, in the course of answering criticisms that he differed on a number of questions with the Gaon of Vilna.

12. Thoroughness in research (in addition to possessing the requisite background in Talmud and Codes) is mandated by Halakhah. As *Birkhei Yosef* (*Yoreh De'ah* 242 :4 citing *She'elot u-Teshuvot Shevut Ya'akov*, II, # 64) notes, it is prohibited to render a ruling without receiving permission from one's master. Nowadays, since most of a rabbi's learning is from books, one must therefore conduct careful research prior to ruling. A result of the reality of legal deciding based upon published sources is that review of the basic discussions of any particular issue will, almost invariably, lead the rabbi onto the full panoply of talmudic and other legal sources necessary to competently adjudicate the question at hand.

At the same time, it is understood that individual rabbis tend to specialize in their areas of halakhic expertise, and may not be aware of relevant sources scattered in other parts of halakhic literature. This only underscores the need for rabbis to consult with colleagues in the process of the research, in order to avoid this pitfall which is inevitable in a corpus so vast as that of Halakhah.

13. Ironically, R. Menashe Klein appeals to this very responsum of R. Moshe in justifying his own right to differ with him regarding the acceptability of the Flatbush *eruv*. See *Om Ani Homah* (Brooklyn, 1981), Introduction. My thanks to Dr. Joel Wolowelsky for calling this source to my attention.
14. See the various concluding formulations of R. Hayyim of Volozhin in *She'elot u-Teshuvot Hut ha-Meshulash*, Pt. I.
15. This does not include the dictates of the *Sanhedrin ha-Gedolah* which create halakhic truth. Cf. Rambam, *Hil. Mamrim*, 1-3 and *Kezot ha-Hoshen*, Introduction. The history of the rabbinic interpretation of the verse (Deut. 17:11): "Thou shalt not deviate from that which they tell you right or left" serves as a *topos* for this question.
16. Ramban, Introduction to *Milhamot Hashem*. In standard editions of the Talmud it is printed before the *Hilkhot Rav Alfás to Berakhot*.
17. Deut. 24: 12. This is shorthand for the famous encounter between R. Eliezer b. Hyrkanus and R. Joshua b. Hananiah recounted in *Baba Mezia* 59b. See also Sifré, Deuteronomy, *ad loc*; and *Hil. Mamrim* 2:1 and *Kesef Mishneh*, *ad loc*.
18. R. Moshe's position here was not without contenders. See the extensive critique by Rabbi Y. T. Schwartz, *Ma'aneh la-Iggerot* (New York, 1973).
19. See too *Iggerot Moshe*, *Yoreh De'ah*, III, # 88.
20. Lit. "were straight in his eyes" (*yashru bi-enev*).
21. Cf. *Sanhedrin* 33a. Rosh then asserts that this rule applies to the teachings of halakhists in every generation.
22. Cf. *Rosh Hashanah* 25a-b.

See Rosh, Sanhedrin IV:6, cited in *Tur*, Hoshen Mishpat, 25. See also *Terumat ha-Deshen, Pesakim u-Khetavim*, # 243 and *She'elot u-Teshuvot Maharik, Shorashim* 94 and 149 who make much the same point regarding the right of a disciple to differ with his master.

Concerning the actual position of Rabad, see I. Twersky, *Rabad of Posquieres*, 2nd ed., (Philadelphia, 1980), 215-26, esp. 220-21 and H. Soloveitchik, "Rabad of Posquières: A Programmatic Essay," *Studies in the History of Jewish Society in the Middle Ages and the Modern Period Presented to Professor Jacob Katz*, (Jerusalem, 1980), 11ff.

23. See Y. Dinari, *Hakhmei Ashkenaz be-Shelhei Yemei ha-Benayim* (Jerusalem, 1984), ch. I.
24. Indeed, it is possible that a rabbi may adhere to his position even in the face of text-based criticism. This, however, requires that he be able to clearly defend his ideas based upon a close reading and interpretation of the texts and cogently rebut the criticisms which come his way.
25. It should be noted that, in principle, there is little difference between rendering a decision based upon one's own research in the Talmud, *Rishonim* and Codes, and choosing a specific view of one recognized *posek* among several. The fact, however, is that, due to the state of the literature, most rabbis will render their rulings through choosing among *Aharonim*.
26. See *Sanhedrin* 32a, 33a and commentaries. This was the original context of Rosh's discussion.
27. *Hoshen Mishpat*, 25:2. See *Darkhei Moshe, ad loc.*
According to Vilna Gaon, the restriction of argument to post-talmudic authorities is based upon the assumption that the authentic chain of the Oral Law ended with the "sealing" of the Talmud in the days of Rav Ashi and Ravina (cf. *Bava Mezi'a* 86a). Subsequent generations are not allowed, therefore, to differ with statements in the Talmud.
It is also the case, that from the start of the period of the *Aharonim* (traditionally the mid-sixteenth century), halakhists do not disagree with the opinions of *Rishonim*. Thus, most of contemporary *pesak* revolves around the study and evaluation of *Aharonim*. (See the important discussion by R. Yosef Karo in *Kesef Mishneh, Hilkhos Mamrim* 2:1).
28. Many authorities contend that in these days one must not disagree with explicit rulings of R. Joseph Caro or Rema (cf. *Birkhei Yosef, ad loc.*; *Netivot ha-Mishpat, ibid*, 20; and R. Eliezer Fleckeles, *She'elot u-Teshuvot Teshuvah me-Ahavah*, Introduction). *Netivot ha-Mishpat (ibid)*, notes that the same absolute deference is not extended to controversies among later authorities (e.g. *Siftei Kohen* and *Sefer Me'irat Enayim*).
29. Cf. the statement of R. Joseph Caro, *ad loc.*
Rema attributes special authority and significance to decisions or practices which have spread throughout Israel. In the next line of his comments here, he asserts that stringencies (*humrot*) which have spread throughout most of Israel ought not be tampered with, unless one has a tradition to the contrary (based upon *Terumat ha-Deshen, Pesakim u-Khetavim*, # 238). As noted above (n. 3), according to Vilna Gaon, though, the reason that this is so is not due to the inherent correctness of the specific ruling but owing to its having been ratified by the Jewish People as a sort of "enactment" (*takkanah*).
30. Shakh, based upon this statement of Rema, declares that one cannot go against common practice even if one has proof to the contrary. The question, however, is what the definition of "common practice" is. According to Rashi (*Sanhedrin* 33a, s.v. *sugya*), *sugya de-alma* is the common practice of most of the local courts. According to Rambam (and R. Joseph Caro), it appears to be the practice adopted in most Jewish communities. It is to this, much less restrictive, definition which Rema appears to subscribe. (See above, n. 3.)
31. *She'elot u-Teshuvot Hut ha-Meshulash*, I, # 11.

Subsequent to the completion and submission of this article, I became aware that Professors Aaron Kirschenbaum and Norman Lamm addressed some of the issues raised in this essay in their "Freedom and Constraint in the Jewish Judicial Process," *Cardozo Law Review* I (1979): 99-133. The reader is encouraged to compare both the similarities and differences between the two presentations.