# The Canonization of the Mishnah

## Introduction

What is the Mishnah? A code of law or an anthology of *Tannaitic* literature? The traditional approach views the Mishnah as a legal code written by the school of Rabbi Yehudah HaNasi (Rabbi). However, among scholars of Mishnah this approach has been the subject of fierce controversy for many years. There were those who regarded the Mishnah as a collection of sources not intended in any way to present legal rulings.[[1]](#footnote-2) There were those who followed the traditional approach and argued that Rabbi intended to make legal rulings in the Mishnah and did so by means of emending the text of the sources in front of him and editing them.[[2]](#footnote-3) Both sides substantiated their claims, until the impression was created that the sources themselves completely contradict each other.[[3]](#footnote-4) In this article I will argue that the resolution of this controversy lies in understanding the historical process of the reception of the Mishnah. At first, the Mishnah did function primarily as an anthology. It was only the second generation of the *Amoraim* [sages of the Talmud] who began to regard the Mishnah as a uniform work and an authoritative and binding legal code.[[4]](#footnote-5) Subsequent generations of *Amoraim* reformulated their approach to the Mishnah with regard to both hermeneutics and legal decision making. Thus, one who studies the Talmud without taking into consideration the historical development concealed within it is influenced by the later approach, which dominates most of the Talmud.[[5]](#footnote-6) An additional stage in the process of the canonization of the Mishnah took place toward the end of the *Amoraic* period and, in particular, at the time of the redaction of the Talmud in the *Savoraic* period: both the text of the Mishnah and its language became consecrated, in similarity to the text of the Bible, and a fastidiousness developed with regard to the language of the text, down to the last word. In this article I will endeavor to delineate this historical process and demonstrate how it is repeated in the halachic literature throughout the generations.

## An Anthology of the Teaching of the *Tannaim*

The beginning of the creation of the Mishnah can be explained by the need to arrange and organize the oral law. This was made necessary at the end of the Second Temple Period, a time when controversies abounded and education and scholarship were in a state of total upheaval.[[6]](#footnote-7)

From the time when the sages gathered in Kerem B'Yavneh they said: the time will come when a man will try to recall something from the Torah and will not be able to quote it or from the oral law and will not be able to find it … they said "Let us begin from Hillel and Shammai." [[7]](#footnote-8)

Collections of the Mishnah were created over the course of the *Tannaitic* period until Rabbi Yehudah HaNasi compiled one comprehensive and authoritative edition. Even after the work of Rabbi, the Mishnah was considered one of several sources of mishnaic literature and alongside it there existed other, external *mishnyot* known as "*braitot*".[[8]](#footnote-9) Some of these stand on their own; others are arranged in collections from scholarly circles that preceded the redaction of the Mishnah or were compiled at the same time as the redaction of the Mishnah or after it.[[9]](#footnote-10) As is to be expected from a composite work, one can find in the Mishnah contradictions and inconsistencies resulting from the fact that it contains an amalgamation of documents from various sources.[[10]](#footnote-11) The first generations of *Amoraic* scholars compared the Mishnah to these various sources, by means of which they clarified both the text of the Mishnah and those opinions differing from those expressed in the Mishnah. They also identified the authors of the anonymous *mishnyot* (referred to as a "*stam mishnah*") or attributed them elliptically to "the sages".[[11]](#footnote-12) Only afterwards, on the basis of this investigation, did they render a legal decision, without giving preference to the Mishnah.[[12]](#footnote-13)

Only in the course of the second and third generations of the Amoraim of the land of Israel did the Mishnah become the fundamental text for the study of the teachings of the Tannaim, replacing other sources.

Ilfa then suspended himself from the mast of a ship and proclaimed: "If anyone asks me a question from the *braitot* of R.Hiyya and R. Hoshaya and I am unable to derive it from the Mishnah then I will throw myself from the mast and drown."[[13]](#footnote-14)

Ilfa[[14]](#footnote-15) took pride in his ability to glean from the Mishnah any law found in a *braita* and so demonstrated a new way of learning and a new approach to the Mishnah. Rabbi Yochanan anchored the beginning of the Mishnah in a *braita* attributed to the time of Rabbi: "Always run to the Mishnah more than to the Talmud."[[15]](#footnote-16) He also declared: "For me, I have only the Mishnah."[[16]](#footnote-17)

Nonetheless the scholars of that generation were still aware that if the law had not been revealed to them from another source, they would not have been able to deduce it from the Mishnah."[[17]](#footnote-18)

Concurrent to the transformation of the Mishnah into the principal textbook for the study of the teachings of the *Tannaim*,[[18]](#footnote-19) a systematic effort was made to transform it into a binding code of law.[[19]](#footnote-20)

The Mishnah was not redacted in a format compatible for use as a code of law in so much as it records both sides of disputes without deciding between them, and retains the contradictions between its various sources. Therefore, Rabbi Yochanan and his students initiated the establishment of a system of rules to enable the adjudication of the law from the Mishnah. As a result, specific legal rulings on each and every *tannaitic* dispute diminished, while the rendering of legal judgments on the basis of the Mishnah according to fixed rules increased. In the following paragraphs we will clarify the innovation of the work of Rabbi Yochanan and his students.[[20]](#footnote-21)

## Ancient Legal Rulings

Dispute was an integral part of the history of Jewish law (*halacha*) at least from the beginning of the *tannaitic* period.[[21]](#footnote-22) This raised a practical question – how would it possible to arrive at an accepted, uniform *halacha* and ensure that "the Torah will not be divided into two Torahs".[[22]](#footnote-23)

Until the time of Rabbi Yochanan there were three methods of rendering legal judgment: bringing the matter before a quorum to be decided by the majority opinion, a political power struggle, or the personal decision by a scholar of stature and authority. We will now examine each of these three methods.

### Majority Decision by a Quorum

In a place where there is an organized framework of courts of law and legal institutions, the law is determined according to the principle set forth in the Torah: to follow the majority.[[23]](#footnote-24) For the sages, this was the principal and most appropriate method of deciding the law:[[24]](#footnote-25)

Rabbi Yannai said:[[25]](#footnote-26) "If the Torah had been given in a decisive format it would not have a leg to stand on[[26]](#footnote-27) … He [Moses] said to him [to God]: Master of the Universe, tell me what is the law? He replied: follow the majority: If the majority wants to acquit, they acquit, if the majority wants to convict, they convict, in order that the Torah is interpreted forty-nine ways to render impure and forty-nine ways to render pure, according to the numerical equivalent of the word "his banner" [from the verse "and his banner over me is love"[[27]](#footnote-28)].[[28]](#footnote-29)

In this passage, Rabbi Yannai attempts to justify both the dispute and the method of deciding it. According to him, controversy is not the result of a mishap but rather a phenomenon emanating from the foundation of the Torah. Deciding according to the majority is the preferred method because there does not exist a definitive specific decision regarding the validity of one of the sides in the controversy.[[29]](#footnote-30)

The majority rule format of decision making was the normal procedure of the Beit Din, upon which all of Tractate Sanhedrinis based. According to the description in the Tosefta Sanhedrin, the principle of decision by majority rule applied not only to legal hearings, civil and criminal, in local Batei Din, but was also the means of establishing a uniform halacha for the entire Jewish people. This was true as long as there was a Sanhedrin in Jerusalem. When the Sanhedrin was abolished and the Batei Din lost their position and operational structure, it was no longer possible to bring doubtful cases to the Sanhedrin for judgment or to establish a uniform and universally accepted Halacha, and it became necessary to establish other means by which to determine the halacha.

In the Yavneh period the sages still saw themselves as a closed community of scholars. Before the removal of Rabban Gamliel, an effort was made to arrive at a consensual halachic decision. When it became clear in which direction the opinion of most sages was leaning, this was accepted as the majority opinion.[[30]](#footnote-31)

However, after the relocation to the Galilee, almost no decisions were made on the basis of a vote determined by the majority opinion among the sages. [[31]](#footnote-32)

### Personal Quarrels and Political Decisions

The collapse of the judicial system and the intensification of the phenomenon of controversies disturbed the sages of the generations before and after the destruction of the Second Temple. The occasional disputes in the time of the "pairs", until Hillel and Shammai, increased and intensified significantly. Because there were no means of rendering decisions, the conflict became political and belligerent. The decision that the law is according to the school of Hillel was the result of a historic social development in the generations near to the time of the destruction, especially the generation of Yavneh.[[32]](#footnote-33) However, even after it was accepted that the law is according to the school of Hillel, it was still possible to render a more stringent judgment in accordance with the school of Shammai.[[33]](#footnote-34) Another decision made in the Yavneh era was the rejection of the legal decisions of Rabbi Eliezer ben Hyrcanus. Nor was this decision taken by vote, but as the result of the excommunication of Rabbi Eliezer, which was also a social and political event, rather than a conceptual decision related to the issue at hand, the points of law at the heart of the controversy.[[34]](#footnote-35) Unofficially another, no less important, development occurred: The Mishnah, which came into being during the generations of the *Tannaim* after Yavneh, was created by the students of Rabbi Akiva, and thus the teachings of Rabbi Ishmael and his school vanished or were rejected. [[35]](#footnote-36)

### The Decisions of Legal Authorities

The most common way of rendering legal decisions throughout the generations has been the acceptance of the decision of a scholar whose judgment binds his students and those who follow him.[[36]](#footnote-37) In the time of the Talmud, these judgments were publicized orally by the colleagues and students of the scholar, transmitted from place to place and even served as a subject for discussion and commentary.[[37]](#footnote-38) The significant majority of judgments of this kind imbedded in the Talmud were rendered by a small number of *Amoraim* known as the heads of the generations.[[38]](#footnote-39)

All three of these methods of rendering decisions were imbedded into the rules of Rabbi Yochanan and his school, and with time the need for them in decisions regarding the teachings of the *Tannaim* was reduced because the rules for making legal decisions on the basis of the Mishnah made other means of rendering judgments redundant.

## The Rules

In order to enable the rendering of legal decisions based on the Mishnah, Rabbi Yochanan had to create "handles for the Torah", tools by means of which it would be possible to deduce the law.[[39]](#footnote-40) Rabbi Yochanan constructed a system of rules that achieved its purpose wonderfully. A few rules facilitated the rendering of a decision in most of the disputes of the Mishnah. The rules of Rabbi Yochanan are divided into two types, personal and methodological. The personal rules determine the status of the *Tannaim* found in the Mishnah and the methodological rules formulate the approach to the text. The distinctive characteristic of decision making on the basis of the rules is that the decision maker is not obligated to take a position pertinent to the subject of the controversy. There is no need to make a decision based on an analysis of the subject matter or an assessment of the various opinions. In the words of Rabbi Joseph Colon[[40]](#footnote-41) (the Maharik):

"It would appear that wherever in the Talmud a decision is rendered in the language of "between this one and that one the law is like this one", the sages of the Talmud did not get to the bottom of each controversy in order to decide that the decision would be rendered according to the one in whose favor they ruled, because the sages of the Talmud could not involve themselves in the controversies of the *Tannaim* and *Amoraim* in every case nor could they be able to decide who is right in every case in all its particulars. [[41]](#footnote-42)

According to the Maharik, determining the law according to rules originated in the inability of the sages of the Talmud to examine each case in depth and in detail. However, these rules had an additional purpose – to establish the status of the Mishnah as an authoritative book of law, such that the deliberation by sages of the Talmud for the purpose of clarifying the law would become redundant. Authority would be taken from their hands and placed, as much as possible, in the book and its authors. The transition from content related decision making to decision making on the basis of procedure is justified in that it preserves the ideal method of decision making according to the majority opinion, which is also a procedural method that relinquishes the attempt to prove the validity of one of the opinions.

### The Rules Relating to Individuals

 Most of the rules relating to individuals appear in the Talmud in a carefully arranged list of apodictic aphorisms.[[42]](#footnote-43) The list of rules appears in both the Babylonian and Jerusalem Talmuds, with slight variations. In both Talmuds the rules are explicitly attributed to Rabbi Yochanan or his students.[[43]](#footnote-44) The following is the list common to both Talmuds:[[44]](#footnote-45)

a. The law is always according to R. Akiva[[45]](#footnote-46) when he differs

from a colleague of his (some say "colleagues").[[46]](#footnote-47)

b. The law is according to R. Jose when he differs from a colleague (some say "colleagues").[[47]](#footnote-48) The law is according to him in in all disagreements between him and members of his generation: Rabbi Yehudah, Rabbi Meir and Rabbi Shimon.[[48]](#footnote-49)

c. In a disagreement between Rabbi Yehudah and Rabbi Shimon or Rabbi Meir – the law is according to Rabbi Yehudah.[[49]](#footnote-50)

d. In a disagreement between Rabbi Shimon and Rabbi Meir – the law is according to Rabbi Shimon.[[50]](#footnote-51)

e. The law is according to Rabbi when he differs from a colleague[[51]](#footnote-52) (some say "colleagues").[[52]](#footnote-53)

These rules are sufficient to decide most individual disputes in the Mishnah because they relate to the most prominent sages and those most often quoted in the Mishnah, the principal heads of the generations in the *Tannaitic* period. Rabbi Akiva is the dominant scholar of the generation of Yavneh, the generation in which the Mishnah began to be compiled. His most prominent disciples, Rabbi Meir, Rabbi Yehudah bar Ilai, Rabbi Yossi bar Chalafta and Rabbi Shimon bar Yohai, carried on their shoulders the transfer of the center of Torah study from Yavneh to the Galilee and the transmission of the teachings of Rabbi Akiva their teacher, and they are the sages most often mentioned throughout the Mishnah.[[53]](#footnote-54)

The framework of rules relating to these four sages shapes the decision making process in the central stratum of the Mishnah. Rabbi himself is not mentioned often in the Mishnah. The significance of the rule that "the law is according to Rabbi" is primarily in order to establish the superiority of the Mishnah over other collections of *braitot*, to grant validity to what appear to be the decisions of Rabbi in the Mishnah and to come to decisions in the disputes of the last generations of *Tannaim*, found more often in the literature outside the Mishnah.[[54]](#footnote-55)

### The Justification of the Rules Relating to Individuals

Deciding the law according to one sage consistently is an astonishing innovation, both in principle -- that it is possible to determine throughout the entire body of oral law that the law is according to one scholar rather than another, as well in its application – how to choose one scholar over another. A sharp expression of this astonishment can be found in a responsum written by Rabbi Y.C Bachrach[[55]](#footnote-56) on the subject of the rules of legal decision making:

I cannot refrain from asking a general question about the decisions of the sages in the Talmud regarding what is mentioned in several places as an important principle: "the law is according to someone", which refers to all of his opinions, everywhere, as it is said, "the law is according to Rabbi Akiva when he differs from a colleague" and similarly with regard to Rabbi Yossi and also Rabbi. How is it possible for a man to be successful in all he does and arrive at the absolute truth in every matter, capable of condemning every tongue that rises against him in judgment?[[56]](#footnote-57) Will the words of all who disagree with him be as nothing, naught, emptiness and lies? Despite the fact that error and mistake effect the whole human race to the extent that even the greatest of the prophets erred! How can one born of woman merit this? In addition to which, who told the sages of the Talmud that he had achieved such a level?[[57]](#footnote-58)

Just as the principle of majority rule cannot justify the decision that the law is according to the school of Hillel, neither can it justify the other individual status rules. On the contrary, it sometimes appears that these rules contradict it, because there are cases in which the rules of individual status apply even when an individual disagrees with more than one other.[[58]](#footnote-59)

It would thus appear that the individual status rules constitute the continuation of the method of decision making on the basis of the ruling of an individual scholar, rather than the method of majority rule. This was a process that integrated the authority of three sages from different generations. The first stage involved the tanna who taught the halacha. His personal status among his peers and his reputation among scholars of the following generations would, in many cases, lead many others to observe the halacha or render decisions in accordance with his opinion. This was still not sufficient however to determine absolutely that the halacha was according to his opinion. In the second stage, the authority of Rabbi Yehudah HaNasi, who cited this opinion in the Mishnah lent it additional weight. Despite the eclectic nature of Rabbi's Mishnah, we cannot ignore the fact that Rabbi choose to cite only some of the opinions on each halacha and favored the teaching of the school of Hillel and Rabbi Akiva and his prominent disciples. Sometimes, some of these halachot were cited anonymously or as the opinion of the "sages" thus giving them more weight. [[59]](#footnote-60) When the Mishnah was accepted as the canonic work of tannaitic literature, the authority of those sages whose opinions appear most frequently was enhanced. In the third stage, the authority of Rabbi Yochanan himself, the greatest Amora of the land of Israel, became tantamount to the "ruling of a scholar" instructing others to rule according to the opinion of these tannaim. The rules that he formulated had his authority.

 It is possible to see in the process of the formation of the rule "the law is according to the school of Hillel" a prototype for the method of formation of the individual status rules. The formulation of the rule "the law is according to Hillel" began with a social and political process,[[60]](#footnote-61) became accepted as a rule of decision making in the time of the *Tannaim*,[[61]](#footnote-62) and in the time of the *Amoraim* was expanded into a binding and very stringent rule. The rule that the law is according to Rabbi Akiva was accepted in a similar way. Historical and personal circumstances created the superior status of Rabbi Akiva among the scholars of his generation. After the years of persecution, after the rebellion of Bar Kokhba and the destruction of Yavneh and the southern region as a whole, the students of Rabbi Akiva created a center of Torah study in the Galilee. Although no one officially announced that "the law is always according to Rabbi Akiva" and no voice from heaven proclaimed it, his students, who led the Torah centers in the Galilee, continued to teach Torah in the way of their teacher and passed on his teachings.

After the teaching of Rabbi Akiva was established as the foundation of Rabbi's Mishnah, [[62]](#footnote-63) its halachic authority was strengthened to the point that Rabbi Yochanan proclaimed " the law is according to Rabbi Akiva when he differs from a colleague".

Of the students of Rabbi Akiva, Rabbi Yossi achieved the status of seniority among his colleagues. This status was accepted by the sages in the next generation, including their leader, Rabbi Yehudah HaNasi.[[63]](#footnote-64) Rabbi Yehudah bar Ilai, the "opening speaker at every gathering" also achieved a lofty public stature and thus merited to become second in the hierarchy of legal decision making. Rabbi Shimon[[64]](#footnote-65) and Rabbi Meir[[65]](#footnote-66) did not achieve a similar status in the academy, perhaps because the course of their lives compelled them to distance themselves from the circle of the sages or because their method of study was not accepted by the majority and most of the scholars of the next generation did not come from their academies.

Rabbi Yochanan formulated the rules for decision making between these students of Rabbi Akiva, according to the social reality and the halachic tradition that became accepted during the intervening generations.

The following story reveals something about the nature of the formulation of the decision-making process in the time of the *Tannaim*, before the rules:

It once happened that Rabbi Shimon ben Gamliel and rabbi Yehudah and Rabbi Yossi were reclining at their meal in Acre when the Sabbath began. Rabban Shimon ben Gamliel said to Rabbi Yossi: "My master, shall we interrupt our meal because of the Sabbath?" He replied "Everyday you prefer my opinions to that of Rabbi Yehudah and now you prefer his opinion over mine? Do you want to seduce the queen with me in the house?" {based on Ester 7:8, meaning "Do you want to embarrass me by ruling according to him in front of me? He replied: "If that is the case let us not stop lest the law will become so established for generations. It was said that they did not move from there until they established the law in accordance with Rabbi Yossi.[[66]](#footnote-67)

Rabbi Shimon ben Gamliel HaNasi wanted to show respect to Rabbi Yehudah bar Ilai by acting stringently and ending the meal at the beginning of the Sabbath in order to sanctify the Sabbath {by reciting the *Kiddush* on a glass of wine}. Rabbi Yossi would not have been expected to object to this because, although according to his opinion there was no need to do so, neither was there any prohibition.[[67]](#footnote-68) However, Rabbi Yossi objected out of concern that the one isolated incident be construed as a *halachic* ruling binding upon subsequent generations. From the words of Rabbi Yossi it can be understood that Rabbi Shimon ben Gamliel usually leaned towards his opinion and preferred his opinions to those of Rabbi Yehudah. The Gemara does not explain why Rabbi Shimon ben Gamliel preferred the opinion of Rabbi Yossi.[[68]](#footnote-69) In the next generation, in the time of the sons of these scholars, the authority of Rabbi Yossi was established. Rabbi Yehudah HaNasi continued the ways of his fathers by deciding the law in accordance with his views and justifying this in the following words: "Rabbi Yossi's opinion is well-founded." However, there was not yet any official obligation to rule in accordance with his views.[[69]](#footnote-70) The obligation was formulated only in the time of Rabbi Yochanan.[[70]](#footnote-71) Before the acceptance of the rules, in disagreements between Rabbi Yossi and Rabbi Yehudah, a scholar could decide to rule according to Rabbi Yehuda (if he leaned toward his opinion) even though it was accepted practice to rule according to Rabbi Yossi. After the acceptance of the rule, a decision contrary to the rule became unacceptable and undesirable and in certain circumstances could even be considered "an error regarding the halacha as clearly stated in the Mishnah."[[71]](#footnote-72)

It can be surmised that some of the stories describing the strengths and weaknesses of these great scholars were intended to explain the status of the scholar within the framework of the rules.[[72]](#footnote-73) This matter is clearly revealed in the following example:

Rabbi Acha bar Chanina said: It is revealed and known before Him Who Spoke and the world came into being that in the generation of R. Meir there was none equal to him; why then was the law not set in accordance with his views? Because his colleagues could not understand the complexity of his thinking, for he would declare the ritually impure to be pure and give a cogent argument and declare the ritually pure to be impure and also supply a cogent argument.[[73]](#footnote-74)

Rabbi Acha bar Chanina was a scholar in the land of Israel from the generation after Rabbi Yochanan and was acquainted with the rules from the beginning of their formulation. He wanted to explain why the law was not determined according to Rabbi Meir, in light of his great erudition. Perhaps he also knew another rule of Rabbi Yochanan, that an anonymous mishnah is usually the opinion of Rabbi Meir. It would thus appear that the rule that the law is in accordance with an anonymous mishnah leads to the conclusion that most of the *halacha* was decided in accordance with his view, and nevertheless, when his name actually appears in a disagreement, the law is not according to his view. Rabbi Acha elevates the stature of Rabbi Meir in a way that justifies both his seniority of rank in the Mishnah and the fact that the law is not decided according to his opinion.[[74]](#footnote-75)

### Methodological Rules

The methodological rules complement the individual status rules and suggest a way of deciding the law in a case in which the name of the scholar does not appear in the Mishnah. The basic rule, "the law is according to the anonymous mishnah"[[75]](#footnote-76) is always attributed in the Talmud to Rabbi Yochanan.[[76]](#footnote-77)

To this rule were added ancillary rules intended to clarify the use of the rule in a case which appears as "anonymous" in one place and as a "dispute" in another.

The Gemara describes the circumstances in which Rabbi Abbahu, one of the greatest disciples of Rabbi Yochanan transmitted the set of these ancillary rules:

R. Abbahu once walked leaning upon the shoulder of his attendant, R. Nahum, while the latter gathered from him knowledge of *halacha*. He asked him: "What is the law where a dispute is followed by an anonymous statement?" He [R. Abbahu] answered him: The law is in accordance with the anonymous statement." ‘What is the law when an anonymous statement is followed by a dispute’? He replied: "The law is not in accordance with the anonymous statement". "What if the anonymous statement appears in a mishnah and the dispute in a *braita*?" He answered: "The law is in accordance with the anonymous statement. ‘What if the dispute is in the Mishnah and the anonymous statement in a *braita*? He replied: If Rabbi had not taught it, how would R. Hiyya know it![[77]](#footnote-78)

The story demonstrates that the ancillary rules were also developed in the academy of Rabbi Yochanan, in the circle of his greatest disciple, Rabbi Abbahu.[[78]](#footnote-79) These rules both establish the seniority of the Mishnah in relation to the *braitot***,[[79]](#footnote-80)** and make a statement with regard to the internal organization of the Mishnah.**[[80]](#footnote-81)**

### The Innovation in the Methodological Rules

According to the straightforward understanding of the tradition of Talmudic decision making, the rules of Rabbi Yochanan reflect the work of Rabbi and his school in editing the *tannaitic* sources.[[81]](#footnote-82) However, this perception does not correspond to the data emerging from the Gemara. If the methodology of Rabbi and the other editors of the *tannaitic* compilations had been known, it would have been common knowledge, or at the very least known to the students of Rabbi in the transitional generation and the first two generations of the *Amoraim*. They should have been the first to apply the rule "the law is according to the anonymous mishnah" and the rules deduced from it regarding the Mishnah and the *braitot*. However, it is clear from both Talmuds that they were not aware of these rules and did not follow them. Even after the rules of Rabbi Yochanan were known they were still attributed primarily to him and to his school and were not considered to be accepted conventions.[[82]](#footnote-83)

The clearest example of this is the rule "the law is in accordance with the anonymous mishnah", the most basic rule and the best known. This rule appears tens of times in the Talmud and in each place is attributed to Rabbi Yochanan. Furthermore, it always appears as a question on a specific ruling of Rabbi Yochanan which contradicts the anonymous mishnah.[[83]](#footnote-84)

About no other scholar is the question of why he ruled contrary to the anonymous mishnah raised anywhere in the Talmud and this is for the simple reason that other scholars were not perceived as bound to this rule.[[84]](#footnote-85)

The ancillary rules with regard to the relation between the Mishnah and the *braitot* were presented for the first time, according to the evidence in the Gemara, by Rabbi Abbahu. It is possible that Rabbi Abbahu did not formulate these rules but merely put them together. However, if the fundamental rule, "the law is according to the anonymous mishnah" is attributed to his teacher, Rabbi Yochanan, it is reasonable to assume that the rules of Rabbi Abbahu are a development of the basic rule of Rabbi Yochanan and were formulated in his academy.

Further proof that the methodological rules relating to the Mishnah and *braitot* are not based on authentic testimony from the time of the creation of these works can be found in the Talmudic dispute about the reasons for the rules.[[85]](#footnote-86) According to the Jerusalem Talmud, the law is in accordance with the anonymous mishnah because the anonymous mishnah reflects the majority opinion.[[86]](#footnote-87) The omission of the name of the scholar indicates that this opinion is the majority opinion, while an opinion brought in the name of a scholar is an opinion that differs from that of the other scholars. The rule that "the law is according to the anonymous mishnah" corresponds to the rule that "between the opinion of an individual and the opinion of the majority, the majority rules" which is a direct continuation of the method of decision making used in the rabbinical court, to follow the majority.[[87]](#footnote-88) In contrast, according to the Babylonian Talmud, the law is according to the anonymous mishnah because Rabbi accepted this opinion and ruled according to it.[[88]](#footnote-89) It would thus appear that the rule "the law is according to the anonymous mishnah" does not derive from the principle of majority rule but is based on the supreme authority of Rabbi,[[89]](#footnote-90) whose rulings at the time of the editing of the Mishnah were accepted as binding.[[90]](#footnote-91) Neither of these explanations is sufficiently grounded in in the traditional descriptions of the activity of Rabbi. There is no mention in either of the Talmuds of any endeavor to clarify the *halacha* in the time of Rabbi which resulted in the creation of the Mishnah. [[91]](#footnote-92)

Furthermore, the Gemara cites another rule in the name of Rabbi Yochanan: "an anonymous mishnah reflects the opinion of Rabbi Meir".[[92]](#footnote-93) Even though the personal status rules of decision making formulated by Rabbi Yochanan himself place Rabbi Meir in a low position in the hierarchy of decision making among members of his generation, the anonymous *mishniyot* according to which the *halacha* is decided are attributed to him! Rav Sherira Gaon explained that in the generations before Rabbi, every scholar recited the "Mishnah" to his students in his own words. Rabbi considered the "Mishnah" of Rabbi Meir to be the version most suited to serve as the basis for his Mishnah because it was the clearest and finest of them all, though this does not mean that he always decided the law according to his opinion.[[93]](#footnote-94) On the basis of this information and other factors it is difficult to believe that there was an ancient, uniform and established tradition about Rabbi's methodology in the redaction of the Mishnah.[[94]](#footnote-95) The data force us to conclude that the anonymous rules do not reflect a tradition existing from the time of Rabbi, but are rather an innovation of Rabbi Yochanan and his school.[[95]](#footnote-96)

## The Justification for Decision Making on the Basis of Rules

Judicial decision making according to a set of rules must be justified on the basis of its aims rather than as a reflection of the history of the creation of the Mishnah. Decision making according to the rules is procedural and perpetuates the ideal method of *halachic* decision making, the method of determining the law in the rabbinical court according to the majority decision. Inherent to the procedure of ruling according to the majority opinion is the idea of relinquishing the aspiration to convince all of the judges of one absolute truth and achieve unanimous agreement as to the correct point of view. In this way the Torah granted legitimacy to a ruling that does not clarify the issues at hand but is based on accepted practice. Also inherent to ruling according to the rules is the principle of procedural ruling. Sometimes, the justification given for the rules is their realization of the principle of majority rule.[[96]](#footnote-97) In addition to which, after the fact, after the rules have been accepted by consensus, this is a legitimate way of making decisions, even more authentic than the attempt to determine the "correct" opinion in the dispute.

The demand for a uniform method of determining the law is expressed in the biblical verses commanding the establishment of a centralized judicial system, in the *braita* describing the methods of decision making in the days when the great rabbinical court sat in the Chamber of Hewn Stone in the Temple from which "the law went forth and was spread throughout all of Israel",[[97]](#footnote-98) as well as in the laws of the rebellious elder which dictate obedience to the accepted *halacha*. The perpetuation of a dispute is regarded as a failure and a crisis.[[98]](#footnote-99) The canonization of the Mishnah served as a substitute for the rendering of legal decisions by the supreme rabbinical court and completed the work that began with the academy in Yavneh. When the Mishnah was accepted as a conclusive and binding work -- and in its wake additional works in subsequent generations – the ideal state of *halachic* unity was almost restored, and the Torah, which had almost divided in two or more, became one again. [[99]](#footnote-100)

## The Revolution in the Interpretation of the Mishnah

After Rabbi Yochanan completed his work and it was accepted in the academies of the *Amoraim*, first in his immediate environment in the land of Israel and within the Jerusalem Talmud, and afterwards in Babylonia and the Babylonian Talmud, the approach to the Mishnah and its *halachic* status radically changed.[[100]](#footnote-101) From this point the Mishnah was not only a source for the study of the methods of the *tannaim* and the basis for the study of Talmud, the comparative analysis of the various sources and the clarification of their opinions, but also an authoritative source of practical *halacha*. The later *Amoraim* no longer adjudicated the disputes in the Mishnah because these adjudications had already been made and established, according to the rules.[[101]](#footnote-102)

The growing recognition that it was possible to deduce practical *halacha* from the Mishnah led to the necessity to complement the basic rules of Rabbi Yochanan with supplementary rules which would assist in decision making in cases in which it was not possible to apply the rules of Rabbi Yochanan. Therefore, subsequent generations continued to develop additional rules, although not as numerous or as systematic as the rules of Rabbi Yochanan.[[102]](#footnote-103)

The acceptance of the perspective of Rabbi Yochanan had another major impact on the way the Mishanh was interpreted. Later A*moraim* who accepted the method of Rabbi Yochanan and his school as axiomatic were compelled to adjust the teachings of the earlier *Amoraim* to the concepts prevalent in their time. They were compelled to justify every instance in which the earlier *Amoraim* made individual decisions not based upon the rules.[[103]](#footnote-104) In a case in which the *halacha* prevalent among the *Amoraim* was in contradiction to the *halacha* that emerged from the Mishnah, the sages preferred to force the matter and interpret the Mishnah so that it conformed to the *halacha,* rather than interpreting it in contradiction to the *halacha* or to the rules of decision making.[[104]](#footnote-105) While early generations, when confronted with a contradiction between two sources in the Mishnah or between the law stated in the Mishnah and the prevailing law, did not refrain from interpreting it as a dispute among the *tannaim,* later generations preferred to resolve the contradiction in the Mishnah[[105]](#footnote-106) and resolve it in accordance with the *halacha*.[[106]](#footnote-107) From here there developed the creative exegetical method of the "*ukimta*".[[107]](#footnote-108)

The choice of the *ukimta* as the preferred method of preserving the rules of decision making despite the exegetical difficulty inherent to them is explicitly addressed by the students of Rabbi Yochanan:

According to whom did Rabbi Yochanan so rule? Didn't Rabbi Yochanan say "the law is according to the anonymous mishnah?" …Rabbi Zeira said "let us interpret the mishnah to mean that there were no coins upon it during the twilight, so as not to contradict Rabbi Yochanan".[[108]](#footnote-109)

Said R. Isaac ben Joseph: "Let us interpret the mishnah to be referring to a sandal which has four buckles and four straps, so as not to contradict the words of R. Yochanan".[[109]](#footnote-110)

The expression "let us understand the mishnah to mean…so as not to contradict the words of Rabbi Yochanan", reveals an awareness and intentionality in the use of the *ukimta*. It was clear to the Amoraim that "our mishnah" had to be understood differently from its straightforward meaning and that ruling according to the anonymous mishnah contradicts the ruling of Rabbi Yochanan. In order to uphold the *halachic* tradition of Rabbi Yochanan, which they regard as binding, while at the same time to preserve the status of the Mishnah as an authoritative *halachic* work, they are compelled to suggest a forced interpretation of the anonymous mishnah in order to uphold both the rule and the ruling.[[110]](#footnote-111)

## The Interpretation of the *Ukimta*

We will demonstrate the process of the change in approach to the Mishnah from a Talmudic *sugia* [a passage comprising a discussion of a specific subject] in which the various approaches are arranged in an ordered and methodical manner. [[111]](#footnote-112) The basis of the discussion is a fundamental contradiction. On the one hand, the law agreed upon among the *Amoraim* is that in order to become liable for punishment for performing the forbidden activity of transferring objects from one domain to another on the Sabbath, one has to remove the object from an area of at least four by four handbreadths and place it in another domain upon a surface of a similar area. [[112]](#footnote-113) On the other hand, the mishnah indicates that the removal and placement of objects in the hands of the master of a house and a beggar at his doorstep is sufficient to incur this liability. The Gemara brings three types of explanations. The first group of explanations argue that the accepted law is according to the opinion of another *tanna* who disagreed with the mishnah. Raba reasons that the author of the mishnah is Rabbi Akiva;[[113]](#footnote-114) Rabbi Yosef argues that the author is Rabbi[[114]](#footnote-115) while Rabbi Zeira reasons that the mishnah was authored by "others".[[115]](#footnote-116) These approaches reflect the early hermeneutic methodology used to interpret the Mishanh: the identification of an anonymous *tanna* and his juxtaposition to contradictory *mishnayot* [mishna, plural] with which the *halacha* is in accordance. The second group of explanations forces an interpretation of the mishnah by means of an *ukimta* in order to make it conform to the accepted law. Rabbi Abba[[116]](#footnote-117) explains that the mishnah is referring to a man holding a basket in his hand[[117]](#footnote-118) while Rabbi Abbahu explains that it is referring to a situation in which the hand is positioned at a distance of less than three handbreadths from the ground and therefore the object may be considered as placed on the ground.[[118]](#footnote-119) These scholars, the students of Rabbi Yochanan, are adopting the approach of "let us understand the mishnah as saying…" so as not to contradict the rule "the law is in accordance with the anonymous mishnah". Rava[[119]](#footnote-120) proposes a more sophisticated explanation: he creates an abstraction of the condition of "four by four", defining it not as a measurement of area but as a measurement of importance, so that it can be adapted also to what is stated in the mishnah: the hand of the man is as important as "four by four".[[120]](#footnote-121) The difference between the methodology of the *Amoraim* of the land of Israel and the methodology of Rava does not directly touch upon the status of the Mishnah: all agreed that the mishnah has to be interpreted so as to conform to the *halacha*. The *ukimta* is the exegetical tool with which the later *Amoraim* and the stammists adapted the Mishnah to the *halacha* and made it possible to realize the vision of Rabbi Yochanan: to derive all of the *halacha* from the Mishnah.

## Homiletic interpretations

With the transformation of the Mishnah into a basic textbook and legal code, an additional phenomenon developed: an exact precision in reference to the language of the Mishnah. Before this transformation, the Mishnah was understood to be freely worded, making it futile to analyze its language with any real precision. On the contrary, we can posit the existence of different versions of one law, which do not indicate a dispute. [[121]](#footnote-122) From this point there was a change in approach to the Mishnah: its language is increasingly regarded as being absolutely precise. In the beginning these took the form of subtleties within the *halachic* language from which were derived the details of the laws and afterwards a non-literal exegesis developed, similar to the *halachic* and *aggadic* exegesis of the Bible. The climax of this phenomenon was in the period of the *Savoraim*, in which *sugiot* developed that are like *midrashim* (homiletic interpretations) based on the language of the Mishnah. [[122]](#footnote-123)

This exegetical path did not become the preferred way in the interpretation of the Mishnah. Its use certainly did not attain the scope and intensity of that of the approach of Rabbi Yochanan. After its zenith in the days of the *Savoraim*, the Mishnah entered a period of decline and loss of stature. For many long years, during the periods of the *Geonim* and *Rishonim*[scholars of the 11th to 16th centuries] the study of Talmud pushed the study of the Mishnah from center stage. The Talmud was considered the most fundamental textbook in academies and study halls and the Mishnah was usually studied as part of the study of the Talmud, with the exception of tractates for which there is no Babylonian Talmud, and in certain communities which still upheld the inherent value of study of the Mishnah in its own right. "Mishnah as an independent unit, a literary corpus in its own right, outside the framework of the Talmud, was apparently not widespread, neither in practice nor in the mentality of those studying the texts."[[123]](#footnote-124) The attempt of Maimonides to return the study of Mishnah to its former glory by means of his *Sefer HaMaor* did not succeed and he therefore turned to the composition of the *Mishneh Torah*, as a substitute for the Mishnah of Rabbi suited to the needs of the time.[[124]](#footnote-125)

## The Meaning for Subsequent Generations

The influence of Rabbi Yochanan and the system of rules that he created went beyond establishing the status of the Mishnah. The unfolding of the way in which the rules of Rabbi Yochanan transformed the Mishnah into a code of law contributes to our understanding of the process of the canonization of *halachic* literature throughout the generations. The Mishnah was the first work to undergo such a process, but not the only one. The most prominent case in point, after the Mishnah, is the Babylonian Talmud. Anyone who peruses the Talmud immediately realizes that it is a collection of discussions and interpretations, not a legal code. [[125]](#footnote-126) However, after its redaction the *Geonim* transformed it into a legal code by means of a system of rules similar to the rules regarding the Mishnah formulated in the Talmud. Those who formulated the rules of decision making in the days of the *Geonim* were of the opinion that the editors of the Talmud designed the work for the purpose of deciding the *halacha*. They reinvented the concept of "the law is according to the anonymous mishnah" as a rule which states that the law is according to the "trend of opinion" (*"sugia d'shmatata*"), despite the significant difference between the character of the two works and between the anonymous passages in the Mishnah and in those the Talmud.[[126]](#footnote-127)

We find similar phenomena in works from the time of the *Rishonim* and *Aharonim* [from the 16th century] until the present time.[[127]](#footnote-128) Many books of *halacha* contain statements in their introductions that the work is intended only to compile sources and enlighten the reader, but after a short time these books turned into authoritative and binding legal codes.[[128]](#footnote-129) The question as to why in the course of time one book becomes canonical and another does not is similar to the question of why a voice came from heaven and announced that the law is according to the school of Hillel. The answers to these questions are to be found in a realm beyond formal *halachic* discussion and must be analyzed in historical, sociological and theological-metaphysical terms. One could say, in the style of the *aggadah,* that a voice came from heaven and announced that the law is according to the *Shulchan Aruch*.[[129]](#footnote-130) A more moderate and conventional explanation would attribute the authority of the *Shulchan Aruch* to the fact that it was approved by two hundred rabbis.[[130]](#footnote-131) However, the very authority to consecrate a book and turn it into an authoritative and binding source of *halacha* is derived from the original enterprise of Rabbi Yochanan and his students regarding the Mishnah.[[131]](#footnote-132)

The principles at the basis of both the canonization of the books of law and adjudication according to rules reflect two revolutions in the formulation of the approach to the Mishnah. Canonization freezes the process of the resolution of a dispute and the investigation of a spectrum of opinions and leads to the establishment of a uniform, agreed upon, universally binding *halacha*. Morover, judicial decision making by the rules implies the abandonment of the uncompromising search for the truth; those deciding on the basis of a rule forgo the aspiration to clarify the point in question and to discover the correct and accepted opinion. Instead, *halacha* is determined by procedure, without discovering which side of the argument is correct. This process influenced the development of a formalistic approach to *halacha* and resulted in a partial loss of the vitality inherent in pertinent discussions and multi-faceted decision making.

##  Reservations

At the conclusion of this article it is important to qualify slightly the extent of the innovation in the revolution we have described.

Neither the canonization of the books nor the initiation of adjudication according to a set of rules ended the topical discussions or the ability to decide contrary to the book or the rules. Opposition to the rules can be found already within the Talmudic discussions themselves. First, because the Talmud preserved opinions contrary to the methodology of the rules of Rabbi Yochanan,[[132]](#footnote-133) and second, and most significantly, because of the nature of the Talmud as a work that emphasizes the discussion of the issues and minimizes the significance of *halachic* pronouncements. The Talmud is a work that shaped *halachic* thought, no less than the Mishnah.[[133]](#footnote-134) Like the Mishnah, every legal code created throughout the generations generated numerous works of commentaries and exegesis which eroded its infallibility to the point of completely negating its exclusive authority. The phenomenon is apparent in every responsum from the responsa literature. What the Talmud did for the Mishnah, the responsa literature did for the legal codes. It questioned its authority even when it claimed to be relying upon it and reintroduced specific discussion about the issues, including discussion about the correct use of the rules and their limitations. The composition of legal codes did not inhibit *halachic* creativity, which continues to flourish and grow. It would appear that the scholars of the oral law succeeded in finding a reasonable balance between the need to create a recognized and binding legal code and the need to allow the continuation of the vibrant and vital development of the world of *halacha*.

1. For an extreme version of this approach, see: H. Albeck, *Introduction to the Mishnah* (Jerusalem: Bialik Institute, 1959), 172-184. [All works cited in this paper are in Hebrew unless otherwise stated.] Albeck attempted to explain the places in the Talmud in which it is made clear that the anonymous mishnah indicates the ruling of Rabbi Yehuda HaNasi. A. Goldberg, ("The Way of Yehudah HaNasi in Arranging the Mishnah" *Tarbiz* 28 (1959): 260-261), followed Albeck and explained that this cannot be proved from the places in the Gemara in which the anonymous mishnah is regarded as the ruling, because they reflect the approach of the *Amoraim*, not the historical reality at the time of the redaction of the Mishnah. E.E. Urbach has made the point that to a certain extent academic scholars must accept the testimony of the *Amoraim* concerning the Mishnah: "Albeck could have said that he does not take into consideration the words of the *Amoraim* in a historical question like the redaction of the Mishnah, and at first it seemed that he would take that approach ('For the *Amoraim* have no fixed opinion on the nature of the Mishnah and its purpose', p. 274) but it can be inferred that he was not comfortable with this position. When all is said and done, Rabbi Yochanan saw Rabbi in person and learned from all of his students and it can therefore be assumed that he knew something about the Mishanh. Albeck therefore interprets their sayings so as to adapt them to his method". (Urbach, "Introduction to the Mishnah" and "100 Years of Mishnah Research"(1960), p. 435.) [↑](#footnote-ref-2)
2. J.N. Epstein seemingly took this position. [J.N. Epstein, *Introduction to the Mishnaic Text* (Jerusalem: Magnes, 1957), 225-226]. Albeck criticized him harshly for this. However, the position of Epstein is more complex than Albeck gave him credit for. Epstein accepts the premise that most of the anonymous *mishnyot* are from the Mishnah of Rabbi Meir (ibid, 96-106). He argues that the Mishnah of Rabbi Yehudah HaNasi was an eclectic work, compiled from various *tannaitic* sources. ("As much as possible, therefore, Rabbi left the sources as they were and strung them together." Ibid, 204-205). Epstein worked to clarify the sources of the Mishnah. [J.N. Epstein, "The Mishnah of Rabbi Yehuda (Studies on the Sources of the Mishnah)" *Tarbiz* 15 (1944): 1-13.] It appears that Epstein mediates between two extremes. On the one hand he accepts that the Mishnah of Rabbi is comprised of sources that were in front of him, some of which he did not interfere with at all. On the other hand, he reasons that Rabbi did interfere with them to some extent during the process of redaction and included in the Mishnah his own rulings, although not entirely or consistently. He also emphasized that Rav was not obligated to rule in accordance with the anonymous mishnah, and that only "the anonymous Babylonian Talmud" attempted to explain the words of Rav according to the method that was accepted in the days of the later Amoraim". (*The Introduction to Mishnaic Text*, 190-191) Shamma Friedman has pointed out the inconsistency in the comments of Epstein in a similar matter, the nature of the Tosefta, and attempted to justify the contradictions in his words in various ways. [S. Friedman, *Tosefta Atiqta, Pesah Rishon*: *Synoptic Parallels of Mishna and Tosefta Analyzed with a Methodological Introduction* (Ramat Gan: Bar Ilan, 2002), 17-21.] E.E. Urbach suggested a moderate intermediary position: "Given the state of the extant sources, we are unable to determine if Rabbi edited the Mishnah according to one comprehensive principle. The nature of the sources in front of him and the extent of their dissemination among the sages apparently determined his approach to them – what to include and what to exclude, what to accept in its current wording and what to correct and change. (E.E. Urbach, *Introduction to the Mishnah and 100 Years of Mishnah Research*, 434) These are his words on the subject of the rulings of Rabbi: "It is clear that the Mishnah is not a legal code like the *Yad HaHazaka* of the Rambam, because everyone knows that a significant part of the Mishnah does not consist of legal rulings. On the other hand, the Mishnah is not only 'an anthology of the Oral Law', as Albeck called it, but a legal canon… In the very activity of choosing and compiling from among the collections of *mishnayot* [mishna, plural] of the various study halls, Rabbi apparently aspired to give variety to his Mishnah and include in it a kind of representation from each of the collections of *mishnyot* known in his day in order that it would be accepted by everyone. This activity included a type of judicial ruling. His compilation became the Mishnah with the capital "M" while the other collections became *braitiot*. A "canon", a standard, was created, according to which, and in relation to which, all other *mishnyot* were evaluated, and there was a finality in its redaction…" (pp. 438-439) In light of his research on the antiquity of the laws in the Tosefta, Shamma Friedman leans more to the positive side: "It is reasonable possibility that the text of the Mishnah we have before us, was reedited, in language and content, by Rabbi or by another final editor". (*Tosefta Atiqta*, 95). [↑](#footnote-ref-3)
3. For a thorough and up-to-date survey of the academic literature in this field, see Y. Elman, "Order, Sequence and Selection: The Mishnah's Anthological Choices," D. Stern (ed.), *The Anthology in Jewish Literature* (Oxford: Oxford University Press, 2004), 53-80. (English) Elman does not merely make a binary distinction between code and anthology. He presents a wide spectrum of possible ways to understand the nature of this corpus and its purposes. He also adds an important new aspect to the discussion: a comparison with Latin, Syrian and Persian legal works. Nonetheless, he does not present a cogent explanation for the discrepancy between the anthological appearance and what some regard as the authoritative tone of the Mishnah. My intention in this article is to resolve this contradiction by means of historical analysis. [↑](#footnote-ref-4)
4. This does not mean that the Mishnah does not include units, of individual mishnayot or larger sections, that reveal a tendency to halachic decision making. A detailed analysis of mishnayot redacted for the purpose of supporting a specific halachic position can be found in Menahem Kahana, "Studies in the Development of Dispute in the Mishnah and its Aims", Tishrei-Kislev). Nonetheless, this tendency is not uniform throughout the Mishnah, and thus it can be said, as pointed out above in note #, that while the mishnaic anthology does contain passages that are not "neutral" and even contain halachic agendas or reflect the teachings and rulings of a particular school, this is not the general tendency of the Mishnah as a whole. אין זאת אומרת, שלא ניתן למצוא במשנה יחידות, ברמת המשנה הבודדת או קבצים גדולים יותר, שיש בהן הטיה להכרעה הלכתית. דוגמה לניתוח מדוקדק של משניות שעריכתן מכוונת לתמוך בעמדה הלכתית מסוימת ראו במאמרו של מנחם כהנא. (מ' כהנא, עיונים בעיצובה של המחלוקת במשנה ובמגמותיה תשרי-כסלו) עם זאת, תופעה זו אינה אחידה במשנה כולה, ולכן ניתן לומר, כמבואר לעיל בהערה #, שבתוך האנתולוגיה המשנאית נמצאים גם קבצים שאינם "נייטרליים" ויש להם מגמה הלכתית או שהם משקפים את תורתו והכרעותיו של בית מדרש מסוים – אך אין זו המגמה הכללית של ספר המשנה. {הקטע חוזר על עצמו} [↑](#footnote-ref-5)
5. Attention to the need to be precise in distinguishing between the early *Amoraic* sections of the Gemara and the later anonymous part, and the need to identify the components of the anonymous sections of the words of the *Amoraim*, is the product of the research developed for the most part in the second half of the twentieth century by David Halivni and Shamma Friedman, on the basis of the earlier work of Klein, Weiss and their predecessors. Even those who disagree about the large quantity of Talmudic material that is allocated by these scholars to the "*stammists*" and to the scholars of the post Aramaic period, admit to the need to distinguish between the early *Amoraic* sections, which sometimes can include also "*stam*" (anonymous sections), and the late "*stam*". In the subject under discussion here, these distinctions are crucial because precise attention to them reveal that the discussions about the relationship between the rulings of the *Amoraim* and the rules are usually late *anonymous* and reflect the period in which the rules were accepted as consensus in the Talmudic world. For a comprehensive discussion on this subject and early sources, see Robert Brody, "The Anonymous Talmud and the Words of the Amoraim", *Iggud: Selected Essays in Judaic Studies* 1 (2008): 213-232. [↑](#footnote-ref-6)
6. Benjamin M. Levin, ed., *Epistle of Rav Sherira Gaon* (Haifa:, 1921), 11. The Sephardic version, and see other versions cited there. [↑](#footnote-ref-7)
7. Tosefta, Eduyot, a, 1.H. Albeck considers this to be reliable evidence about the beginning of the compilation of the Mishnah (*Introduction to the Mishnah,* 82-87, 257-259). Epstein argues that this is a testimony about a gathering in Kerem b'Yavneh in which they began to order the disputes between the school of Hillel and the school of Shammai. (*Introduction to Mishnaic Texts*, 422-427). Both of them also summarize the opinions of their predecessors on this subject.

The question of the catalyst for the creation of the Mishnah, the nature of the testimony of Tractate *Eduyot* (Testimonies), and Rav Sherira Gaon's interpretation of it, have been discussed from various perspectives. Recently, Adiel Schremer has suggested that the gathering in Yavneh described in Tractate Eduyot was intended to preserve and nurture the halachic method of the school of Hillel, the *Nesi'im* and the school of Rabbi Akiva that contradicted the traditionalist approach of the school of Shammai and Rabbi Eliezer and his school. Adiel Schremer, "'Avot' Reconsidered: Rethinking Rabbinic Judaism," *JQR* 105 (2015): 287-311 [↑](#footnote-ref-8)
8. The term "*braita*" itself can be attributed to a later period of the Babylonian *Amoraim*, after the Mishnah had been established as the superior text. [Neil Danzig, "The Development of the Term '*Braita'*" *Sinai* 85 (1979): 217-224] [↑](#footnote-ref-9)
9. "Large collections of *mishnayot* such as the "Mishnah" of Rabbi Huna, the "Mishnah" of Rabbi Hoshaya, and the "Mishnah" of Bar Kafra." (Jerusalem Talmud, 3, 5, (48:3). [↑](#footnote-ref-10)
10. The manner of the creation of the *tannaitic* literature and the formation of the Mishnah of Rabbi is described here briefly according to accepted opinions, beginning with the *Epistle of Rav Sherira Gaon* (pp. 17-47), and in recent scholarship from the days of Nachman Krochmal [*Guide for the Perplexed of the Time*, in *The Works of Nachman Krochmal* (Shimon Ravidovich, ed.) (Berlin: Einot, 1924), 217-237] and Zechariah Frankel [*The Ways of the Mishnah* (Leipzig, 1859), 209-218] -- without entering into points of controversy which are irrelevant to our discussion. For an up-to-date discussion and sources on this subject see Schremer (in note 7, above). [↑](#footnote-ref-11)
11. The question "who are the sages?" usually elicits the identification of the "sages" as one particular scholar. It appears as the first question about a mishnah, for example: "'And the sages declare it valid' —who are the sages? Rabbi Eliezer said: it was Rabbi Elazar who said that the witnesses to the delivery make it effective." (Gittin 22:a-b). It is more common as a question of the identification of a *braita* that is brought in the course of the discussion in the Gemara (for example, Taanit 6:a), or as the solution to a contradiction between *braitot* in which the words cited in both in the name of the "sages" contradict each other. (for example, Gittin 76:a). There are cases in which the clarification of "who are the sages?" appears in the "stam" (anonymous) section of the Gemara in order to justify why they did not rule according to the sages. These cases are late and reflect the acceptance of the rules (for example, Yevamot 46:b). Nonetheless, it appears the first generation of Amoraim already שכבר אמוראים ראשונים related to an opinion brought in the name of the "sages" as the majority opinion according to which the ruling must be made. The following are examples in which the term "the law is like the majority" is employed in the Babylonian Talmud, in all of which "the majority" appears in the Mishnah in the name of the "sages": Berachot 9:a, 37:a, Yoma 36:b, Moed Katan 20:a, Yevamot 46:a, Yevamot 47:a, Ketubot 21:a. On the methods of the *Rishonim* (medieval scholars) in ruling according to the "sages", see *Yad Malachi*, (Livorno, 1767) *klal* 661. [↑](#footnote-ref-12)
12. Some consider those who make legal rulings based on the Mishnah to be destructive (Babylonian Talmud, Sotah 22:a). Rashi explains it thus: "Because we don't know the reasons of the Mishnah, sometimes it happens that one forms the wrong impression. Furthermore there are many *mishnayot*, as it is said "who is that? It is so-and-so!", "that is an individual opinion", or "the law is not according to his opinion", in addition to which, in a dispute between the early *Tannaim,* they do not know who is correct and the result is that one could make the wrong ruling." (Rashi, idem, sub voce "shmurin"). [↑](#footnote-ref-13)
13. 11 Babylonian Talmud, Taanit 21:a, Ketubot 69:b. On the practical ramifications of this story, see: D. Sperber, "Philology and Reality in the Study of Classical Rabbinic Literature" *Sidra* 1 (1985): 141-143. On its conceptual and psychological aspects, see: Jonah Frankel, *Studies in the Spiritual World of the Aggadic Story* (Tel Aviv: HaKibbutz haMeuchad, 1981), 88-90. Admiel Kosman, [*Men's World : Reading Masculinity in Jewish stories in a Spiritual Context* (Jerusalem: Keter, 2002), 121-126. Rafi Vaknin,"Ilfa and Rabbi Yochanan: Torah and Merchandise: A Lesson in Educational Philosophy" *Hagut beHinuch Yehudi* 9 (2010): 65-72.](http://merhav.nli.org.il/primo_library/libweb/action/display.do?tabs=detailsTab&ct=display&fn=search&doc=NNL_ALEPH002693180&indx=2&recIds=NNL_ALEPH002693180&recIdxs=1&elementId=1&renderMode=poppedOut&displayMode=full&frbrVersion=&dscnt=0&scp.scps=scope%3A%28NNL%29&frbg=&tab=default_tab&dstmp=1444922244664&srt=rank&mode=Basic&&dum=true&vl(freeText0)=%D7%9E%D7%A1%D7%9B%D7%AA%20%D7%92%D7%91%D7%A8%D7%99%D7%9D%20&vid=NLI)  [↑](#footnote-ref-14)
14. An *Amora* in the land of Israel, colleague of Rabbi Yochanan. About him, see: Hyman, *The History of the Tannaim and Amoraim,* (London: Express, 1910), vol. 1, 150; H. Albeck, *Introduction to the Talmuds* (Tel Aviv: Dvir, 1969), 180-181; Benjamin Lau, *The Sages*, 4 (Jerusalem: Maggid, 2012), 205-209. [↑](#footnote-ref-15)
15. Baba Metzia 33: a-b: "Our Rabbis taught: 'They who occupy themselves with the Bible [alone] are deserving and not deserving , with Mishnah, are deserving and are rewarded for it; with Talmud -- there is nothing more deserving; always run to the Mishnah more than to the Talmud. Now, this is a contradiction. You say, 'Talmud — there can be nothing more deserving' and then you say, 'run always to the Mishnah more than to the Talmud!' — Said R. Yochanan: This mishna was taught in the days of Rabbi; everyone abandoned the Mishnah and went to the Talmud; therefore he subsequently taught them: "Always run to the Mishnah more than to the Talmud". See Jonah Frankel, "Ha Gufa Kashia" *Tarbiz* 42 (1973): 269, and note 19 there, regarding the transmission of the words of Rabbi Yochanan, and compare to Jerusalem Talmud, Horoyot, 3, 5 (48:c). For sources and a summary of opinions on the meaning of this passage and its parallels, as well as an original interpretation on the basis of a correction in the text of the Jerusalem Talmud, see Shlomo Naeh, "Three Comments of the Text of the Jerusalem Talmud and Its Meaning, " *Leshonenu* (2012): 195-215. [↑](#footnote-ref-16)
16. Jerusalem Talmud, Terumot 2, 1, (41: c) and parallel texts. The Babylonian *Amoraim*, from the third generation, use a similar expression: "It is our mishnah". When they began to decide the law they had already put the Mishnah in first place in order of importance. See: Epstein *Introduction to the Text of the Mishnah*, 238-240; Benjamin DeVries, *Studies in the Development of the Talmudic Halacha* (Tel Aviv: Zioni, 1962), 47-49. [↑](#footnote-ref-17)
17. Yevamot 92: b: R. Yannai said: A vote was taken at the academy and it was decided that betrothal with a *yevamah* is not valid. R. Yochanan said to him: Rabbi, O Master, is this not our mishnah? As we have learnt… The other answered "If I had not lifted up the shard for you , would you have found the

pearl underneath it?" So too in Makot 21: b. A similar dialogue takes place between Rabbi Hiyya bar Abba and Rabbi Yochanan in Bava Metzia 17:2. See: Albeck, *Introduction to the Talmuds*, 646. [↑](#footnote-ref-18)
18. It is reasonable to assume that the canonization of the Mishnah had a social-cultural role in the consolidation of a Jewish *halachic* society and in the ousting of other sects, especially Christianity, from the realm of legitimate discourse. What the prayer against the heretics did in the synagogue, the canonization of the Mishnah did in the study hall. See: Rivka Nir, Early Christianity: The First Three Centuries (Raanana: The Open University, 2009), 56 and the chapter on the attitude to heretics, 411-419. Moreover, it is possible that the canonization of the mishnaic literature was instrumental in the marginalization of the halacha of those tannaitic schools that were not part of the mainstream. This group included the students of the school of Shammai, Rabbi Eliezer ben Hyrcanus and his school, and Rabbi Akiva's sparring partner, Rabbi Ishmael and his school. See below.

On canonization as a means of shaping a culture and a society, see for example: Rakefet Sela-Sheffy, “Struggles over the Canon: Culture Preservation and Culture Transformation” in *Canon and Holy Scriptures*, *ed.* Yaacov Shavit (Tel Aviv: Tel-Aviv University: The Chaim Rosenberg School of Jewish Studies, 2009), 17-46 (English abstract: XIX-XX). Moshe Halbertal discussed the subject of canonization in the Torah world at length in his book, *The People of the Book*, (Cambridge, MA: Harvard University Press, 1997). On the canonization of the Mishnah, see pages 45-72 and briefly in his work on Maimonides: *Rabbi Moses ben Maimon* (Jerusalem: Zalman Shazar Center, 2009), 162-163. [↑](#footnote-ref-19)
19. It is important to distinguish between two processes that occurred almost simultaneously: the recognition of the Mishnah as a work of distinguished pedigree preferred over other *braitot,* and its transformation into a binding legal code. Despite the close connection between these two developments, they are not necessarily interdependent. The book could be an authorized source of the teaching of the *Tannaim*, but being full of disputes, unable to serve as a code of law. See the distinction made by Halbertal between a canon that shapes and a canon that binds. (above, note 17). [↑](#footnote-ref-20)
20. In the framework of the discussion on the canonization of the biblical collection, great emphasis is placed on the question of the attitude to written works (Mishnah Yadiim, 4: 5-6) and see the in-depth discussion in Menahem Haran, *The Biblical Collection* (Jerusalem: Bialik Institute, 1996), vol. 1, 201-275. In the case of the Mishnah, the consecration of the work was unconnected to its writing. The controversy about the writing of the Mishnah was settled definitively by Y. Sussman who demonstrated that the Mishnah was not written down until the Geonic period. [Y. Sussman, "The Oral Law: Its Interpretation is its Meaning: the Power of the Tip of the Yod" *Mekharei Talmud* 3 (2005): 209-384] The explanation of how an oral text can become redacted into a final and authoritative version was provided earlier by Saul Lieberman in his article "How the Mishnah was Published" in *Greek and Hellenism in Jewish Palestine* (Jerusalem: Ben Zvi Institute,1984), 213-224. [↑](#footnote-ref-21)
21. For a comprehensive anthology of the subject, see: H. Ben- Menachem, et. al. (eds.) *Controversy and Dialogue in Halachic Sources*, vols. a-c, (Boston: University of Boston, 1992-2003). For a brief description: Menachem Elon, *Jewish Law*, (Jerusalem: Magnes, 1978), 870-876. For an up-to-date summary of discussions on the authority of the sages, traditionalism versus creativity and originality, the connection between these subjects, and the attitude of the sages toward dispute, see:

Yishai Kiel, "The Authority of the Sages in the Babylonian Talmud — A Zoroastrian Perspective" *Shenaton ha-Mishpat ha-Ivri: Annual of the Institute for Research in Jewish Law :* ???

 137 – 153See also Schremer, note#. [↑](#footnote-ref-22)
22. Tosefta, Sotah 14:9 and Babylonian Talmud, Sotah 47:b include the many disputes and schisms in a long list of negative social phenomena that occurred as the result of the moral decline of the people of Israel. [↑](#footnote-ref-23)
23. Exodus 23:2. There is a difference between the simple meaning of the verse and the midrashic (homiletic) interpretation that this is the source of the obligation to accept the majority opinion, as explained in Rashi's commentary on the verse. However, in the classical rabbinic literature the verse is mentioned several times as the source for majority rule both in *halacha* (Bava Metzia 59:b) and in government (Hulin 11:a) E. E. Urbach has pointed out the difficulty in transferring the concept of deciding according to the majority from legal procedure used in the rabbinic court to a principle used in judicial decision making according to the rules. See E. E. Urbach, "On the Principle 'After the Many'" *Mekhkarim b'Madai Hayahdut* 2 (1998): 503-509. [↑](#footnote-ref-24)
24. The Tosefta in Hagiga 2:9, and in parallel texts, describes the ideal situation of a system of organized rabbinical courts and at its head the High Court in the Chamber of Hewn Stone from which is promulgated a uniform *halacha* accepted by all the Jewish people. Historians disagree as to whether this tradition reflects a historical reality but there is no doubt that it represents the idea of *halachic* unity – an idea widespread in the *tannaitic* period. See Benjamin DeVries, "Dispute" *Sinai* 53 (1963): 296-301. For a detailed analysis of this Tosefta, see: Ishay Rosen-Zvi, "Protocol of the Beit Din of Yavneh? : A New Look at the Tosefta Sanhedrin Chapter Seven" *Tarbiz* 78 (2009): 447-477] [↑](#footnote-ref-25)
25. In a parallel text in *Pesiqta Rabati* (Ish Shalom edition, paragraph 21, the Ten Commandments, *piska kamaita*) the first part of the saying is brought in the name of Rav Tanchum bar Hanilai. [↑](#footnote-ref-26)
26. In a parallel text in *Pesiqta Rabati*: "A scholar who made a *halachic* decision would have had no leg to stand on because if he declared something impure others would declare it impure in a similar way and if he declared something pure others would declared it pure in a similar way. " [↑](#footnote-ref-27)
27. Song of Songs 2:4, "and his banner over me is love". The numerical equivalent of "*ve' diglo*", "his banner" is forty-nine. [↑](#footnote-ref-28)
28. Jerusalem Talmud, Sanhedrin, 4,2 (22: a) and compare Babylonian Talmud Chagiga 3:b. [↑](#footnote-ref-29)
29. So the Ridbaz explains in his commentary on the Jerusalem Talmud. See Y.D. Gilat, "On the Ways of the Formation of the Halacha" and "On the Disputes between the School of Hillel and the School of Shammai" in *Yad leGilat: The Collected Articles of Y.D. Gilat*, I. Ta-Shma, Israel Gilat, eds, (Jerusalem: Bialik, 2002), 150-151,157-158. A. Sagi, *These and Those: The Meaning of Halachic Discourse* (Tel Aviv: HaKibbutz HaMeuhad, 2002), 24-29, 87-124,175-197. Shalom Rosenberg, *It is Not in Heaven*, (Alon Shvut: Tvunot, 1997), 69-79. [↑](#footnote-ref-30)
30. So it appears from cases outside the rabbinic court in which Rabbi Akiva justifies himself in acting contrary to the opinion of Rabban Gamliel because many disagreed with him. (Tosefta Berachot 4:15, Yom Tov 2:12). Later generations disagreed over the question if there could be a majority decision without a vote. See the *Talmudic Encyclopedia,* vol. 9, under "*Halacha*", 256-257 and notes there. [↑](#footnote-ref-31)
31. Evidence of deciding by vote according to the majority after the period of Yavneh: "and our rabbis took a vote in Usha" (Babylonian Talmud Rosh HaShana 15:a, inter alia), "Rabbi and his court of law took a vote" (Ohalot 18, 9), From the beginning of the *amoraic* period: "Rabbi Yannai said 'in a group they voted and decided'" (Babylonian Talmud Yevamot 92:b, inter alia). According to the parallel text in the Jerusalem Talmud, Tractate Yevamot 1,1 (2:c) Rabbi Yannai testified: "Over thirty elders voted".(And see Benjamin Lau, *The Sages*, 4, 96-102). On the time of Rabbi Yehudah HaNasi, see: Babylonian Talmud, Avodah Zara 36:a, 38:b; on the "*havurah*" in the land of Israel in the *amoraic* period, see Moshe Beer, *The Sages of the Mishnah and the Talmud: Teachings, Activities and Leadership* (Ramat Gan: Bar Ilan University, 2011), 51-58. [↑](#footnote-ref-32)
32. A late *amoraic* legend gives the task of adjudication between the two schools to a voice from heaven and explained the decision to rule according to the school of Hillel on the basis of a moral principle: "Because they were pleasant and modest and taught their opinion as well as that of the school of Shammai, and moreover gave precedence to the opinion of the school of Shammai." (Babylonian Talmud, Eruvin 13: b). *Halachic* scholars found it difficult to accept the homiletic justification because they did not regard a voice from heaven as an authoritative source for the determination of a rabbinic dispute. This was expressed by Rabbi Yehoshua in the dispute over the oven of Akhnai, "one does not pay attention to a voice from heaven" (Bava Metzia 59: b), an opinion also brought to justify a ruling that is not according to the school of Hillel (Yevamot 14:a). Moreover, considerations of moral virtue are not supposed to decide the arguments between the sages. Therefore, the Tosafists proposed that the *halacha* was set in accordance with the school of Hillel because they were the majority. (Tosafot, sub voce: "Rabbi Yehoshua" on Yevamot 14:a) The difficulty with this interpretation is that there is no evidence that there was an official quorum in which the schools of Hillel and Shammai decided by vote that the *halacha* would be according to the school of Hillel. To the contrary, there is evidence of a completely different kind of forum in which the school of Shammai was victorious: the majority leaned to their side and rulings were made according to their opinion on certain topical matters. Tractate Shabbat (Mishnah Shabbat 1:3, Tosefta 1:16, Jerusalem Talmud, Shabbat 1:4 (3:3) and the Babylonian Talmud 17:1) describes a dispute between the schools in which a majority comprised of the school of Shammai forced a decision in its favor. In the Tosefta, Yevamot 1, 9-13, there is a different description of the failure of an attempt to establish the *halacha* in the dispute between the houses: "the time was out of joint". See the summary of this subject in the book of I. Ben Shalom, *The House of Shammai and the Struggle of the Zealots against Rome* (Jerusalem: Ben Tzvi Institute, 1995), and for a description of the historical process of acceptance of the laws of the school of Shammai, see; Ben Shalom, 273-276, and in the sources cited in the notes there. See also, Y. Sussman, "The Study of the History of the Halacha and the Scrolls of the Judean Desert, Early Talmudic Musings in the Light of "Some of the Stories of the Torah" *Tarbiz* 59 (1990): 36-37 and notes 116-119 there, 69 (note 226), and especially 72 (note 237). [↑](#footnote-ref-33)
33. Tosefta, Yevamot 1:13. Compare Tosefta Sukkah 2:3; Eduyot 2:3. Safrai demonstrated that until the period of Yavneh, *Tannaim* from the school of Hillel also observed the law according to the school of Shammai (S. Safrai, "Deciding the Law According to the School of Hillel in Yavneh", *The Proceedings of the Seventh World Congress of Jewish Studies* 3 (1981): 21-44. See also Saul Lieberman, *Tosefta Kifshuta* (New York: Rabinowitz, 1955), 4-9 (on Yevamot 1). According to A. Bittman, "On the Nature of the Rule that the Law is like the School of Hillel" *Sinai* 82 (1978): 185-196, the harsh expression: "the school of Shammai in place of the school of Hillel is not a mishna" is late. It appears in the Babylonian Talmud in three places only and in all of them in the anonymous part of the discussion in a later layer. (Brachot 36:a-b, Beitza 1:a, Yevamot 9:a-10:b). The sharp expression: "he who acts according to the School of Shammai is liable for the death penalty" (Jerusalem Talmud, Berachot 1, 3, (3: b) and in the Babylonian Talmud, Berachot 11:a) would appear to be a aphorism rather than a law. It relates to the words of Rabbi Tarfon in the Mishnah in Berachot, that it would be better to become subject to the death penalty than to act according to the school of Shammai. However it does not appear from the mishnah that it was the intention of Rabbi Tarfon to argue in general that one who follows the school of Shammai is subject to the death penalty. On the contrary, Rabbi Tarfon is one of the sages in the generation of Yavneh who still acted according to the school of Shammai in many matters. See Louis Ginzberg, *A Commentary on the Palestinian Talmud* (New York: JTS, 1941), 143-160, for a discussion of the problems that arise from the *sugia* in the Babylonian Talmud and a comparison of the approach of the Talmuds and the approach of the *braitot* to the rule "the law is always according to the school of Hillel". In his opinion, even though the Jerusalem Talmud includes the "phrase" "subject to the death penalty" in the wording of the *braita*, it is clear that this is a Talmudic addition and there is no evidence for the existence of the phrase "one who does not follow the words of the school of Hillel is subject to the death penalty" in the *tannaitic* sources. [↑](#footnote-ref-34)
34. This judicial tradition is not worded as a rule but derives from the narrative tradition about the excommunications of Rabbi Eliezer ben Hyrcanus and the rejection of his rulings in favor of the leadership and rulings of Rabbi Yehoshua ben of Hanania. (According to the story of the oven of Akhnai in the Babylonian Talmud, Baba Metzia 59:b, and according to the position of Rabbi Yehoshua in Niddah 7:b). The expression "Rabbi Eliezer *shamoti*" that appears in the Talmuds as a reason for the rejection of the laws of Rabbi Eliezer can be explained in two ways – either he belonged to the school of Shammai or he was excommunicated ("*shmata*", "excommunicated" in Aramaic). Either way, the matter under discussion is a social historical phenomenon rather than a formally worded legal code such as the rules of Rabbi Yochanan. See Y.D. Gilat, *The Mishna of Rabbi Eliezer ben Hyrcanus* (Tel Aviv: Dvir, 1968), 309-329. [↑](#footnote-ref-35)
35. David Weiss Halivni, *Midrash, Mishna and Gemara*: *The Jewish Predilection for Justified Law,* (Cambridge, MA: Harvard University Press, 1986). [↑](#footnote-ref-36)
36. Tosefta Eduyot 1, 5: "[If one] asked a sage…" The ruling of a sage in his place of residence is binding upon all residents of that place, even if the custom of most of the world is different (Shabbat 150:a). Even a sage who himself rules differently must follow the ruling of the local rabbinic authority. (Shabbat 46:a) There are procedural rules regulating the methods of judicial ruling of the decision makers ("*poskim*"). (Tosefta, ibid., Negaim 1, 11, Jerusalem Talmud, Yoma 7, 3, (44:c), Babylonian Talmud, Eruvin 62:b. All these sources are cited in the *Shulchn Aruch*, Yoreh Deah, *siman* 242) [↑](#footnote-ref-37)
37. See for example the discussion in Hulin 49: a in which *Amoraim* from the third generation participate in the clarification of the report of a law in the name of Rabbi Yehoshua ben Levi. [↑](#footnote-ref-38)
38. The number of the *Amoraim* in the Babylonian Talmud in whose names are cited definitive *halachic* decisions with regard to disputes among the *Tannaim* ("Rabbi A said the law is x"), is not more than twenty, out of hundreds of *Amoraim* known to us, according to the most conservative method of calculation. The most prominent of them all were Rav and Shemuel in the first generation, Rav Nachman, Rav Chisda and Rav Huna in the second generation, Rav Yosef in the third generation, Rava in the fourth generation and Rav Pappa in the fifth generation. Among the *Amoraim* of the Land of Israel: Rabbi Yehoshua ben Levi, Rabbi Yochanan and Reish Lakish, Ulla, Rabbi Elazar and Rabbi Chanina. On the nature of these decisions, see the article by Barak Cohen on Shemuel's rulings. (B. S. Cohen, 2013). [↑](#footnote-ref-39)
39. This chapter is based upon a doctoral thesis written under the supervision of Professor Y. Sussman (Yehuda Brandes, *The Origins of the Rules of Pesika*, 2002) and a subsequent article Yehuda Brandes, "Rabbi Yochanan's Pesika Revolution: The Rules of Pesika" in *The Ways of Peace: Studies in Jewish Thought Presented to Shalom Rosenberg* (B. Ish-Shalom, ed.) (Jerusalem: Beit Morasha, 2007). [↑](#footnote-ref-40)
40. France – northern Italy 1420-1480. [↑](#footnote-ref-41)
41. *Responsa of the Maharik* (Jerusalem, 1988), *shoresh* 765. [↑](#footnote-ref-42)
42. On the organization of the collection, see U. Zur, "The Formation of the Rules of *Halacha* in a Threefold Structure in the Babylonian Talmud (Eruvin 46:b)" *Netuim* 19 (2014): 121-129. [↑](#footnote-ref-43)
43. The students mentioned in the discussion in Eruvim 46:b are Rabbi Yaakov, Rabbi Zerika, Rabbi Assi, Rav Hiyya bar Abba, Rabbi Assi bar Chanina, Rabbi Yaakov bar Idi and Rav Abba. All are *Amoraim* of the land of Israel from the third generation, students of Rabbi Yochanan. [↑](#footnote-ref-44)
44. Babylonian Talmud, Eruvin 46:b. Jerusalem Talmud, Terumot 3, 1, (42: a). In the Jerusalem Talmud cited here there is a textual problem stemming apparently from an amalgamation of various sources: the maxims of Rabbi Yochanan and Rabbi Yonatan and that which is deduced from them are completely identical in the text in front of us and so it is clear that there is a redundancy here. We have no proven means for recreating the text of the Jerusalem Talmud in this passage, but this is not relevant to our discussion here. [↑](#footnote-ref-45)
45. The rule is attributed in the Babylonian Talmud to Rabbi Yaakov and Rabbi Zerika (Eruvin 46:b), the students of Rabbi Yochanan, not to Rabbi Yochanan himself. In the Jerusalem Talmud it is not included in the list of rules. [↑](#footnote-ref-46)
46. In the rule about Rabbi Akiva the principal version is "from his colleague" in the singular. In MS Munchen 95 it is explicitly added "not from his colleagues", whereas in MS Vatican 109 the text reads "from his colleagues". See also the *She'iltot*, she'ilta 68, in the wording of the citation from Eruvin 61:b. It would appear that the multiplicity of versions in the manuscripts are an outcome of the basic question discussed already in the Talmud itself regarding the scope of the rule. Usually it is decided in the Babylonian Talmud that the correct reading is "his colleague". In other words, a law determined according to an individual opinion is not as good as one decided according to the majority. This was said also with regard to Rabbi Akiva (Ketubot 4:a),Rabbi Yossi (Bava Meztia 33:a and Bechorot 37:a), Rabbi (Pesachim 27:a and Ketuvot 21:a). See also Bava Batra 124:b. The question as to whether the text should read "his colleague" or "his colleagues" can be understood simply as the question "Is the law according to him only when he contradicts an individual or also when he disagrees with everyone?" However, it is possible that even according to the reading "his colleagues", the meaning is not that the law is according to him even when he disagrees with the majority, but it is the generalization of "his colleague", in other words "the law is according to him when he disagrees with any of his colleagues individually." According to this understanding, the rules are not founded upon contradictory traditions and they do not stand in contradiction to the rule "in the case of an individual opinion versus a majority opinion, the law is according to the majority, and the conclusion of the Gemara corresponds nicely to both versions of the rule. [↑](#footnote-ref-47)
47. The rule is worded in the plural in Eruvin 46: b in the saying of Rabbi Yaakov and Rabbi Zerika. In the Jerusalem Talmud, Eruvin 3, 1(42:a), it is cited as "Rabbi Yossi said in the name of Rabbi Yochanan." [↑](#footnote-ref-48)
48. In Eruvin 46: b the rule of Rabbi Yossi appears in two forms. Once, in the general wording of Rabbi Akiva and Rabbi Zerika, and afterwards in detail in the words of the *Amoraim* discussing the relative status of the four students of Rabbi Akiva. The rules attributed to Rabbi Yochanan are: 1) according to Rabbi Yossi against Rabbi Yehudah, 2) according to Rabbi Yehudah against Rabbi Meir, and 3) according to Rabbi Yehudah against Rabbi Shimon. From here they inferred by an a fortiori argument ("*kal vehomer"*) that the law is according to Rabbi Yossi against Rabbi Meir and Rabbi Shimon. [↑](#footnote-ref-49)
49. Both rules are brought in Eruvin 46:b and in Jerusalem Talmud, Terumot in the name of Rabbi Yochanan. In the Jerusalem Talmud, Rabbi Zeira cites, in the name of Rabbi Yaakov bar Idi, the rules in the name of Rabbi Yochanan and Rabbi Ba bar Yaakov bar Idi brings them in the name of Rabbi Yonatan. [↑](#footnote-ref-50)
50. This rule is brought in the Jerusalem Talmud in the name of Rabbi Yochanan. This tradition did not reach the Babylonian Talmud and therefore the dispute between Rabbi Meir and Rabbi Shimon remains unresolved there. Nonetheless, there is evidence from the aggadah in Eruvin 13:b that the sages of the Babylonian Talmud were also familiar with the rule that "the law is not according to Rabbi Meir". [↑](#footnote-ref-51)
51. The rule of Rabbi Yaakov and Rabbi Zerika in Eruvin 46: b is attributed to Rabbi Yochanan in the Jerusalem Talmud, Terumot. [↑](#footnote-ref-52)
52. Worded in the singular in Eruvin 46: b and in the plural in Jerusalem Talmud, Terumot. The possibility of reading "his colleagues" is raised uncertainly in Bava Batra 124:b and as a rejected presupposition in Pesachim 27:a, and Ketubot 21:a. In each case this is a commentary of the anonymous Gemara to the rulings of the *Amoraim* in the dispute between Rabbi and his colleagues. [↑](#footnote-ref-53)
53. Avraham Goldberg has in several places described the place of Rabbi Akiva and his four greatest students in the Mishnah. See Avraham Goldberg, "And it is all According to Rabbi Akiva" *Tarbiz* 38 (1969): 231-254. *Commentary to the Mishnah Tractate Shabbat*, Jerusalem: 1976, 19, and the aforementioned *Commentary to the Mishnah,* *Tractate Eruvin*, Jerusalem: 1986, 18. [↑](#footnote-ref-54)
54. For additional information about these rules and the extent of their diffusion and acceptance in the Talmud, see: E. B. Halivni, *The Rules for Deciding Halakha in the Talmud* (Lod: Mekhon Lemehqere Sifrut, 1999). [↑](#footnote-ref-55)
55. Germany, 1638-1701. [↑](#footnote-ref-56)
56. A play on words based on the verse Isaiah 54:17. [↑](#footnote-ref-57)
57. *The Responsa of Chavot Yair* (Lemberg: Rahatin, 1894) *siman* 94. [↑](#footnote-ref-58)
58. For example, Babylonian Talmud, Gittin 67:a. See *Halichot Olam*, portal five, 1,1, 228 (Portnoy edition, Jerusalem, 1998, 230); *Yavin Shemua*, loc. cit., and in editor's note 22 and in the sources mentioned there. In particular, *Yad Malachi*, *siman* 230: "The law is like Rav Yossi when he disagrees with his colleague or colleagues." See the entry "*halacha*" *Talmudic Encyclopedia*, 9, 286, and in the sources listed in the notes there. [↑](#footnote-ref-59)
59. Either this was a clear-cut authoritative ruling of Rabbi, who deliberately made the mishnah anonymous, or the literary decision of Rabbi, as the editor of the Mishnah, to include within it material from the school of a certain sage, in which his opinion appears as anonymous . [↑](#footnote-ref-60)
60. As great deal has been written about the social and cultural reasons for the ascendance of the school of Hillel, there is no need to expand further here. See note 33 [↑](#footnote-ref-61)
61. See note 34. [↑](#footnote-ref-62)
62. See note 54. [↑](#footnote-ref-63)
63. Gittin 67: a: "Rabbi said: The law is like Rabbi Yossi, who said "words are not sent by a messenger". Rabbi Shimon his son said to him: Since Rabbi Meir and Chaninah from Ono disagree with Rabbi Yossi, why did Rabbi say that the law is according to Rabbi Yossi? He replied to him: Be quiet, my son, be quiet, you never saw Rabbi Yossi, if you had seen him you would realize that his opinion is well grounded". Shabbat 51: a: Rabbi decreed: "it is forbidden on the Sabbath to bury cold food [in order to keep it cold]." Rabbi Ishmael the son of Rabbi Yossi said to him: "Father permitted to bury cold food." [Rabbi] then declared: "so a *halachic* authority has already ruled". Rav Pappa said: "Come and see how the scholars show affection for each other! Because if Rabbi Yossi were alive he would bow his head and defer to Rabbi, just as Rabbi Ishmael who has taken his father's place, bows his head and defers to Rabbi, and yet [Rabbi] declared that "so a *halachic* authority has already ruled". Also in Yevamot 105: b. See: Benjamin Lau, *The Sages*, 3, (Jerusalem: Sifriat Eliner/The Jewish Agency, 2009), 78-106 and the sources there. [↑](#footnote-ref-64)
64. The aggadah portrays Rabbi Shimon as an august and aloof man. Both in the well-known story about his days in the cave (Babylonian Talmud, Shabbat 33: b and parallel texts) and in his self-description and that of his son (for example: Babylonian Talmud, Sukkah 45:b). It is possible that the very attributes that made the "masters of the aggadah" regard him as the father of mystic lore and (later on) the author of the Zohar, are the very characteristics that caused the "masters of *halacha*" to remove him from the middle path in *halachic* decision making. In certain subjects the law was decided according to Rabbi Shimon in rather early stages of the *amoraic* period, and the matter raised doubts among the "masters of the rules" with regard to the periodization of the rule to determine between Rabbi Yehudah and Rabbi Shimon. See Y*ad Malachi*, *siman* 577 and the *Talmudic Encyclopedia* (above note 25) 294, and the sources in the notes.

The question of the *halachic* status of Rabbi Shimon bar Yochai greatly disturbed the kabbalists who wanted to adopt the laws appearing within the Zohar even when they contradict the accepted practice based on the Talmud and the rabbinic literature dependent upon it. See Yaakov Katz, "The Relationship of the *Halacha* and Kabbalah in the Generations after the Revelation of the Zohar" *Da'at* 4 (1980): 57-74. (republished in *Halacha and Kabbala*, (Jerusalem,1984), 52-69, especially 58 and following); Israel Ta-Shma "Rabbi Yosef Caro between Ashkenaz and Sepharad – a Study of the Dissemination of *Sefer HaZohar*" *Tarbiz* 59 (1990): 153-170. And see Benjamin Lau, *The Sages,* 3, 118-148. [↑](#footnote-ref-65)
65. In Horyot 13: b. there is an *aggadah* which explains the ousting of the Torah of Rabbi Meir from the Mishnah. See also the portrait of Rabbi Meir in Lau, *The Sages*, 3, 167-246. [↑](#footnote-ref-66)
66. Tosefta, Berachot 5, 2. [↑](#footnote-ref-67)
67. Babylonian Talmud, Pesachim 100: a. [↑](#footnote-ref-68)
68. The personal and institutional interactions between the sages of this generation, and in particular the relations between the group of students of Rabbi Akiva and the House of the Nasi [the "Prince" or "Patriarch"] requires a separate investigation and many have already addressed the question. Signs of the tension between them are discernable in an *aggadah* in the Babylonian Talmud (Horyot 13: b). See for example, A. Oppenheimer "The Status of Rabban Shimon ben Gamliel in Sanhedrin" in *The Land of Israel from the Destruction of the Second Temple until the Muslim Conquest* (Z. Brass et al., eds), (Jerusalem: Yad Ben-Zvi 1982), 82-84. See Lau, *The Sages* 3, 249-263. [↑](#footnote-ref-69)
69. The Babylonian Talmud, Gittin 67: a, Jerusalem Talmud, Gittin 6, 7 (48: b). In the context in which they are cited, the words "his argument is well grounded" is praise that is not substantially different from the praise of other sages mentioned in that passage in the Gemara and it cannot be inferred from them that the law must be according to his opinion in every case. It is merely a justification of why Rabbi ruled in accordance with him in this matter in Gittin, against two sages who disagreed with him. [↑](#footnote-ref-70)
70. In the opinion of Urbach, even Rabbi Yochanan himself did not intend to formulate binding rules. As Urbach expressed it: "It can almost be said that these "rules" are not legal rulings but statistical assessments, that in most cases in disputes of these kinds the law is in accordance with the opinion of a specific *Tanna*." [E.E. Urbach, *The Halacha, its Sources and Development,* (Givatayim: Yad leTalmud/Masada, 1984), 203]. Thus the contradictions between the rules of Rabbi Yochanan and his individual rulings are solved. However, even Urbach would admit that among the students of Rabbi Yochanan the rules were already understood as binding precepts. [↑](#footnote-ref-71)
71. See the Babylonian Talmud, Ketubot 84:b, and Rashi there , sub voce "*bedavar Mishnah*". [↑](#footnote-ref-72)
72. Like the *aggadot* that were mentioned above that tell of the removal of Rabbi Meir, the seclusion of Rabbi Shimon and the popularity of Rabbi Yossi. [↑](#footnote-ref-73)
73. Babylonian Talmud, Eruvin 13: b. [↑](#footnote-ref-74)
74. This explanation is appropriate also to the status of Rabbi Shimon bar Yochai. While the *aggadah* ascribes to him unique and hidden power, it removes him from this world and from the exoteric rulings within the realm of reality. [↑](#footnote-ref-75)
75. In addition to the rule that "the law is in accordance with the anonymous Mishnah" there is an expression based on a basic principle originating in the rabbinic court: "In the case of dispute between an individual opinion and the majority opinion, the law is according to the majority opinion." This expression was used primarily in situations in which one opinion is presented in the Mishnah in the name of "the sages" and another in the name of an individual sage. The number of these cases is small relative to the number of *mishnayot* in which one opinion is presented as the anonymous mishnah and another in the name of an individual sage. See E.E. Urbach, "On the Rule 'After the Many'", 503-509, and see above note #. [↑](#footnote-ref-76)
76. For example: "And who said that this was the opinion of Rabbi Yochanan? Did Rabbi Yochanan not say: the law is according to the anonymous Mishnah, as it is learnt…" (Shabbat 46: a) or "and he raises a question from one saying attributed to Rabbi Yochanan about another saying attributed to Rabbi Yochanan"; "Did Rabbi Yochanan say…did not Rabbi Yochanan say ' the law is according to the anonymous mishnah, as we learn'?" (Shabbat 91:b) and so forth every time this rule appears in the Talmud. See the "*Mesoret Ha Shas*" in the edition of the *Complete Israeli Talmud,* Yevamot 16:b, 42:b. And see the discussion below about the contradictions between the statements of Rabbi Yochanan. [↑](#footnote-ref-77)
77. Babylonian Talmud, Yevamot 42: b. [↑](#footnote-ref-78)
78. In addition to this system of basic rules, most of which are attributed, as we have seen, to Rabbi Yochanan and his school, it is possible to find in the Talmud other rules, more limited in scope and of lesser importance. Some of them are not rules but *halachic* decisions that sound like rules and therefore on occasion misled some of the commentators and the authors of the collections and lists of rules. To illustrate, the phrase "the law is like Rabbi a in the matter of x" is not a rule but a *halachic* tradition in a particular matter. For example, "the law is according to Rabbi Shimon Shezuri regarding [the writing of a bill of divorce] for those in danger and regarding the tithe" is only a tradition that indicates that the law was decided according to him in these two matters. As *halachic* decision making according to rules became more common, a tendency developed to turn such phrases into more general rules and so, apparently, were created rules such as "everywhere that Rabbi Shimon Shezuri expressed an opinion, the law is in according to it" (Babylonian Talmud, Minhot 30: b; Hulin 75:b). After a careful examination and the sifting out of all spurious rules, very few remain, the use of which is very limited. In contrast to the collection of rules of Rabbi Yochanan, they appear scattered randomly, do not cover many disputes, and relatively little use has been made of them in the judicial literature . [↑](#footnote-ref-79)
79. According to the testimony of Rav Zeira, the "Mishnah" of Rabbi Hiyya and Rabbi Hoshaya is a select Mishnah. (Babylonian Talmud, Hulin 141:b). Apparently, Rabbi Abbahu reasoned that if the *braita* of Rabbi Hiyya, which is considered to be select, does not compare with the Mishnah of Rabbi, then other collections of *braitot* certainly cannot compare with it either. The decision that the Mishnah of Rabbi is preferable to the *braitot* is the foundation of the entire method of Rabbi Yochanan and his students, but the additional rule of Rabbi Abbahu takes it to another level: the law that has not received the seal of approval of the Mishnah of Rabbi is not worthy of consideration, even if it appears in other *tannaitic* sources as the anonymous mishnah. [↑](#footnote-ref-80)
80. On the internal order of the *mishnayot* and the question of whether the Mishnah does or does not have a structured format see the discussion in the Gemara regarding an anonymous rule followed by a dispute, (Bava Kama 102:b and Avodah Zara 7:a). In the process of canonization new expectations are created, not only from the content but also from the general structure of the canonized work. Therefore, attention has been given to the symbolic meaning of the structure of the Mishnah: six orders, sixty tractates. On the numerical significance of the canonization of the books of the Bible, see: Guy Darshan, "The Twenty-Four Books, Twenty-Two Books and the Homeric Corpus" *Tarbiz* 77 (2007): 5-22. On the structure of the orders of the Mishnah, see M. I. Kahane, "Apples of Gold in Settings of Silver: the Mishnah and its Order of Arrangement" *Tarbiz* 76 (2007): 29-40. As in the question of the rules, so also with regard to the question of the literary structure -- we must carefully determine what came first: were the numerically exact patterns and symbols described by Kahane used by Rabbi in the redaction of the Mishnah or were they incorporated into the Mishnah when it began to be regarded as an extraordinary work? [↑](#footnote-ref-81)
81. This is the common assumption in the literature of the classical rules which describes the nature of the Mishnah according to the rules of *psika* [adjudication] in the Mishnah. See "The Law is According to the Anonymous Mishnah" Talmudic *Encyclopedia*, (Ramat Gan: Bar Ilan University, 2002) 9, 353-365 and the sources cited there in the notes. [↑](#footnote-ref-82)
82. In the *sugia* about the rules in the Babylonian Talmud, Eruvin 46:b, a saying of Rav Mesharshia is quoted: "These rules are not accepted". After a lengthy discussion with an abundance of proof-texts, the Gemara narrows the scope of this saying and argues that it represents the opinion of Rav only. The Gemara there brings proofs from Babylonian *Amoraim* from the third or fourth generation and later who used the rules. In several places in the Talmud, the contradiction between the rule, "the law is according to the anonymous mishnah", and the conflicting ruling of Rabbi Yochanan himself is explained by attributing each of the sayings to a different student of Rabbi Yochanan. In other words, among the students of Rabbi Yochanan were those that did not accept the principle "the law is according to the anonymous mishnah". Epstein has demonstrated that the early *Amoraim* still had not accepted the Mishnah as authoritative. [J.N. Epstein, *Introduction to the Text of the Mishnah* (Jerusalem: Magnes, 2000), 349-352.] DeVries demonstrated by a literary analysis of the language of the Talmud the difference between the early *Amoraim* and later generations in their approach to the Mishnah and concluded that Rabbi Yochanan and his colleagues are the "borderline" of the transitional generation. See Benjamin DeVries, *Studies in the Development of the Talmudic Halacha*, (Tel Aviv: Avrahan Zioni, 1962), 48-49. [↑](#footnote-ref-83)
83. There are two types of resolutions to the contradictions in the Gemara: 1. To explain the anonymous mishnah in such a way that it will not contradict the law attributed to Rabbi Yochanan. This is the way of the *ukimta* that will be explained in detail in the following pages. 2. To say that there are conflicting traditions in the name of Rabbi Yochanan: "There is a contradiction between this *Amora* and the opinion of Rabbi Yochanan" (Shabbat 112: b, et al.). According to Rashi (Hulin 43:a, sub voce "*amorai ninhu*") there were among the students of Rabbi Yochanan those who did not accept his authorship of the rule "the law is according to the anonymous mishnah". So the Tosafists proved (Yevamot 16:b, sub voce"*amorai*") and see the commentary of the *Sefat Emet* to Taanit 26:b sub voce "begemara" (Jerusalem 1996) and in the *New Responsa of Binyan Zion*, (New York: Ben Zion Cohen, 1950) *siman* 128. It would appear that Rabbi Yochanan formulated the rule at an advanced age, while in his youth he still studied and taught in the way he had been taught by his teachers and therefore occasionally did not rule according to the anonymous mishnah and even explained anonymous *mishnayot* as the opinions of individuals. His students transmitted these teachings in his name and when the rule "the law is according to the anonymous mishnah" was formulated, it contradicted his earlier teachings. [↑](#footnote-ref-84)
84. Jerusalem Talmud, Taanit 2,13 (66:a) and in parallel texts, there appears an earlier wording of this question; Rabbi Elazar, the student of Rabbi Yochanan, is saddened when he reveals that Rabbi Yochanan "put aside the anonymous and did according to the individual". This indicates that Rabbi Elazar's understanding of the principle "the law is like the anonymous mishnah" was based on the premise that the "anonymous" view is the opinion of the majority. However, the fact that in that very place the question of Rabbi Elazar is answered by his realization that the "anonymous" view is actually the opinion of an individual, proves that he knew well that some "anonymous" *mishnyot* are individual opinions and hat Rabbi Yochanan himself knew how to distinguish between them. See the list of examples of this in J. N. Epstein, *Introduction to the Literature of the Tannaim* (Jerusalem: Magnes, 1957), 240-245. [↑](#footnote-ref-85)
85. A. Baumgarten, ‘Yohanan and Resh Lakish on Anonymous “Mishnayot”’, *Jewish Law Association Studies* 2 [1986]:. 75-88 [↑](#footnote-ref-86)
86. An early *tannaitic* source provides evidence of the "majority opinion" in the Mishnah. The Mishnah in Eduyot 1: 5-6 and the Tosefta in Eduyot 1:4 discuss the question of why the individual opinion is listed with the majority opinion in the Mishnah: "because there is no law other than the opinion of the majority". However it appears that this refers to cases in which it is known that there is a dispute between an individual and the majority and the law is decided according to the majority and the mishnah nonetheless mentions the rejected opinion. The Mishnah and the Tosefta refer there to the first *halachot* in that tractate, (Eduyot), which discuss disputes between Hillel and Shammai in which the law is according to neither of them, but according to "the sages". It is therefore important to clarify that the question there is why the Mishnah mentions the controversy and the story of the testimony of the weavers but not as a question in which it is assumed that the opinion of the anonymous mishnah is the opinion of the majority. [↑](#footnote-ref-87)
87. This is proved from the principal *sugia* in the Jerusalem Talmud that deals with the clarification of the status of the "anonymous mishnah" in Yevamot 4, 11 (6:b): "Rabbi Yochanan said: everywhere that there is an anonymous mishnah it is the opinion of the sages, unless his teacher explains it [as an individual opinion]". See the discussion there on the contradiction between this rule and the rule mentioned by Reish Lakish that "the anonymous mishnah is Rabbi Meir". The Gemara reconciles the two positions and resolves the dispute between them. See Epstein, *Introduction to the Literature of the Tannaim*, 98. [↑](#footnote-ref-88)
88. The famous example in Hulin 85:a: "Rabbi Hiyya bar Abba said in the name of Rabbi Yochanan: 'Rabbi agreed with R. Meir's opinion with regard to slaughtering an animal and its young on the same day and cited it in the Mishnah as the opinion of ‘the sages’, and he agreed with R. Shimon's view regarding covering up the blood and cited it in our mishnah as the view of ‘the sages’" is a proof-text for those who argue that Rabbi edited the Mishnah in accordance with his own rulings. However, it is nothing more than testimony to the methodology of Rabbi Yochanan as understood by the Babylonian Talmud. This is also the approach of the anonymous Gemara at the beginning of tractate Beitza: "Now was it not Rabbi who taught our mishnah anonymously? Why then is it that regarding the Sabbath he teaches the mishnah anonymously according to R. Shimon, whereas regarding the holidays he teaches the Mishnah anonymously according to R. Judah? I will answer: with respect to the Sabbath, which is severe, and people do not treat it lightly, he taught the mishnah anonymously according to R. Simeon who is lenient; with regard to a holiday, which is less stringent, and people might treat it lightly, he taught the Mishnah anonymously according to R. Judah who is strict. (Beitza 2:b) [↑](#footnote-ref-89)
89. The source of Rabbi's authority is a subject of discussion among historians, recently, in the books of Ofra Meir, *Rabbi Yehudah HaNasi: the Portrait of a Leader in the Traditions of Eretz Israel and Bavel* (Tel Aviv: HaKibbutz HaMeuhad, 1999), Aharon Oppenheimer, *Rabbi Judah HaNasi* (Jerusalem: Zalman Shazar, 2007)] and Benjamin Lau, *The Sages,* 3, 305-353. [↑](#footnote-ref-90)
90. The Babylonian Talmud contains hundreds of *sugiot* in which they clarify the questions, "Who taught that mishna?" or "Should we say that Rabbi X taught that mishna?" based on the assumption that it is necessary to identify the anonymous *Tanna*. In Sanhedrin 34: b and Niddah 50: a, they distinguish between an "anonymous majority" and other anonymous opinions and from this it can be inferred that not every anonymous opinion is a majority opinion. The expression "this is taught anonymously" is found frequently in the Babylonian Talmud and the ruling is according to it, even if this is not attributed explicitly to Rabbi. In Beitza 2:a-b, Rav Nachman says: "this is taught anonymously" whereas the anonymous Gemara says: "was it not Rabbi who taught this anonymously?" and points out the contradiction between his two anonymous rulings. It appears that Rav Nachman was not disturbed by the contradiction between the two anonymous rulings. [↑](#footnote-ref-91)
91. The rabbinical court of Rabbi is mentioned in the Mishnah (Avodah Zara 2:6). However, according to the Gemara the person under discussion is the grandson of Rabbi, Rabbi Yehuda Nesia. (Rashi Avodah Zara 35:b, sub voce "Rabbi" and also in Ohalot 18:9 and in Tosefta Shviit 4:17). The collection of traditions on the activity of Rabbi as a *posek halacha* [adjudicator] was organized by Ofra Meir (213-238) and it is not possible to find there real evidence of the participation of the Beit Din of Rabbi in the arrangement of the Mishnah and legal adjudication. [↑](#footnote-ref-92)
92. This rule is part of another list of rules which attributes each of the familiar works of the *Tannaim* to one *Tanna*. Babylonian Talmud, Sanhedrin 86:a. The other *tannaitic* works are also attributed by Rabbi Yochanan himself to specific schools and scholars, not to the arrangement of editors. The anonymous Tosefta was attributed to Rabbi Nehemia, the anonymous Sifra to Rabbi Yehuda, and the anonymous Sifrei to Rabbi Shimon. For further discussion see Barak Cohen, note 62, in note 39 above and the sources cited there. [↑](#footnote-ref-93)
93. *The Epistle of Rav Sherira Gaon*, 28-29. Rabbi Yehuda Bar Kalonymus walked into this minefield in his book *Notes on the Amoraim and Tannaim*. Under the heading : "Rabbi Yochanan (1)" he included a sub-chapter on the rule "the law is according to the anonymous mishnah" and reached the conclusion: "it appears to me that the explanation is that certainly in every case where an individual disagrees with an individual or the many with the many and an anonymous mishnah, according to Rabbi, is like one of them, the anonymous opinion is the law. But between an individual and a majority, when the anonymous is like the individual, even though there is reason to say that Rabbi reasons like the individual opinion - the *Amora*im do not accept it. In several places the anonymous opinion is according to Rabbi and we reject it and we do not rule according to that anonymous opinion". .. and thus "we have found *Amoraim* who relied upon what they were taught, and when they challenge them from the Mishnah they say that they do not know who taught that mishnah." Rabbi Yehudah ben Kalonymous, *Notes on the Tannaim and Amoraim* (Bloy edition) (New York: 1994), 131-232. [↑](#footnote-ref-94)
94. As I have mentioned, it must be noted that Rabbi Yochanan himself did not adopt a uniform position regarding "*stam*" mishnayot. Sometimes, when he encounters contradictions between them, he is forced to consider one of them "a hapax legomenon". From an historical perspective, it is difficult to elucidate this point from within the Mishnah itself, as explained in Elman's article cited above. However, it is possible that the intermediate approach of Avraham Goldberg will be useful here. Not only Albeck, but also Epstein, acknowledges that the *"stam"* mishnayot are not only halachic decisions (as he wrote in one place) but also sometimes reflect the older corpus from which Rabbi's Mishnah was compiled. (He discussed the sources of the material in his introductions to the tractates of the Mishnah in his *Introduction to the Mishnaic Text*) If so, it must be concluded that the very process of selection from the corpus of a specific sage added authority to the teaching of those sages from the school of Rabbi Akiva, but did not render them absolutely decisive. [↑](#footnote-ref-95)
95. All of the sayings that attribute to Rabbi a deliberate ruling by means of presenting the words of an individual sage as that of "the sages" or the anonymous mishnah, and which provided the commentaries and academic scholarship with proof-texts that rabbi taught certain opinions as anonymous, are later than Rabbi Yochanan and it can therefore be assumed that they were influenced by him. First and foremost is the famous source in Hulin 85:a cited above in note #. The attribution of the saying to Rabbi Yochanan undermines the premise that this is an ancient tradition and strengthens the claim that it was Rabbi Yochanan who initiated this approach to the Mishna. [↑](#footnote-ref-96)
96. It was explained above that according to the Tosafists the rule that the law is according to the school of Hillel is based on the assumption that the followers of Hillel were the majority. According to the Jerusalem Talmud, the basic rule "the law is like the anonymous mishnah" also derives from the assumption that the anonymous mishnah reflects the majority opinion. The acceptance of the opinion of one scholar among the scholars of his generation and the generations after him is also a type of approval of the majority. [↑](#footnote-ref-97)
97. Tosefta Hagigah 2,9. Sanhedrin 7, a, and see the article of Ishay Rosen-Zvi, "Protocol of the Beit Din of Yavneh?: A New Look at the Tosefta Sanhedrin Chapter Seven", 447-477] on the structure and components of this *tosefta*. [↑](#footnote-ref-98)
98. On the ways in which the *Rishonim* coped with the "failure" implicit in dispute, see G. J. Blidstein (1986), "Tradition and Institutional Authority for the Concept of the Oral Law According to Maimonides" *Daat* 16 (1986): 14-15. [↑](#footnote-ref-99)
99. Yaakov Elman argues that the process of canonization and codification also has a general cultural context in this period. He identifies a similar phenomenon in the development of the codification of Roman law. Roman Jurists like Gaius and Ulpian, in the course of the third century, changed from anthologists to the authors of binding legal codes. For the comparison, see Elman, "Order, Sequence and Selection",58. {I made changes here—though it was written in English} [↑](#footnote-ref-100)
100. Uri Zur has studied the influence of the rules of judicial decision making on *sugiot* in the Talmud (U. Zur, "The Influence of *Halachic* Considerations in the Editing of the *Sugiot* in the Babylonian Talmud and its Impact on the *Halacha*" *Dinei Yisrael* 19 (1997-1998): 217-239. (U. Zur, "Rabbi Yochanan's Applications of the Rules of *Halacha* that he Included in the Babylonian Talmud", *Moreshet Yisrael* (2015): 55-68. and Idem, "Applying General Rules of Halakhah in Halakhic Exegesis", *Review of Rabbinic Judaism* 18 (2015): 1-22. (English) [↑](#footnote-ref-101)
101. This matter can be resolved by a simple statistical analysis. The Babylonian Talmud contains hundreds of rulings by the first generations of the *Amoraim* on disputes between *Tannaim* worded as "Rabbi A said -- the law is like Rabbi B". They become increasingly rare in the later generations of *Amoraim* until eventually disappearing altogether. [↑](#footnote-ref-102)
102. These lists appear in the literature dedicated to the rules from the *"Seder Tannaim u-Amoraim"* of the Geonic period up until the entry *"Halacha"* in the contemporary *Talmudic* *Encyclopedia.* From merely reading the rules it is not possible to discover either the source of each rule or when it was created, let alone to ascertain to what extent it was applied or became established. See the reference above to Halivni in note #. [↑](#footnote-ref-103)
103. Bava Kama 102:a, Avodah Zara 7:a. Rav Huna ruled like Rabbi Yehudah in the dispute with Rabbi Meir which appears in the *braita* regarding the craftsman who ruined his work. Rav Yosef argued that this is a redundant ruling because the opinion of Rabbi Yehudah appears as the anonymous mishnah and the rule is that when the anonymous mishnah differs from a dispute in the *braita* the law is according to the anonymous Mishnah. This is apparently the first example in which a Babylonian *Amora* criticizes the ruling of an *Amora* who preceded him, on the basis of the rules of Rabbi Yochanan and Rabbi Abbahu with regard to the anonymous mishnah. [↑](#footnote-ref-104)
104. In the literature of the commentaries on the rules and introductions to the Talmud we find an indecision that derives from an inconsistency in the Gemara – sometimes the rule is disregarded, sometimes the law is decided in accordance with it and sometimes in contradiction to it; sometimes the sages of the Gemara ask about it and sometimes they do not; sometimes they ask why the law was decided in contradiction to the rule and sometimes they actually ask why it is necessary to rule according to the rule, because the matter is unnecessary. Later authors derived from this situation conclusions about the scope of the validity of the rules. See for example in *Yad Malachi*: *simanim* 170 (the law is in accordance with the anonymous mishnah), 230 (the law is in accordance with Rabbi Yossi), 577-583 (the rules concerning the students of Rabbi Akiva). E.E. Urbach discussed the inconsistency between the *halachic* traditions and the rulings in the Talmud, and in this context also the contradictions between conflicting *halachic* traditions. His basic conclusion is that the selective use of rules derives from the independent *halachic* traditions of the sages, traditions that did not correspond to the rulings that were derived from the rules. (Urbach, "Tradition and Halacha"*,* *Tarbiz* 50 (1981): 136-163). [↑](#footnote-ref-105)
105. It was Rabbi Yochanan who formulated the ideology of the resolution of contradictory *mishnayot* according to the opinion of one *Tanna*: "He who explains to me the mishnah about 'a barrel' in accordance with only one *Tanna* -- I will carry his clothes for him to the bathhouse." (Sanhedrin 62:b) The differentiation between sources in the mishnah expressed in wording such as " there is a contradiction [literally, break] -- the one who taught this did not teach that" appears as the resolution of a contradiction in the Mishnah proposed by Shemuel (Yevamot 108:b) and Rabbi Yochanan (! Baba Kama 40:b, and see above note # on the process of the formation of the rules by Rabbi Yochanan himself), Rabbi Elazar (Shabbat 92:b, Yevamot 108:b, Ketubot 75:b, Bava Kama48:b, Hulin 16:a, Kritot 24:b) Rabbi Yermiyah (Yevamot 13:a) and Rabbi Zeira (Bava Kama 47:b). The rejection of the "break" and attempt to understand the mishnah without contradiction is primarily a later Babylonian approach: Ulla (Yevamot 108:b) Rava (Shabbat 92:b, Yevamot 13:a, Yevamot 108:b, Ketubot 75:b, Bava Kama 47:b, 48:b). (In two places (Bava Kama 40:b and Kritot 24:b) it is unclear whether the text reads Rava or Raba), Rav Papa (Hulin 16:a) Rav Ashi (Shabbat 92:b). Just as Rabbi Yochanan also sometimes did not rule in accordance to the rules (perhaps in the period of his life that preceded the formulation of the rules) so too, he and his students were still compelled to speak of a "break", whereas later on, especially in Babylonia, the approach of rejecting the break and endeavoring to resolve the contradiction in the Mishnah became prevalent. [↑](#footnote-ref-106)
106. According to Avraham Goldberg, ["The Method of Rabbi Yehudah HaNasi in Organizing the Mishnah" *Tarbiz* 28 (1959): 261-262], the phenomenon existed already among the early *Amoraim*. He demonstrates this from the words of Shemuel. Even he admits that the phenomenon intensified to a large extent in the later generations of the *Amoraim*. On the *ukimta* as an exegetical method, see Moshe Zilberg, *Such is the Way of the Talmud* (Jerusalem: Hebrew University Student Union: 1922), 19-25. A. Weiss and Z. A. Steinfeld argue that there are also later examples of the *ukimpta* that were transmitted and worded as if they were said specifically by the early *Amoraim*. See: Zvi Aryeh Steinfeld, *A Qualified Admission: Studies in Judicial Talmudic Sugiot* (Ramat Gan: Bar-Ilan University, 1979), 38, 44. [↑](#footnote-ref-107)
107. On the conceptual meaning of the exegetical method of "*ukimta*" see Menachem Fish, "Forced Interpretations and Authoritative Texts: the *Amoraic Ukimpta* and the Philosophy of Halacha" *New Studies in the Philosophy of Halacha*, (A. Ravitsky and A. Roznak, eds.) (Jerusalem: Magnes, 2008), 311-344 and Michael Abraham, "A Platonic Look at the *Ukimptot*: The Talmudic System of Thought and the Relationship between the Mishnah and the Gemara" *Akdamut* 28 (2013): 115-141. [↑](#footnote-ref-108)
108. Shabbat 46:a. [↑](#footnote-ref-109)
109. Shabbat 112:b. [↑](#footnote-ref-110)
110. In the early stages the phenomenon still existed of presenting the anonymous opinion as an individual opinion in order not to contradict the rule, however it was clear that the excessive use of this method would lead to the negation of the rule and thus it is not common in the later generations. In the circle of Rabbi Yochanan they justified in this way cases in which he ruled contrary to the rule. In the Jerusalem Talmud [Yevamot 4, 11, (6:b)] we read that Rabbi Elazar was distressed that Rabbi Yochanan ruled according to Rabbi Yossi, in contradiction to the anonymous Mishnah. When he heard that Rabbi Hiyya taught this Mishnah in the name of Rabbi Meir he expressed his amazement at Rabbi Yochanan's knowledge of Tractate Gittin. See also Jerusalem Talmud, Megilla 1,4 (70:d). [↑](#footnote-ref-111)
111. Shabbat 4:a – 5:a, this chapter is based on: Brandes, "The Structure and Significance of the *Ukimta Sugiyah*" Netuim 11-12 (2004): 9-38. [↑](#footnote-ref-112)
112. 101 In his commentary Shabbat 4:a, Nachmanides argues that the requirement that the removal or the replacement be done above a surface of four by four handbreadths is a Talmudic tradition without a biblical or tannaitic source. . [↑](#footnote-ref-113)
113. The Mishnah at the beginning of chapter eleven. There is a discussion on the words of Raba in the anonymous gemara, supported by Raba's interpretation of this mishnah in the parallel discussion on page 97:a. The anonymous gemara questions the opinion of Raba and moves the *sugia* towards the interpretation of Rav Yosef. [↑](#footnote-ref-114)
114. Rav Yosef refers to the *braita* found also further on, on page 7:b. The anonymous gemara rejects the possibility of adjusting the opinion of Rabbi in the *braita* to the mishnah, and moves the *sugia* towards the interpretation of Rabbi Zeira. [↑](#footnote-ref-115)
115. Also the suggestion of Rabbi Zeira to interpret the Mishnah according to the opinion of others in the *braita*, was rejected by the anonymous gemara, which interprets the *sugia* in light of a group of explanations in the style of the *ukimta.* Rav Zeira appears here next to Raba and Rav Yosef, Babylonian *Amoraim*, and it is therefore correct to consider him to have been a Babylonian *Amora*, before he moved to the land of Israel and learnt the teachings of Rabbi Yochanan. On the fidelity of Rabbi Zeira to the Babylonian teachings even after his move to the land of Israel, see A. Goldberg, "Rabbi Zeira and the Babylonian Custom in the Land of Israel" *Tarbiz* 36 (1967): 319-341. [↑](#footnote-ref-116)
116. An *Amora* of the land of Israel from the generation of the students of Rabbi Yochanan. [↑](#footnote-ref-117)
117. His interpretation necessitates the rejection of the language of the Mishnah. The Mishnah reads "his hand" and he is compelled to interpret this as "the basket in his hand" and therefore his suggestion is rejected and the *sugia* precedes to the explanations of Rabbi Abbahu. [↑](#footnote-ref-118)
118. The anonymous gemara becomes increasingly convoluted in its attempt to explain the practical conditions of the application of the *ukimta*: in order to describe a situation in which the hands of the beggar and the master of the house are less than three handbreadths above the ground, it is necessary to posit a man who is bending over, or standing in a pit or is a dwarf! Therefore Rava asks (or the anonymous gemara puts the question into his mouth) "Did the Tanna bother to inform us of all these?!" The forced *ukimta* defies the laws of probability and is rejected. There are more than a few *ukimtot* of this type in the Gemara that were not rejected, although it appears that here the anonymous gemara is attempting to lead the discussion in the direction of the abstract interpretation of Rava. [↑](#footnote-ref-119)
119. The gemara brings this explanation also in the name of Ravin who said it in the name of Rabbi Yohanan and cites an additional *halachic* saying in his name that supports this approach. It appears that this method of resolution is not the innovation of the Babylonian Talmud and has roots as far back as the school of Rabbi Yochanan himself. [↑](#footnote-ref-120)
120. On the trend of abstraction see Urbach, *The Halacha: Its Sources and Development,* and Leib Moscovitz, *Talmudic Reasoning: from Casuistics to Conceptualization*, (Tübingen: Mohr Siebeck, 2002) (English). [↑](#footnote-ref-121)
121. An example from the beginning of the Talmud: The time of the recitation of the Shema in the evening at nightfall is worded in the Mishnah and *braitot* in three ways: "From the time that the priests **go in** to eat their tithes", "from the time that the priests are **eligible** to eat their tithes" or "from the time that the priests are **in a state of ritual purity** [allowing] them to eat their tithes". There is no reference in the Gemara to these variations in wording. (Brachot 2:1-2) [↑](#footnote-ref-122)
122. There is a significant gap between the way of the early *Amoraim* and the way of the later *Amoraim* or the Stammists of the late Gemara. It appears that the later *Amoraim* related to the wording of the Mishnah as sacrosanct and exact in its nature and therefore were in the habit of making very subtly nuanced interpretations in the way that the *Tannaim* interpreted the Bible in the midrashic literature. Rabbi Yaakov Eliyahu Efrati has pointed out this phenomenon regarding the *sugiot* on ""What do the words "this is the rule" come to add"?" See Y. A. Efrati, *The Period of the Savoraim and their Literature* (Petach Tikvah: Agudat Bnei Asher, 1973), 159-278. In his opinion, the question of "to add what?" is based on the assumption that there is no redundancy in the Mishnah, and that it is possible to replicate the method of the *midrash halacha* regarding generalizations and details, from the Torah to the Mishnah. Efrati argues that this assumption does not exist in either the Jerusalem Talmud or the early generations of *Amoraim*. The subject of the differences in approach between the early and later *Amoraim* in the matter of the exactitude of the Mishnah has been discussed also by A. Weiss in several of his works, in particular in his lecture "The Works of the Svoraim" Jerusalem, 1953. David Henshke has pointed out the difference between Abaye and Rava, see D. Henshke "Abaye and Rava –Two Approaches to the Mishnah of the *Tannaim" Tarbiz* 49 (1980): 187-193. And see also Y. S. Spiegel, "A Shortcut in the Language of the *Tannaim* and on *Pshat* and *Drash* in the Mishnah" *Asufot* 4 (1990): 9-26. And see Avinoam Cohen, "Talmudic Questions with a *Savoraic* Character" in *Studies in the Hebrew Language and Talmudic Literature*, (Menahem Zvi Kaddari and Shimon Sharvit, eds.) (Ramat Gan: Bar Ilan University, 1990), 83-101; "Halachic Criticism in Contrast to Literary Criticism in the *Sugiot* of the Talmud – A Chapter in the Multi-layered Creation of the Mishnah" *Asufot* 3 (1989): 331-346. [↑](#footnote-ref-123)
123. Yaakov Sussman, "Manuscripts and Textual Traditions of the Mishnah" *World Congress of Jewish Studies 7 (Studies in Talmud, Halacha and Midrash*) (1981): 222, and see the general description of the phenomenon in this article. [↑](#footnote-ref-124)
124. The Rambam sought to achieve the aim of returning mishnaic-like study to the center of the educational arena by means an alternative to the Mishnah, his opus – the *Mishneh Torah*. See Y. Brandes,"The *Mitzvah* of *Talmud Torah* and *Sefer Mishneh Torah* of the Rambam" *Netuim* 5 (1999): 9-26. [↑](#footnote-ref-125)
125. The Talmud is also a canonical work but a textbook, not a legal code. See Elon, *Jewish Law,* 902-903. [↑](#footnote-ref-126)
126. On the rules of legal decision making of the *Geonim* and the literature of the rules, see Simcha Assaf, *The Geonic Period and its Literature,* (Jerusalem: Rav Kook Institute,1977), 147-153, 223-245; E Fuchs, "Judicial Decision Making, Textual Authority and Personal Awareness: Reflections on the Ways of *Pesika* in the Late Geonic Period" in *Topics in the Study of the Talmud* (Jerusalem: The Israel Academy of Sciences and Humanities, 2001), especially 102-103. [↑](#footnote-ref-127)
127. So, for example, it is possible to discern in the decision of Rabbi Yosef Caro to rule according to the first three *Poskim Rishonim* [early adjudicators] –the Rif, the Rambam and the Rosh, a decision similar to the personal status rules established among the *Tannaim*. (Alon, *Jewish Law*,1093-1096) similarly, the discussions of the commentators of the *Shulchan Aruch* on the way of deciding in a case in which the author brings, in addition to the law, also the opinion of "there are those who say", can be compared to the methodological discussion on the status of "anonymous" opinions and "disputes" in the Mishnah. See "The Rules of the *Shulchan Aruch*" in "*Yad Malachi*". [↑](#footnote-ref-128)
128. The classic case in our generation is the book *Shemirath Shabbath: A Practical Guide to the Observance of Shabbath* by Rabbi Yehoshua Neuwirth. In the introduction to the book it is explicitly stated that the book is not intended for the purpose of the ruling of law. However, within a very short time the book turned into the ultimate authority on the laws of the Sabbath and updates to it were printed as well as adaptations for rulings according to the Sephardic customs. The entrance of this book to the world of *halachic* literature is reflected in the responsa literature. In the collection of responsa, *Igrot Moshe*, in a responsum from 1980, Rabbi Moshe Feinstein mentions the book as a source for the opinion of Rabbi Shlomo Zalman Auerbach, because the author was his student. (*Responsa Igrot Moshe*, Orach Hayyim 4, 76). By 1981 he already acknowledged the status of the author as a *posek* [adjudicator] in his own right: "And it was shown to me that in the book *Shemirath Shabbath*, whose author is a student ("*avrech*") great in Torah, the *Rav*, the *Gaon*, Rabbi Yehoshua Neuwirth, may he live a long life, in the land of Israel, in chapter one, section 27 wrote that also it is simply forbidden." (Ibid, 5:20) It is clear from his words that the book is new and the author needs to be presented as a student ("*avrech*") great in Torah." In a later responsum from that same year he simply wrote: "and they showed me that the Rabbi, the great one, Yehoshua Neuwirth, may he live a good and long life, the author of the book, *Shemirath Shabbath* cites … (Ibid 5, 35). The words "and they showed me" do however indicate that the book still did not have the status of a book of law that he knew directly and relied upon. Rabbi Shlomo Zalman Auerbach responded to the reference in *Igrot Moshe* to what was cited from his teachings in *Shemirath Shabbath* and from his words it can be understood that he valued the importance of being exact with regard to the language of the book, as is fitting for a precisely worded legal work: "and in any case I wish to inform him that there was a mistake in that it was written only to be diligent, whereas, on the contrary, precisely because many fail in this, it is important to strongly emphasize the prohibition". (*Responsa Minchat Shlomo,* (Jerusalem: Shaarei Ziv, 1999), 1,6). And this is also evident from his justification in *Minchat Shlomo* of what is written in *Shemirath Shabbath* (sections 1, 7, 19) although I have also found a place where Rabbi Shlomo Zalman Auerbach expresses reservations about a ruling in *Shemirath Shabbath* (ibid 2, 30). Rabbi Eliezer Waldenberg wrote in a letter to Rabbi Auerbach: "I have now perused the book that was published recently by your student called *Shemirath Shabbath: A Practical Guide to the Observance of Shabbath* and your impact is apparent in almost all of it, as it "stands on your shoulders". (*Responsa Tzitz Eliezer*, (Jerusalem: Waldenberg, 1985-1998), 9:17, "On Medical Care on the Sabbath", chapter 2). Even Rabbi Ovadiah Yosef in his responsa, *Yabia Omer* and *Yehave Da'at* , often mentioned the opinions of *Shemirath Shabbath* with the phrases "and so he wrote" "and so he ruled". In some of his responsa he used the book as a source of the rulings of Rabbi Auerbach but there are also responsa in which he related to it as a legal work in its own right. The status of *Shemirath Shabbath* among the wider public and younger *poskim* [adjudicators] is that of an authoritative legal work, approaching the status of canonical. [↑](#footnote-ref-129)
129. A similar story was recounted by the Chida [Chaim Yosef David Azulai] in the name of the great scholars, *Maareket Sfarim*, *ot* b, *siman* 49. [↑](#footnote-ref-130)
130. Cited in *Birkei Yosef*, Hoshen Mishpat, *siman* 25, *ot* 29. And in *Shem HaGedolim,* ibid, and see also Elon, *Jewish Law*, 1140-1141. [↑](#footnote-ref-131)
131. An additional outcome: *Shulchan Aruch*, Yoreh Deah, 242, section 9: "Someone said that everything that is written in the books of the rulings of the *Geonim* a scholar can teach while his teacher is still alive, but he cannot teach something he has made up and cannot rely upon proofs to compare one word to another on his own." This law is based on the status of legal codes as more authoritative than the rulings of one's teacher. See the "*drishah*" on the Tur there section 4, *Siftei Cohen*, sub paragraph 16, loc. cit. [↑](#footnote-ref-132)
132. First of all, the students of Rabbi Yochanan disagreed on the question of the validity of the rules: " To what [extent were these meant to influence] the law in practice? — R. Assi replied: to decide the law. R. Hiyya bar Abba replied: the sages should lean toward then. R. Jose ben R. Hanina replied: as it appears to them." (Eruvin 46:b). Second, the saying of Rav Mesharshia in the Babylonian Talmud: R. Mesharshia said: 'These are not rules'." Rabbi Mesharshia was an *Amora* of the fifth generation in Babylonia! On the saying of Rabbi Mesharshia there is a long *sugia* beginning with the words "From whom did R. Mesharshia learn this? [46:b] Its conclusion is "These rules are not accepted by all because Rav did not accept them." [Eruvin 47:b] From this *sugia* it appears that the statement of R. Mesharshia was made in general and only the anonymous *sugia* narrowed the scope of his words. However, it would appear from several places in the Babylonian Talmud and even from this *sugia* itself that some of the *Amoraim* who preceded Rav Mesharshiahad already accepted the rules in Babylonia. For example, Rav Yosef (Baba Kama 102: b; Avodah Zara 7:a) and Abaye (Eruvin 47:b). A further limitation that emerges from this *sugia* is that the rules were mentioned only when the law was not explicitly decided to be otherwise. ("Where it was stated, it was stated":Eruvin 46:b) See *Sefer Haitur* (edition of Rabbi Meir Yonah) "*pikadon"*, 72: b, who rejects the rule that "between Rabbi Shimon and Rabbi Yehuda the law is like Rabbi Yehuda" on the basis of the words of Rav Mesharshia. [↑](#footnote-ref-133)
133. E. B. Halivni addressed the issue of the extent to which the *Amoraim* used each of the rules. His work is pioneering within the field of the systemic study of the rules of *halachic* ruling and thus does not distinguish between the various periods and types of connection to the rules. [E. B. Halivni, *The Rules for Deciding Halakha in the Talmud* (Lod: Mekhon Haberman Lemehqere Sifrut, 1999)] The statistical work of Y. HaCohen-Krieger, "The Rules of the Sages for Deciding the Law in a Dispute of the *Tannaim*" *Badad* 14 (2004): 99-116, examines the level of correspondence between the adjudicated law and the rules in the *halacha* of the *Tannaim*. This study is also based on the rules as they were established by the authors of the literature of the rules in accordance with what can be found in the Talmud, without consideration of the developments within the Talmud. [↑](#footnote-ref-134)