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THE ROLE OF MANUSCRIPTS IN HALAKHIC DECISION-MAKING: HAZON ISH, HIS PRECURSORS AND CONTEMPORARIES

During the course of this century rabbinic scholarship has been enriched by the discovery and publication of highly significant medieval manuscripts that had heretofore languished in various libraries throughout the world. Certainly, any newly discovered sources that contribute to a keener understanding of talmudic texts or which cast light upon cognate material are to be welcomed with enthusiasm. The plethora of material does, however, prompt the investigation of one very broad issue which has many ramifications in various areas of Halakhah. At times newly uncovered manuscript data contravene accepted halakhic precedents and norms. What weight, if any, is to be assigned to material that was unavailable to the classical codifiers of Jewish law? This issue has received a significant measure of attention on the part of a number of rabbinic authorities, albeit frequently in a manner that requires further amplification and clarification.

The most authoritative and best known discussions of this topic are presented in various writings of R. Abraham Isaiah Karelitz, popularly known as Hazon Ish. The views of Hazon Ish regarding the issue have been widely disseminated and have become the subject of considerable controversy. A lengthy discussion of the view of Hazon Ish regarding the significance to be accorded to newly discovered manuscripts first appeared in the pages of *Tradition* (Summer, 1980) in an article by Professor Zvi A. Yehuda and was followed by a rejoinder authored by Professor Shnayer Leiman (Winter, 1981). However, in light of the recently published third volume of the letters of Hazon Ish (Bnei Brak, 1990) containing material that is germane to this topic, a reexamination of the position of Hazon Ish regarding this question is necessary. Moreover, since Hazon Ish's comments are scattered throughout his voluminous writings, it is not surprising that some of these remarks were overlooked in the earlier discussions. Furthermore, there is a significant body of material addressing this topic that must be culled from the writing of other scholars. Only upon analysis of this entire

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corpus does a comprehensive view of the treatment of this issue by contemporary scholars emerge.

I. NORMATIVE AUTHORITY OF *SHULHAN ARUKH*

A. PRIMACY OF *SHULHAN ARUKH*

There can be little question that during earlier ages, prior to definitive codifications of Halakhah, early authorities were quite prepared to accord decisive weight to halakhic manuscripts of still earlier times that came to light in their own days.

The earliest reference to discrepancies between various manuscript versions occurs in the famed letter of Rav Sherira Ga'on.[1] Apparently, referring to discrepancies in talmudic citations of pre-talmudic written records of oral transmissions, Rav Sherira Ga'on attributes such discrepancies not to error, but to separate transcription of a common corpus by different reporters. Since he ascribes the textual variations to differences in nomenclature employed by different teachers or students, he urges that every attempt be made to reconcile the conflicting versions as reflecting different ramifications of a common thesis. In a rather strained application of R. Sherira Ga'on's comments, R. Shlomoh Yosef Zevin urges adoption of a similar approach in reconciliation of divergent talmudic texts.[2]

Rambam, *Hilkhot Malveh ve-Loveh* 15:2, reports that a certain halakhic ruling recorded by the *Ge'onim* was based upon an incorrect talmudic text. Rambam recounts that he personally examined various manuscripts that had been committed to writing in Egypt some five hundred years earlier and found them to be at variance with the version followed by the *Ge'onim*. On the basis of the evidence of those manuscripts, Rambam unhesitatingly overrules the ruling of the *Ge'onim*.[3] Similarly, Rambam, *Hilkhot Ishut* 11:13, disagrees with a ruling of "some *Ge'onim*" which he ascribes to an error in the manuscripts available to them and reports that he examined many ancient manuscripts and found that they supported his own view.

Ramban, in his commentary on *Niddah* 64a, presents several different methods of calculating the anticipated onset of the menses and concludes his remarks concerning the prohibition regarding cohabitation at the time that the menstrual period must be anticipated by adding that

> a *ba'al nefesh* (a spiritually sensitive individual) should be careful to be stringent with regard to matters concerning the onset of menses [and refrain from cohabitation] both in accordance with our opinion and in accordance with those of earlier authorities until a spirit from on high will be showered upon us or upon others to determine conclusively which is the proper path that a

> person should choose. However, if there should be found something indicative of one of these positions in the treatises of the *Ge'onim* or in their responsa, it is proper to follow [that position] and to go in their footsteps.

Ramban clearly declares that, with regard to this issue, the ruling of the *Ge'onim*, if it could be ascertained, is to be regarded as definitive. Obviously, Ramban did not himself have access to sources portraying the view of the *Ge'onim* on this matter, but indicates that, were such—presumably textual—material to become available to him, he would have regarded it as conclusive. It is, of course, possible that Ramban was prepared to accept new textual evidence with regard to that issue because, in this instance, his own position may not have been formulated in a hard and fast manner. Nevertheless, it is clear that Ramban was prepared to assign great weight to manuscripts of earlier authorities that were not part of the corpus of halakhic writings transmitted to him by his own teachers.[4]

These sources certainly serve to underscore the fact that, at least before final, binding halakhic determinations became universally accepted within the Jewish community, the importance of manuscript material was considerable. Any question that arises with regard to the role to be assigned to manuscript sources is limited to utilization of modern-day discoveries for purposes of overturning or modifying rulings that have been accepted as normative by virtue of incorporation in *Shulhan Arukh* or by being otherwise widely accepted within the Jewish community. Thus, for example, *Hazon Ish*'s oft-cited disavowal of manuscript evidence in establishing novel halakhic decisions must be understood, not as denigration of manuscript evidence per se, but as a reflection of the relative significance to be assigned to such sources in diverse epochs of halakhic decision-making.

A number of rabbinic scholars who have expressed extreme reluctance to accept as authoritative halakhic positions based upon manuscripts at variance with the normative rulings recorded in *Shulhan Arukh* have bolstered their view with a very interesting observation. One significant source for the formulation of this consideration may be found in the comments of Hazon Ish in a letter included in his work on *Yoreh De'ah* 150:8, s.v. *"Mikhtav—a letter."* This letter is also published in his comments on *Zera'im, Hilkhot Kela'im* 1:1, and is reprinted in *Iggerot Hazon Ish*, III, no. 48. In this communication Hazon Ish points out that the decisions of the *Shulhan Arukh* were not necessarily based upon the principle of majority rule. Hazon Ish rejects the principle of majority rule as a normative principle of decision-making other than in the context of a formal pronouncement by a *Bet Din*. Although Hazon Ish considers that, in practice, halakhic decisors frequently adjudicate on the basis of majority rule, he asserts that they do so solely because of their lack of personal acumen. However, a personage of the stature of the author of *Shulhan Arukh* might well have consciously and legitimately rejected a view held by the majority of scholars. Hence, discovery of additional views contradicting a position espoused in *Shulhan*

Arukh is a matter of little relevance. Moreover, emphasizes Hazon Ish, not all authorities published their decisions and not all published manuscripts have reached our hands. Accordingly, Hazon Ish argues, newly found manuscripts do not necessarily alter the balance of opinion with regard to any issue in controversy, for even were new opinions of *rishonim* to be uncovered, we still might not know the manner in which the majority ruled since the opinion of other *rishonim* may yet be unknown to us. But, most significantly, *Shulhan Arukh* may, indeed, have consciously ignored the hitherto unknown sources and followed a minority opinion. Mere discovery of the existence of such opinions is itself not reason to overturn the ruling of *Shulhan Arukh*.[5]

In order to place Hazon Ish's comment in proper context, it is instructive to consider the remarks of R. Jonathan Eibeschutz, *Urim ve-Tumim, Kitsur Tokpo Kohen* 123-124. *Tumim* raises a question concerning the role of manuscripts in adjudication of financial disputes. In financial litigation the rule is that the defendant can enter a claim of "*Kim li*—I maintain the minority position" in order to retain possession of his money, since in matters of jurisprudence, the principle of *rov*, i.e., a presumption that determination of the relevant rule is in accordance with the majority, does not pertain. If so, suggests *Tumim*, perhaps it is possible to go a step further. When new manuscripts appear in print, queries *Tumim*, why should the defendant not be entitled to argue "*Kim li*—I rely upon those opinions even though they are not reflected in hitherto accepted sources"? Furthermore, notes R. Jonathan Eibeschutz, even if it is accepted that the law is in accordance with the majority, how is it ever possible to determine which of two conflicting views was held by the majority of early authorities? Thus, for example, although, with regard to a specific matter the opinion of Rambam was recorded by him in his *Mishneh Torah*, it is entirely possible that many of Rambam's contemporaries disagreed with him with the result that his opinion was a minority one. Over the generations, persecutions and evil decrees prevented the publication of many works and other writings were never adequately disseminated.[6] Hence, the fact that a conflicting view was held by a majority of Rambam's peers may be unknown to us. After a lengthy discussion, *Tumim* points out that he has a *kabbalah*—a received tradition—that the scholars of the generation in which *Shulhan Arukh* was compiled accepted the rulings recorded therein as normative and binding.

Parallelling the tradition of *Tumim*, R. Chaim Joseph David Azulai, *Shem ha-Gedolim, Ma'arekhet Sefarim, Ot Bet*, no. 59 and *Birkei Yosef, Hoshen Mishpat* 25:29, records a very interesting historical fact transmitted by "aged" Torah scholars in the name of R. Chaim Abulafia. The latter authority is reported as having declared that he had received a tradition to the effect that contemporaneously with the publication of *Bet Yosef* "almost" two hundred rabbis agreed to the principle established by R. Joseph Caro that halakhic decisions are to be made on the basis of the majority of

two of the three opinions of Rif, Rambam, and Rosh.[7] Accordingly, since *Bet Yosef*'s decisions were, in effect endorsed by two hundred contemporary authorities they perforce represent the majority view.[8] The point, if historically correct, is a cogent one. However, the report is limited to endorsement of *Bet Yosef*'s canons of decision-making and does not serve to explain the decisive weight given to the decisions of Rema.[9]

Tumim adds the further observation that "to my mind there is no doubt" that *Shulhan Arukh* and Rema wrote with divine inspiration[10]

> because many questions have been raised challenging them by later authorities and answered in a sharp and penetrating manner. Also they incorporated many laws with sweetness and conciseness of language, and without doubt they did not design all of this on their own for in light of the enormity of work, the work of heaven, that was incumbent upon them, how would that have been possible? And who is the man who can compose a work that encompasses the entire Torah, culled from all the words of the early-day and the latter-day authorities...? [This was possible] only because the divine spirit[11] reverberated within them that their language might be precise in determining the Halakhah [even] without the intent of the writer and the divine wish was successfully accomplished through their hand.

Therefore, concludes *Tumim*, one cannot substantiate a claim of "*kim li*," predicated on novel minority opinions and advancing arguments not cited in *Shulhan Arukh*. Any opinion not referred to by *Shulhan Arukh* and Rema is irrelevant insofar as halakhic decision-making is concerned.[12] A similar conclusion is attributed by *Tumim*[13] to *Havot Ya'ir*, no. 165.[14]

Thus Hazon Ish's views regarding manuscripts are neither innovative nor astonishing. He did not at all formulate a position *de nouveau*. Rather, the attitude expressed in his somewhat cryptic letter is a view previously expressed by eminent latter-day authorities. Halakhah was in a more fluid state as it evolved and developed prior to its codification in the *Shulhan Arukh*. Written with what R. Jonathan Eibeschutz described as divine guidance, *Shulhan Arukh* became uniquely authoritative with the result that thereafter, Halakhah lost a great measure of its earlier fluidity. Thus, it is not at all startling that, subsequent to codification of the *Shulhan Arukh*, newly discovered manuscripts are of no great significance in terms of halakhic decision-making.[15]

Tumim's point regarding the impossibility of determining a majority versus a minority view on the basis of manuscript material is reflected in an interesting controversy with regard to the use of newly discovered manuscripts concerning the question of what constitutes a "public domain" for purposes of carrying on the Sabbath. It is a fundamental principle of Sabbath law that enclosure of an open space by means of an *eruv*, or symbolic wall, renders carrying permissible only in an area in which carrying is otherwise forbidden by virtue of rabbinic edict, but is of no effect with regard to

an area that constitutes a "public domain" according to biblical law. *Shulhan Arukh, Orah Hayyim* 345:7, cites two conflicting opinions defining a "public domain" for purposes of biblical law. According to the first opinion, streets that are sixteen cubits wide and lack a roof and walls, or streets that have walls but have open gates at both ends, constitute a "public domain." According to the second opinion, an additional condition must be satisfied in order for such an area to be regarded as a public domain, namely, the area must be traversed daily by six hundred thousand people. Rema, *Orah Hayyim* 357:3, comments that, "in our day," there exists no public domain. Thus, it would appear that Rema rules in accordance with the second opinion and maintains that the presence of six hundred thousand people is a *sine qua non* of a public domain. Since, in Rema's time, that condition did not pertain even in major metropolitan areas, no locale could be described as a public domain.

Mishkenot Ya'akov, Orah Hayyim, no. 120, meticulously cites a list of newly found sources each of which maintains that an area may constitute a public domain even though it lacks the presence of six hundred thousand persons. *Mishkenot Ya'akov* argues that, had Rema been privy to these sources, he would not have ruled that the presence of six hundred thousand people is necessary in order to render an area a public domain. Accordingly, *Mishkenot Ya'akov* prohibits reliance upon an *eruv* even in cities that are not large enough to have a population of six hundred thousand. This position is cited as authoritative by *Arukh ha-Shulhan* 345:17[16] and, as a consequence, the latter authority proceeds to develop at length a novel thesis to permit *eruvin* in such cities, arguing that in such cities other criteria necessary for constituting a public domain are absent.

However, in the course of a lengthy discussion, *Teshuvot Bet Efrayim, Orah Hayyim*, nos. 26-27, disagrees with the conclusion of *Mishkenot Ya'akov* and cites the earlier noted comments of *Tumim* to the effect that, regarding any controversy among early authorities, we have no way of ascertaining which position constituted the majority opinion;[17] rather, the Jewish community has accepted the decisions of the *Shulhan Arukh* and Rema as binding.[18]

Although *Mishkenot Ya'akov, Orah Hayyim*, nos. 121-122, responds at great length to the arguments of *Bet Efrayim* he fails to address this particular issue. It would appear to this writer that while, at first blush, it seems that *Mishkenot Ya'akov* disagrees with the position of *Tumim*, this is not really the case. It may be cogently argued that if an opinion is not recorded in *Shulhan Arukh*, discovery of new manuscript sources will not change the final ruling. The fact that an opinion is ignored by *Shulhan Arukh* indicates its rejection. However, if *Shulhan Arukh* quotes an opinion and deems it worthy of mention, it is possible that *Tumim* would agree that since the opinion is recognized as legitimate by *Shulhan Arukh*, albeit not followed in his own normative ruling, new sources may well serve to alter the final

determination, particularly with regard to a matter, such as that discussed by *Mishkenot Ya'akov*, which involves a host of authorities rather than an isolated source. An opinion deemed worthy of mention by *Shulhan Arukh* is one that cannot be rejected out of hand or, to use the terminology of *Tumim*, such an opinion is one that bears the sanction of divine guidance. Consequently, if it is found to be corroborated by a wide array of newly discovered sources it may assume even greater importance.

It must also be noted that *Tumim*'s position appears to be self-limiting. It seems apparent that *Tumim* claims that the rulings of *Shulhan Arukh* and Rema occupy a privileged position because (1) of their universal acceptance and (2) because the divine spirit guided R. Joseph Caro and R. Moses Isserles in their codification of *Shulhan Arukh*. *Tumim* presumably does not accord similar status to the ruling of later authorities. In all likelihood, *Tumim* would concede that, insofar as later authorities whose decisions did not receive such widespread and final definitive acceptance are concerned, the information that comes to light as a result of newly found manuscript sources is not to be ignored and, accordingly, the rulings of those later authorities may be disputed on the basis of such manuscripts. However, as will be discussed below, R. Moshe Sternbuch, *Mo'adim u-Zemanim*, IV, no. 274, extends this concept even to later authorities.[19]

A similar position to that propounded by *Tumim*, but based upon a somewhat different premise, may be deduced from a well-known anecdote related in the name of R. Joseph Baer Soloveitchik, *Bet ha-Levi*, by his great-grandson, Rabbi Joseph B. Soloveitchik.[20] The *Rebbe* of Radzhin claimed to have found the blue dye necessary for use in the manufacture of *tekhelet* for *tsitsit* and to have conclusive proof that this dye was indeed the *tekhelet*. Nevertheless, *Bet ha-Levi* refused to sanction use of the dye. He maintained that the Torah bids us "Ask your father, and he will tell you, your elders, and they will say unto you" (Deuteronomy 32:7).[21] Although, strictly speaking, the anecdote reflects a narrow point of Halakhah, namely, that the denotation of any biblical term can be established only upon the basis of a *mesorah*, the underlying concept is much broader in nature. All novel halakhic decisions require a *mesorah*, a tradition that is authoritatively transmitted. When such tradition is lacking, halakhic argumentation and dialectical proofs are insufficient.

It may well be argued that previously unpublished responsa containing halakhic decisions that are absent in *Shulhan Arukh*, and which did not become part of the *mesorah*, are lacking the halakhic authority conveyed by the process of "Ask your father and he shall tell you, your elders and they will say unto you." Although this contention is not entirely identical with the reasoning of *Tumim*, nor is it articulated by Hazon Ish in explicit terms, it may quite well explain the reason why serious halakhic decisors and *poskim* assign relatively little weight to new manuscript material, even when the material is known to have been authored by recognized and

authoritative scholars. To be significant for purposes of halakhic decision-making and *psak*, acceptance by *klal Yisra'el* throughout the millennia and consequent incorporation into the *mesorah* is a *sine qua non*.

B. CONFLICTING VIEWS

It is, however, by no means the case that all authorities accord a privileged position to the rulings of *Shulhan Arukh* insofar as new manuscript evidence is concerned.[22] In a discussion of the laws concerning sale of *hamets* to a non-Jew, *Shulhan Arukh ha-Rav, Orah Hayyim* 448:12,[23] states that in order for the sale to be valid in a manner that satisfies all opinions it is not sufficient for the non-Jew simply to make a down payment or to deliver a token sum as the purchase price and to allow the balance of the amount due as payment for the *hamets* to remain a debt. Rather, the non-Jew must either pay the full purchase price of the *hamets* or he must provide a guarantor (*arev kablan*), who accepts responsibility on behalf of the non-Jew for payment of the outstanding sum in the event that the non-Jew is unable or unwilling to pay the full amount himself. *Shulhan Arukh ha-Rav* reiterates this position in the section of his *siddur* dealing with the laws of the selling of *hamets*.[24] In the latter source he spells out the reasoning underlying this position, namely, that, in order to be valid, a transfer of property in return for consideration requires payment of the entire sum stipulated as the purchase price. The standard text for the sale of *hamets* customarily includes a stipulation stating that the down payment constitutes the purchase price in its entirety while any additional payment is assumed as an ordinary debt. Nevertheless, *Shulhan Arukh ha-Rav* asserts that, according to the opinion of some prominent early-day authorities, this arrangement is not acceptable.

In formulating that position, *Shulhan Arukh ha-Rav* reports that "it is well-known in the portals of Halakhah that many of the manuscripts of the *rishonim* were not yet printed even during the lifetime of the *aharonim*, of blessed memory, i.e., the *Taz*, the *Magen Avraham* and those that followed them. [They were not published] until recently, close to our own generations, as can clearly be seen to be the case with regard to the work of the *Shitah Mekubetset* on various tractates and similar works. Accordingly, one assuredly should not rely for leniency in practice upon the permissive positions that are found in the works of the *aharonim*, of blessed memory, particularly with regard to a serious biblical prohibition such as *hamets*, regarding which the Torah established stringencies, [viz., the] prohibitions of "*bal yera'eh*" and "*bal yimatseh*" (i.e., the dual prohibitions "it may not be seen" and "it may not be found").

Shulhan Arukh ha-Rav does not identify the early-day authorities to whom he refers. In his *Teshuvot She'erit Yehudah, Orah Hayyim*, no. 10, R.

Yehudah Leib, a brother of the author of the *Shulhan Arukh ha-Rav*, analyzes and amplifies his distinguished brother's position at great length. *Shulhan Arukh, Hoshen Mishpat* 190:10, rules that, if a purchaser makes partial payment for an object, title transfers immediately unless the seller demands the entire payment forthwith (*nafak ve-ayal azuzei*). Rema, in a gloss, *ad locum*, adds that, if the purchaser makes partial payment and explicitly accepts the remainder of the amount as a binding debt (*zakav alav be-milveh*), the sale is consummated even if the seller subsequently demands immediate payment.

She'erit Yehudah points out that *Shitah Mekubetset, Baba Metsi'a* 77b, cites a ruling of *Teshuvot ha-Rif* to the effect that even though the remainder of the purchase price is accepted as a debt, if the seller subsequently demands payment in full and such payment is not forthcoming, the sale may be rescinded by the seller. *She'erit Yehudah* asserts that it is this ruling of *Teshuvot ha-Rif*, as cited in *Shitah Mekubetset*, to which *Shulhan Arukh ha-Rav* refers. *She'erit Yehudah* maintains that the designation of a guarantor serves to validate the sale in such circumstances even according to the opinion of *Teshuvot ha-Rif*.[25]

Thus, *Shulhan Arukh ha-Rav* was prepared to accept the material found in new manuscripts even when halakhic positions contained therein differ from the rulings of *Shulhan Arukh*. It is important to note, however, that, in this instance, the novel position reflected in the manuscript material necessitated a halakhic revision in the nature of a stringency. It does not necessarily follow that *Shulhan Arukh ha-Rav* would have been prepared to accept a leniency based upon new manuscript evidence contrary to the ruling of *Shulhan Arukh*.

R. Moshe Sternbuch, *Mo'adim u-Zemanim*, IV, no. 274, affirms the primacy of the rulings incorporated in *Shulhan Arukh* in explaining why the stringent position of *Shulhan Arukh ha-Rav* with regard to sale of *hamets* was not accepted. Following a detailed analysis of the position of *Shulhan Arukh ha-Rav*, Rabbi Sternbuch notes that since *Shulhan Arukh, Hoshen Mishpat* 190:10, contradicts the view of *Shulhan Arukh ha-Rav*, the ruling of *Shulhan Arukh* must be followed even though it appears to be contradicted by new manuscript evidence. Rabbi Sternbuch declares:

> . . . for we have received a tradition from the great Torah authorities of the [preceding] generations, of blessed memory, that the rulings of the *Shulhan Arukh* are not changed as a result of discovery of manuscripts, even those authored by the great early-day scholars. Their reason may be explained as follows: The Holy Spirit shined forth *in the house of study of the author of the Shulhan Arukh and the acknowledged decisors according to whose rulings all of the house of Israel conducted themselves for many generations*.[26] Accordingly, it is incumbent upon us to continue in their path, even if we now find manuscripts of some early-day authorities whose path is not the same.

It is noteworthy that the view herein expressed by R. Sternbuch is virtually identical with that formulated by *Tumim* as cited earlier.[27] However, R. Sternbuch broadens this concept to encompass not only the rulings of *Shulhan Arukh* and Rema but also the rulings of other later-day preeminent halakhic decisors[28] whose decisions have been accepted as binding by *klal Yisra'el* over the generations.[29]

A sharply different attitude is manifested by R. Jacob Ettlinger. R. Jacob Ettlinger, author of several volumes of talmudic novellae entitled *Arukh la-Ner* and of a responsa collection entitled *Binyan Tsion*, accepted material found in previously unpublished manuscripts as authoritative even in instances in which the rulings therein were at variance with those of *Shulhan Arukh*. In *Binyan Tsion*, no. 69, R. Ettlinger discusses the remarks of Rabad, *Ba'alei ha-Nefesh, Sha'ar ha-Perishah*, in which Rabad cites a comment of Rav Hai Ga'on concerning regulations pertaining to a bride following consummation of her marriage. Rabad reports that Rav Hai records that, following the initial act of intercourse, the halakhic status of a virgin bride is that of a *niddah*, i.e., a menstruant woman who is required to count a period of seven days in which she is free of all bleeding and to immerse herself in a *mikveh* before resuming marital relations with her husband, but adds the comment that the bed upon which the bride sleeps or reclines is not rendered impure since her status as a *niddah* is merely doubtful. Rabad questions the relevance of the latter statement since the laws of purity and impurity have no application in our day.

Rabad proceeds to explain Rav Hai Ga'on's comment in the following manner. Rabad maintains that if a woman is definitely a *niddah*, her husband may not sleep on her bed even when she does not also occupy the bed. However, this stricture is limited to the case of a woman who is a "certain" *niddah*. Since a bride, upon consummation of her marriage, is not a "certain" *niddah*, the husband is not restricted from lying upon her bed. Thus Rabad explains Rav Hai's reference to the "impurity" of the bed as referring to restrictions upon utilization of the bed based upon prohibited forms of familiarity with a menstruant wife rather than as a reference to ritual defilement of the bed. Rabad concludes his comments with the statement that even though this leniency is not a practice for which support from earlier sources can be adduced (*eino min ha-halakhah*), it is nevertheless to be considered among those matters that *"ha-da'at makhra'at alei-hem*—wisdom determines their acceptance." Rabad's analysis of Rav Hai Ga'on's position is accepted as authoritative by Rosh, *Niddah* 10:2, and *Shulhan Arukh, Yoreh De'ah* 193:1.

R. Jacob Ettlinger points out that a quite different interpretation of the opinion of Rav Hai can be given based on the geonic responsa that had been published only a short time previously. *Teshuvot ha-Ge'onim, Sha'arei Teshuvah* (Leipzig, 1858), no. 5, declares that, in an epoch in which the laws of ritual purity were a matter affecting daily life, the ritual purity associ-

ated with objects with which a *niddah* came into contact was a matter of great importance and had ramifications in aspects of daily life. *Teshuvot ha-Ge'onim*, explains that, in order to memorialize those practices and in order that the laws of ritual purity not be entirely forgotten, the custom arose for all persons—not just the husband of the menstruant woman—to avoid reclining upon the bed of a *niddah*. Rabbi Ettlinger recognizes that, insofar as this custom is concerned, since it is merely commemorative in nature, the practice of reclining upon the bed of a *niddah* is limited to instances in which the woman is a certain *niddah*.

Nevertheless, R. Jacob Ettlinger argues that, according to the explanation of the origin of the custom recorded in *Teshuvot ha-Ge'onim*, there is no basis for a distinction between a woman who is definitely a *niddah* and a virgin bride insofar as restrictions devolving upon the husband are concerned. Although the practice for others not to recline upon the bed of a *niddah* is merely a commemorative custom, the restriction placed upon the husband is regarded by Rav Hai as a matter of Halakhah. As is evident from the text of Rav Hai Ga'on's responsum published in *Teshuvot ha-Ge'onim, Sha'arei Teshuvah*, no. 168, Rav Hai Ga'on understood the restriction imposed upon a bride subsequent to the initial act of intercourse as predicated upon a concern that the emotional impact of the experience might cause actual menstrual blood to flow. Accordingly, concludes Rabbi Ettlinger, since the woman must be treated as a possible *niddah*, as a matter of Halakhah, the husband is forbidden to recline upon her bed.

R. Jacob Ettlinger endeavors to demonstrate that Rosh was unaware of this particular responsum of the *Ge'onim*[30] and, as a result, both Rabad and Rosh misunderstood Rav Hai Ga'on's statement regarding the distinction to be made between a woman who is definitely a *niddah* and a woman whose status is doubtful. Since the author of *Shulhan Arukh* based himself upon Rabad and Rosh's erroneous understanding of Rav Hai Ga'on, the ruling codified in *Yoreh De'ah* 193:1 is incorrect. In consonance with this view, R. Jacob Ettlinger rejects the ruling of *Shulhan Arukh* and declares that a husband may not sit on his wife's bed even when, as a bride, she becomes a "doubtful" *niddah*.

It is thus clearly evident that R. Jacob Ettlinger was prepared to reject a ruling of *Shulhan Arukh* on the basis of newly published manuscript evidence even though the matter at issue was only rabbinic in nature.[31]

Nevertheless, it does not follow that this case serves as a paradigm for all other cases, even with regard to stringencies. The matter with regard to which R. Jacob Ettlinger was prepared to reject the ruling of *Shulhan Arukh* involved establishing the original—and accurate—version of a statement relied upon by *Shulhan Arukh*. It does not necessarily follow that R. Ettlinger would accept new sources that disagreed with a ruling of *Shulhan Arukh* in instances in which that primary source was consciously rejected by *Shulhan Arukh*. R. Jacob Ettlinger may not have been willing to ascribe a ruling

shown to be based upon an errant transmission to a "divine spirit" but may, nevertheless, have accepted the principle that normative Jewish law rejects any position formally rejected by *Shulhan Arukh* as being outside the pale of the *mesorah*.

It is instructive to note that R. Ettlinger's decision in contravention of the ruling of *Shulhan Arukh* did not gain wide acceptance among rabbinic scholars. However, the reason for the lack of support for *Arukh la-Ner*'s view may well be unconnected to the fact that he ruled upon manuscript evidence which other *poskim* refused to accept as authoritative. Rather, as has been correctly pointed out by R. Ovadia Yosef, *Taharat ha-Bayit*, I, 501, Rabad concludes his comments explicating Rav Hai Ga'on's position with the observation that this ruling is a matter mandated by reason (*ha-da'at makhra'at aleihem*). Thus, even if Rabad misinterpreted Rav Hai Ga'on's comments, the conclusory ruling was viewed by Rabad as logically mandated and was adopted by Rabad as his own opinion—even though, in reality, it may have been at variance with Rav Hai Ga'on's view. Accordingly, those authorities may well have concluded that it was Rabad's independent decision that was relied upon by Rosh and *Shulhan Arukh* (rather than the opinion of Rav Hai Ga'on) which became normative Halakhah.

It must also be stressed that the instances in which both *Shulhan Arukh ha-Rav* and *Binyan Tsion* disagree with rulings of *Shulhan Arukh* on the basis of new manuscript evidence involve matters in which the new manuscript evidence leads to a stringency (*le-humra*). It cannot be deduced from those discussions that these authorities would have accepted new manuscript data for purposes of establishing a leniency (*le-kula*).

There is some ambiguity with regard to whether *Shulhan Arukh ha-Rav* would have been prepared to posit a stringency based upon manuscript evidence with regard to a rabbinic prohibition or whether his consideration of manuscript material was limited to matters pertaining to biblical prohibitions. In his comments on the *siddur*, *Shulhan Arukh ha-Rav* emphasizes that "one should not rely on leniencies of latter-day authorities with regard to *hamets*, especially with regard to a grave matter that is prohibited in the Torah with the prohibitions of *bal yera'eh* and *bal yimatseh*." Although *Shulhan Arukh ha-Rav* employs the word "especially" (*u-be-frat*) which may imply that he would maintain the same opinion even if the prohibition were rabbinic in nature, nevertheless, he does not record an explicit statement to that effect with regard to a rabbinic prohibition.[32] The comments of *Binyan Tsion*, however, make it abundantly clear that R. Jacob Ettlinger was prepared to accept new manuscript evidence even with regard to a stringency pertaining to matters that are rabbinic in nature.[33]

II. POSSIBILITY OF SCRIBAL ERROR

In another comment Hazon Ish does declare manuscripts to be outside the received corpus of the *mesorah*, but for a more limited reason. *Hazon Ish, Eruvin* 67:12, seeks to deduce a halakhic concept from a statement of Rabbenu Hananel. However, in a parenthetical comment, Hazon Ish adds that the remarks of Rabbenu Hananel were incorporated in the Vilna edition of the Talmud on the basis of a manuscript text and that he "does not know" whether one can rely on such newly discovered texts. Hazon Ish writes:

> I do not know whether it is possible to rely on [works that are] newly printed since the *mesorah* has been interrupted among us and we do not know the identity of the copyists, for the work of copying is very difficult. Even when carried out by persons who are alacritous and meticulous many textual errors are commonly found. And if it transpires that there is even a slight laxity in scrutiny the [meaning of the] entire matter can be totally changed. Therefore, we must deem the words of the authorities from whom the transmission of the *mesorah* to us was not interrupted throughout all the generations, and whose works were guarded assiduously by the scholars of each generation to preserve them and to correct them, to be more accurate. All the more so, it is difficult to rely upon any new text in instances in which it is not possible to make a determination on the basis of the import of the text but rather on the basis of inference from its terminology.

Errors in transcription and copying are frequent and common. In the introduction to his *Hebrew Manuscripts: A Treasured Legacy* (Cleveland and Jerusalem, 1990), Binyamin Richler discusses some of the difficulties involved in the transcription of manuscripts and texts. He astutely remarks:

> It is almost impossible to copy a written text of moderate length without making at least a few errors. Even if a scribe were to copy a 300-page book containing 100,000 words with 99.5 percent accuracy, he would still be responsible for 500 mistakes throughout the book. In practice, few scribes approach such accuracy. The possibilities for error are immense: the script in the original may be smudged or illegible; two lines a few inches apart might begin or end with the same word, and the scribe might inadvertently skip from one line to another, omitting the text in between; the scribe may be a layman ignorant of the subject matter he is copying and, encountering an unfamiliar word, may copy it incorrectly; a scribe may incorporate into the text critical notes written on the margin even though they were never written by the author; an assistant to the scribe who reads the text next to him might substitute homonyms of similar-sounding words.[34]

According to Hazon Ish, standard works must be regarded as having a high degree of reliability because basic texts that have been in use by the

community of scholars over a period of generations have undergone rigorous scrutiny and errors in the text have been noted and corrected whereas newly found material has not been subjected to similar intensive scrutiny by a large number of scholars. Hence, such texts cannot be relied upon implicitly, particularly in cases in which one is engaged in deductive analysis based on nuances in the phraseology employed in the text. In contradistinction, the published versions of Rashi and *Tosafot*, for example, have been subjected to painstaking study and correction, most notably in the glosses of *Bah* and the comments of Maharsha, Maharshal and Maharam. Similarly, the writings of early *poskim*, such as Rosh and Mordekhai, have been textually emended by *Bet Yosef* and by subsequent commentators on the *Shulhan Arukh*.

The impact of this latter argument is significant in assessing the reliability of the text of any particular manuscript. There are times when manuscripts serve to resolve discrepancies between conflicting texts. If a ruling recorded by *Shulhan Arukh* were found to be based upon an earlier disputed version of a particular text of a work authored by an early authority and a new version of that work were now to become available on the basis of which it becomes abundantly clear that one of the disputed interpretations of the text is indeed correct, it may be argued that Hazon Ish might well accept that manuscript source as dispositive. However, were the new manuscript not to be entirely explicit and unequivocal in support of a particular interpretation, but instead was found to be cryptic and concise in its statement, Hazon Ish would not have accepted the new manuscript text as definitive because, since the text had not been scrutinized over the ages, there exists a significant possibility of textual inaccuracy that might affect halakhic conclusions to be drawn from the text.

Rabbi Yechiel Ya'akov Weinberg, *Seridei Esh*, III, no. 33, secs. 5-6, discusses a difficulty found in a statement recorded in Rabbenu Tam's *Sefer ha-Yashar*. Rabbi Weinberg declares that in order to arrive at a proper understanding of the passage in question it is necessary to emend the text of that work. He then proceeds to offer two possible interpretations, each of which presupposes a variant textual rending. Rabbi Weinberg points out that various early-day scholars understood the statement found in *Sefer ha-Yashar* in diverse ways. He suggests that they may have disagreed as to the manner in which the text must be emended in order to make it comprehensible and that their conflicting interpretations follow from the manner in which they emended the text. Nevertheless, cautions Rabbi Weinberg, this analysis is speculative and, in the absence of manuscript evidence, it cannot be demonstrated conclusively. However, he hastens to add, it is quite possible that the *rishonim* were in possession of earlier, more accurate manuscripts of *Sefer ha-Yashar* in which the language was more explicit and unequivocal. In that comment, *Seridei Esh*, makes essentially the same observation as did *Hazon Ish*, *Eruvin* 67:12, namely, that, in the process of