

## **The Force of Custom According to the *Yerushalmi***

By David Greenstein

Every society develops commonly accepted sets of behavior that apply to the social and personal lives of its members. These conventionalized actions are called “customs.” Customs develop through the tacit acquiescence of a society’s members to abide by them, though the customs lack official authorization. When a custom becomes officially endorsed it becomes a law. Thus custom may be the “historical” or “legal” source of the law.<sup>1</sup> But customs continue to exist and develop even after the establishment of a legal system. Since it is impossible for even a well developed legal system to regulate every detail of every area in its purview, there are bound to arise generally accepted ways of dealing with those matters which have not yet been incorporated into the legal system or which the system prefers to leave alone. Should the law attempt to redefine behavioral norms already established through custom, custom and law may come into conflict.

The conflict is between two authorities—that of the people to establish their own practices and that of the people’s legal institutions, which may claim authority either from the people or from a higher, even divine, source. From the perspective of the law, of course, custom can only be placed in a secondary position to law, both functionally and in principle. This is so important for the safeguarding of the law’s authority that some Jewish legal thinkers have even attempted to subsume custom’s authority completely within the authority of *halakhah*, claiming that custom merely reflects some forgotten enactment.<sup>2</sup>

Such a claim is extreme, however. Menachem Elon suggests that it is possible to recognize that the people have some power while maintaining the primacy of the *halakhah*:

The people are endowed with this decisive power and authority because there is a presumption that the people, who base their conduct on the *Halakhah*, intend their actions to be true to its spirit.<sup>3</sup>

Elon defines “custom,” מנהג as “[A]nonymous legislation”—as opposed to “deliberate legislation”<sup>4</sup>—or as “covert legislation”—as opposed to “legislation overtly enacted by the halakhic authorities.”<sup>5</sup> These terms are inexact: a סתם משנה is more properly called anonymous legislation, and customs are not legislated in secret or through guile in the way that, for example, R. Yohanan b. Zakkai “covertly” arranged for the law to be established that Yavneh be considered the legitimate seat of the Sanhedrin.<sup>6</sup> Elon’s intention, however, is to point out that customs become recognized as normative practices, though they are not instituted by any specific authority.<sup>7</sup> Moreover, his use of the term “legislation” calls to the fore the question of the relation between these two types of legislation, law and custom. His conclusion is that custom may only supplement the law—by either helping determine the law in cases of doubt or disagreement, or, as stated above, by filling in gaps in the legal system.<sup>8</sup>

Yet the Palestinian Talmud seems to take a more radical position regarding the power of custom vis-a-vis law. In a phrase that is found only in the Yerushalmi and not in the Bavli, it declares that *המנהג מבטל את ההלכה*—“custom overrides the law.” This would seem to give priority of place to custom over law, implying a greater power inherent in the people as a source that creates or determines normative behavior. Can this be the Yerushalmi’s meaning?

Israel Ta-Shma has claimed that this is the correct understanding of the Yerushalmi. In his study of customs in early Ashkenaz,<sup>9</sup> he concluded that the quasi-legal valorization of custom peculiar to that community derived, in part, from its Palestinian heritage. He points to the reference to this rule made by the Palestinian community in their exchange with Pirqoi ben Baboi.<sup>10</sup> In order to support his thesis, Ta-Shma analyzes a number of instances which seem to illustrate a difference between the Yerushalmi and the Bavli in their attitudes to custom. He further attempts to show, at least in one instance in *BT Megillah*, that this difference affected the final editing of the Bavli.<sup>11</sup> This essay will not examine all of Ta-Shma’s discussion. But it will accept that his work has established enough cause to seek to determine the meaning of this provocative phrase—*המנהג מבטל את ההלכה*—mentioned only twice in the Yerushalmi,<sup>12</sup> in order to make a preliminary determination as to whether this indicates a real difference of halakhic philosophy between the Bavli and the Yerushalmi. We will further consider whether such a difference may be seen not only in the presence or absence of this phrase, but also in the editing of parallel *סוגיות* in the two Talmuds.

#### THE CASE IN *BAVA MEZIA*

Commentators generally agree that the instance in *Bava Mezia* is the less provocative case. The Mishnah there states:

One who engages laborers and instructs them to arise early and retire late [*i.e.*, to begin work in the early hours of the morning and to return to their homes in the evening] may not compel them [to do so] where the custom is not to begin early and work late.<sup>13</sup>

The Mishnah continues that local custom must be followed with regard to the extent and conditions of the employer’s obligation to feed his workers—*הכל כמנהג המדינה*—“all is according to the custom of the province.” The Mishnah continues with a story of R. Yoḥanan b. Matya who instructed his son to be careful to stipulate with his laborers how much he would have to feed them, for, otherwise, his legal obligation would be impossible to satisfy. To this Rabban Shim’on b. Gamliel demurs, maintaining that no explicit stipulation is necessary, since “all is according to the custom of the province.”

The Yerushalmi begins:

R. Hosha`ayah said: “This is to say that custom overrides the law.” Said R. Immi: “Generally, one who wishes to extract something from his fellow must bring proof [to do so], except in this case.”

The ambiguity of R. Hosha`ayah’s statement is apparent. What is the referent of his opening phrase, *זאת אומר*—“This is to say”? What part of the Mishnah serves R. Hosha`ayah as the

basis for his deduction? Following the *Pene Moshe*, Elon explains that the Yerushalmi's dictum refers to the beginning of the Mishnah. It implicitly sets forth a dispute between employer and laborer as to whether the employer had demanded that the laborers rise early and retire late. The laborers refuse to do this, but demand payment, nonetheless. Since the custom corroborates the laborers' claim, they need not bring real proof in order to extract payment. In this monetary dispute—*ממונה*, custom overrides the usual evidential requirements established by law.

Thus, according to Elon, the Yerushalmi's statement about the power of custom is true, but only in a limited sense. While "custom establishes new norms that are contrary to existing law, *i.e.*, norms that modify or abrogate existing law,"<sup>14</sup> this creative power of custom operates here in the field of civil law, where the law itself recognizes the meta-legal authority of "social contract." As such, any new law created by *מנהג* is not really an overriding of the law, since it satisfies the law's standards of justification in civil matters – compliance with social usage.<sup>15</sup>

However, the problem with this interpretation is that it is too powerful. If it is correct, then there is no basis for the Yerushalmi to deduce from this case that "custom overrides law." This would merely be a case of local custom setting the standard for civil law.<sup>16</sup> But Elon does not see this as a difficulty. On the contrary, he insists that the "plain meaning" of the phrase is merely the application of the social contract nature of civil law to this particular custom. Therefore, for Elon, the case in *Bava Mezia*, being a case of *ממונה*, does not offer sufficient support for the argument that the Yerushalmi grants *מנהג* extraordinary power. He goes so far as to suppose that this phrase, in its original, "plain meaning" was first formulated for the case of *Bava Mezia*, and only later somewhat misapplied to the case in *Yevamot*, which is one of ritual law—*איסורא*.<sup>17</sup>

Another problem with this interpretation is that the Mishnah does not describe a dispute involving claim and counterclaim. It does not read that the employer claims that he hired the laborers under certain conditions and that they deny this. It rather reads that, though he has hired them with certain demands stated—*ואמר להם*, he may not enforce those demands in violation of local custom. This difficulty lies behind certain remarks by some of the *ראשונים*, who could not accept that, had such a stipulation been made it would not be binding, no matter what the local custom might be. They explained that the original employment agreement was made without any stipulations at all. The employer added his demands later. However, "if he stipulated this from the beginning, everything follows according to the stipulation."<sup>18</sup>

This reading leads directly into the first comment of the Bavli: *פשיטא*—"Isn't this obvious?"<sup>19</sup> If the extra conditions desired by the employer were not set forth at the time of employment, what possible right can he have to force the workers to comply with them? To this the *גמרא* answers that it must be assumed that the initial agreement carried extra compensation. In such a case we might have thought that the employer was within his rights to demand additional conditions. Since the workers can claim that they will earn the additional compensation by means other than longer working hours, the employer cannot compel them to meet his demands. Thus, the phrase in the Mishnah, *הכל כמנהג המדינה*,—"all is according to the custom of the province, does not constitute grounds for preferring the laborers' side of the dispute. The custom simply tells us what the laborers will continue to do given the employer's inability to change the arrangement. While this construction by the Bavli may make legal sense, it should be recognized that none of

this has any bearing on the question of custom overriding law. So for the Bavli, which does not invoke this principle, such a reading of the Mishnah may be adequate. But it falls short of preparing the way for the Yerushalmi's deduction.

Here, the comment of the Remakh—R. Moshe Kohen of Lunel—is of interest. He begins with the same assumption as the other ראשונים, that there was no explicit stipulation at the start of employment and that the employer added it afterwards. He then continues:

It would appear appropriate to say that even though they [the workers] agreed with him and worked this way [i.e., according to the later stipulation] for one day, they may be allowed to renege the next day based on the custom. And if he made a stipulation with them about this from the very start, even in a place which did not have a custom [in accord with the stipulation], it is a monetary stipulation [תנאי ממון] and it would appear appropriate to say that he could compel them on this. But this requires study.<sup>20</sup>

The Remakh adds that the workers actually did work for the employer under the new conditions. However, they then reneged and demanded conditions that were in accordance with the local custom. The *novitas* of the Mishnah is that the custom overrides the agreement that they had clearly adopted. Indeed, unlike the other ראשונים, Remakh is not completely sure that an explicit stipulation would be any stronger. A reading such as this would fit the Yerushalmi's statement. Understood in this way, R. Hosha'ayah is not merely reiterating the accepted idea that local usage is followed in civil law. In this case the agreement accepted by both parties—which is normally sacrosanct in all civil cases—can be annulled by one side through appeal to local custom. R. Immi's statement is thus doubly true: The employer, though he can prove that the workers accepted his conditions, cannot compel them to continue to do so; the laborers, on the other hand, can extract payment from the employer without having to satisfy the requirement for proof for their case, a requirement they could never meet. The radical possibility that Remakh hesitates over is indeed the interpretation offered as one possibility by R. Elijah Foulda, who writes:

“That is to say that custom overrides the law”—He learns [from the phrase] “and he said to them” etc. that this was when he hired them. And by law we say that all should follow in accordance with his stipulation. Even so, in a place where they are accustomed not to work early and late he cannot force them. From this it is learned that custom overrides the law.<sup>21</sup>

This radical interpretation is ignored by all other authorities<sup>22</sup> who have made other attempts to explain the Yerushalmi. B. Lifschitz has offered a new interpretation of the Yerushalmi's phrase.<sup>23</sup> He suggests that the key word, מכלל, does not mean “overrides” or “annuls.” It has no normative meaning here at all. Rather, its purport is practical. It means: “causes one to forget.” Thus, the phrase should be read: “A custom can cause one to forget what the *halakhah* is.” With this explanation Lifschitz attempts to show that there is no difference between the Bavli and Yerushalmi. He deduces from the Mishnah that, where there is no local custom, the laborers are legally required to work early and late. The requirement derives from the tacit acceptance of this rule by both sides. However, when there is a local custom which contradicts the regular legal

requirements, we assume that the parties defer to the custom rather than to the law. This is not a normative supplanting of the law, but merely a psychological fact of life. Lifschitz' assumption is shaky, since the Yerushalmi seems to say that legal requirements for workers' hours were established as a *תנאי ב"ד*—Stipulation of the Court, only where there was no custom, implying that there is no overall law which is being forgotten through the spread of a custom.

Benjamin De Vries suggests that the phrase is not referring to any labor dispute between the parties in the Mishnah. Nor is R. Immi's statement about rules of evidence to be connected with R. Hosha'ayah's statement, which immediately precedes it.<sup>25</sup> R. Hosha'ayah really meant to comment on the Mishnah in its entirety. Citing the *Sede Yehoshu'a*, De Vries says that R. Hosha'ayah's meaning is that, where custom rules, we do not heed the general *halakhic* determination which would otherwise apply. While this interpretation, unlike Lifschitz' explanation, concedes some normative power to custom, it insists that there is, here, no real conflict between custom and law because the law was really only formulated "where there is no custom"—*במקום שאין מנהג*—to use the *גמרא* phrase.

Saul Lieberman divorces the statement of R. Hosha'ayah entirely from the question of the workers' obligations to their employer. Instead, he suggests that the comment is related to the Mishnah's second part, which deals with the obligations of the employer and the rights of the laborers to adequate meals. In his edition of Maimonides' collection of laws from the Yerushalmi, Lieberman explains a law in *PTKetubot 5:6 (30a)*:

'A widow and her children may fall (in support entitlements)—*יִרְדּוּ*—but may not rise (in support entitlements)—*לֹא עִלּוּ*—And immediately following we learned 'the laborers may rise, but they may not fall [...] and therefore I chose to drop this clause, because custom has already nullified this halakhah. And so we have learned in *PTBava Me'zia*, the beginning of Chapter 7 (11b) 'One who engages laborers' etc., 'R. Hosha'ayah said: This is to say that custom overrides the law'. And the Rishonim were very strained in explaining the Yerushalmi. And if not for the words of our Rabbis [...] I would explain the Yerushalmi in its straightforward sense- that according to the halakhah, if one hires workers from another place who do not know the custom of the province, their law should be that they should rise to his level (of food provisions) but they should not fall (lower), as is explained in the Yerushalmi here. But the custom nullified the halakhah, and they followed the custom that even if they came from another place, they were fed according to the custom of the place to which they came [...]<sup>27</sup>

In this interpretation, there is a standard law that, when it comes to the laborers' board, they are entitled to the higher of whichever standards are in practice. Yet the custom has established that local standards prevail even if this is to the laborers' detriment.

While Lieberman does not say so explicitly, this interpretation could follow as well from the end of the Mishnah itself. R. Shim'on b. Gamliel says as much when he disagrees with R. Yohanan b. Matya. He says that however great the laborers' legal entitlements may be in the abstract, they are considerably reduced by local custom, without the need for explicit agreements to that effect. It may be significant, therefore, that such an understanding of the Mishnah is precluded by the

Bavli. The Bavli<sup>28</sup> asks about the story of R. Yoḥanan b. Matya: “Why [bring ] a story to contradict [the previous part of the Mishnah]—מעשה לסתור?” It therefore explains that the issue is not about some legal entitlement that the laborers have unless there is a limiting stipulation. Rather, on the contrary, there was a point not mentioned in the Mishnah—חסורי מהכרא—that any stipulation made must be seen as augmenting the laborers’ customary rights. The worry of R. Yoḥanan b. Matya was that since his son had explicitly stipulated something already covered by local custom, that the stipulation could be interpreted as an unspecified addition to his son’s customary obligation as the employer. To this Rabban Shim`on ben Gamliel replies that the stipulation should not be so understood. Thus, for the Bavli the custom has not annulled a law at all.<sup>29</sup>

The case in *Bava Mezia* has received numerous interpretations. These interpretations divide over the question of the possibility of accepting the words of R. Hosha`ayah at face value. While such a reading has the recommendation of adherence to פשט—the simple meaning of the text, it is precluded for Elon and others because of the conceptual impossibility it poses for them. This, in turn, is connected to other assumptions regarding the historical development of the *halakhic* system, *halakhic* concepts and the harmonization of the Bavli and the Yerushalmi. The question of whether the case in *Bava Mezia* shows that custom can override law is somewhat clouded by the civil nature of the laws involved, with their dependence on social conventions. So it is to the case in *Yevamot* that we must turn.

#### THE CASE IN *YEVAMOT* AND ITS PARALLELS

The “social contract” standard of justification for practices does not apply to איסור והתר —ritual law—which derives its authority from Divine Scripture as interpreted and protected by the rabbis. Yet the Yerushalmi also applies this statement in the case of חליצה—a case of ritual law. Does this show that the Yerushalmi holds the more radical view outlined above? In order to ascertain this, it is necessary to try to understand the entire סוגיא in which this phrase occurs:

The twelfth chapter of Mishnah *Yevamot* begins with a discussion of the requisites for performing חליצה. The Torah requires that, in the presence of a court of three, the widow remove a shoe from her brother-in-law’s foot. What kind of shoe is meant?

If she [the widow] performed the חליצה with a מנעל [a shoe made of leather],<sup>30</sup> her חליצה is valid; if with אנפילין [a shoe made of cloth or felt],<sup>31</sup> it is invalid; if with a סנדל [a shoe that has only a sole and straps but no leather covering the foot] to which a heel is attached, it is valid, but if it has no heel it is invalid.<sup>32</sup>

The Yerushalmi comments on this part of the Mishnah:

- A. “If she [the widow] performed the חליצה with a מנעל [a shoe made of leather], her חליצה is valid;”  
—On whose account is it necessary [to teach this]?  
—On account of R. Meir: “(And ) [For]<sup>33</sup> R. Meir says ‘One does not perform חליצה with a מנעל.’”
- B. A בריתא: R. Yose said: “It happened that I went to *Nezivin* and I saw an old man there and I said to him, ‘Did you really know R. Yehuda b. Betera in your

- time?’ And he said to me, ‘My master, I was a moneychanger in my city and he was always at my table.’
- And I said to him, ‘Did you ever see him preside over a הליצה in your time? What did he use for הליצה, a shoe [מנעל] or a sandal?’ He said to me, ‘My master, is there a sandal to be found in our area?’ Then I said, ‘Then why did R. Meir see fit to say ‘One does not perform הליצה with a מנעל?’”
- C. R. Ba [Abba] said [in the name of] R. Judah, [who said] in the name of Rav: “If Elijah [the prophet] should come and say that הליצה may be performed with a מנעל, he would be obeyed; [if he said] that הליצה may not be performed with a סנדל, he would not be obeyed; for it has been the practice of the people to perform הליצה with a סנדל, and custom overrides the law.”
- D. R. Ze’eira said [in the name of] R. Jeremiah [who said] in the name of Rav: “If Elijah [the prophet] should come and say that הליצה may not be performed with a מנעל, he would be obeyed; [if he said] that הליצה may not be performed with a סנדל, he would not be obeyed; for it has been the practice of the people to perform הליצה with a סנדל, and custom overrides the law.”<sup>34</sup>

Elon seeks to mitigate the force of the Yerushalmi’s statement. He explains that, since the custom of using a sandal is not prohibited by law, but is actually endorsed by the Mishnah, it is not really a custom overriding an existing law. It’s power lies in buttressing an existing law against any attempt to change it, even by Elijah himself. Such a supplementary (“determinative”) role is acceptable even in the realm of ritual law.<sup>35</sup> But Elon’s presentation of the issue here makes it quite difficult to understand why the Yerushalmi should ever use this phrase, which, if Elon is right, grossly misstates the case.<sup>36</sup> Other scholars disagree with Elon’s underlying assumption. They maintain that the Yerushalmi is not bothered by the distinction between ממונה and איסור.<sup>37</sup>

To understand the phrase “custom overrides [or annuls] the law,” which is the culmination of this סוגיא, one must begin with the sections that lead up to that phrase. A straightforward reading of the start of the סוגיא seems to indicate that the Mishnah’s ruling, allowing the use of a shoe, is contrasted with the view of R. Meir. The language of the Mishnah implies that the allowance is only בדיעבד—post facto. Thus, R. Meir’s view is a categorical prohibition. The reading that R. Meir absolutely prohibits the use of a shoe fits well with the story of R. Yose in the ברייתא. The old man reported that since there were no sandals to be found, R. Yehuda b. Betera could only use a shoe. This would sound like a *post facto* situation. Still, R. Yose understands that R. Meir would have prohibited such use. But this is not the sense of the traditional commentators, *Pene Moshe* and *Qorban Ha-’Edah*. They explain that the Mishnah’s *post facto* permission is also R. Meir’s view.<sup>38</sup>

In the Yerushalmi there may be some ambiguity regarding the extent of R. Meir’s prohibition—is it absolute or only *ab initio*? But a different understanding of R. Meir is recorded in the parallel סוגיא in the Bavli.<sup>39</sup> The two traditions reported in the Yerushalmi in the name of Rav (sections C and D) are also reported in the Bavli, though by different tradents.<sup>40</sup> The striking difference from the Yerushalmi’s tradition is the absence of the provocative ending, “and custom

overrides the law.”

While lacking that phrase, the Bavli provides discussion lacking in the Yerushalmi. It declares that there is a difference between tradition C and tradition D. According to C, one is permitted to use a shoe only secondarily. Elijah’s *novitas* would be to allow it *ab initio*. But according to D, one is completely allowed to use a shoe for הליצה until such time as Elijah may disallow it.

These two possibilities are declared to be a tannaitic argument—תנאי היא—regarding R. Meir’s position. R. Yose tells the story of the old man in *Nezivin*. He asks about R. Yehuda b. Betera’s practice of הליצה—was it with a shoe or a sandal? The old man protests “Does anyone use a shoe for הליצה?” It emerges that one tradition has it that R. Meir allows use of a shoe only *post facto*. But R. Ya`aqov reports that R. Meir allows it *ab initio*.<sup>41</sup>

The traditional commentators on the Yerushalmi, influenced, it would seem, by this reading in the Bavli, interpret R. Meir in the Yerushalmi exclusively in terms of an *ab initio* prohibition. But Nahmanides recognized that the Yerushalmi really seems to indicate that R. Meir’s was a more absolute prohibition.<sup>42</sup> The Yerushalmi’s understanding of R. Meir is thus the opposite of the Bavli’s.

There is yet another parallel to the Yerushalmi. Tosefta *Yevamot* 12:11 begins by apparently commenting on *MYevamot* 12:2. First, R. Yehudah modifies the mishnaic tradition whereby R. Eli`ezer disqualifies use of a wooden sandal for הליצה. The Tosefta then relates the following version of the *Nezivin* story, which differs from both the Bavli and the Yerushalmi:<sup>43</sup>

R. Shim`on said: “I found a certain old man in *Nezivin*. I said to him, ‘Was R. Yehudah b. Betera an authority for you?’<sup>44</sup> He said to me, ‘Yes, and he was at my table always.’ I said to him, ‘Did you ever observe him when he arranged a הליצה?’ He said to me, ‘Yes.’ I said to him, ‘With what did you see him [do it], a shoe or a sandal?’ He said to me, ‘Does anyone ever perform הליצה with a shoe?’ I said [to him, ‘If so,] why did R. Meir see fit to allow הליצה with a shoe?’ R. Ya`akov said in his name, ‘R. Meir would admit that one may not do הליצה with a shoe.’”

There are, thus, numerous traditions regarding the views of R. Meir and R. Yehuda b. Betera as to the use of a sandal or a shoe for הליצה. To summarize:

For R. Meir—	The Yerushalmi has: אין חולצין במנעל.
	The Bavli has: a) הלצה במנעל חליצתה כשרה.
	b) חולצין במנעל לכתחילה.
	The Tosefta has: a) חולצין במנעל.
	b) אין חולצין במנעל.

For R. Yehuda b. Betera, the Yerushalmi has it that he used a shoe for הליצה, while the Bavli and the Tosefta have it that he used a sandal.

ANALYSIS OF THE PHRASE – המנהג מבטל את ההלכה

For Benjamin De Vries this confusion is not so much of a textual nature<sup>45</sup> as reflective of

conflicting traditions:

Thus it emerges that there were different traditions regarding the suitability of the shoe [for הל'צה], even with regard to R. Meir's opinion. And our Mishnah decided according to R. Meir (as in the Tosefta and the Bavli). However it seems that the custom had been of yore to do *halizah* with a sandal. It emerges, therefore, that a custom overrides a law, meaning that a custom overrides the deciding of a law [פסק הלכה]. But this is not a custom which conflicted with an existing law from the start, for there were various opinions. The very mention of Elijah in this context proves that the issue is one of clarifying a doubtful law or of a tradition, as is his role, usually, in the field of halakhah, and therefore there are also different formulations of Rav's words regarding *halizah* with a shoe.<sup>46</sup>

De Vries propounds a stronger claim for the Yerushalmi's phrase than does Elon. Custom fills more than a determinative/supplementary role. It may actually block the decision-making process of *halakhah*, forcing the *halakhah* to accede to its determination – as long as the law was not decided first. But De Vries' approach may be criticized for being too synoptic, fusing all parallel versions without dealing with the specificity of the one text which contains the troublesome phrase. It is the Yerushalmi which contains this phrase; yet De Vries, as he notes, describes the Mishnah's stance vis-à-vis R. Meir according to the Bavli and Tosefta. De Vries fails to explain why the Bavli reads differently than the Yerushalmi

The same is true for Berakhyahu Lifschitz' approach. Applying his interpretation, outlined above in the *Bava Mezia* case, to our case, Lifschitz explains that the custom to use a sandal has caused everyone to forget that a shoe may also be used. So if Elijah will come to tell us this—*שומעין לו*—we will lend an ear to remind ourselves of the forgotten law. According to this, the concluding phrase does not refer to Elijah's attempted prohibition of the use of a sandal, but to his allowance (*ab initio* or *post facto*) of a shoe. Lifschitz's support for his suggestion is weak. The reading of the traditions about Elijah is very forced.<sup>47</sup>

Ephraim Urbach was more willing to accept the Yerushalmi's statement at face value. Urbach sees the custom of using a sandal as a practice which did not have *halakhic* authorization. The *halakhah* wished to impose certain restrictions on the kind of sandal to be used, restrictions which the custom disregarded:

The *mishnah* distinguishes between a sandal with a heel and one without but the custom recognizes no such distinction. Furthermore, the *mishnah* accepts *halizah* with a sandal with a heel only *post facto* as is evident from the *amora*'s comment with regards to the first clause of the *mishnah*, "If the woman performed *halizah* with a shoe it is valid." The thrust of his remark, "If Elijah comes and says that we can perform *halizah* with a shoe," is that if the prophet rules that it is permitted in the first instance we will accept the ruling although it does not jibe with the anonymous—and therefore authoritative—*mishnah*. Similarly, should the prophet rule that "we cannot perform *halizah* with a sandal," i.e., in the first instance, we will reject the ruling although it jibes with our *mishnah*, because the public is accustomed to use the sandal. [...] A public custom which reflects the "normal behavior" changes the *halakhah*.<sup>48</sup>

Urbach's interpretation is straightforward. However, he glosses over the apparent differences between the Bavli and Yerushalmi, calling the rule *את ההלכה מבטל*—“an aphorism which appears [...] in the Talmud.”<sup>49</sup> Why is this talmudic aphorism absent from one of the Talmuds?

As mentioned above, it is Ta-Shma who has most clearly stated that this phrase represents a point of contention between Babylonian and Palestinian traditions. He distinguishes between the Babylonian and the Palestinian understandings of Rav statements (C and D):

Rabbis and scholars have already noted that the people's custom to use a sandal does not oppose the halakhah's stand as it is explained in the mishnah [...] Elijah, in his words, is the one trying to establish a new law. In this case the people's custom actually supports the common law, and it is by right that Elijah's power be mitigated so that he will not be able to set up a new law against it, and there is no 'custom overrides the law' here. However, this claim is correct for the Babylonian Talmud alone, for it does not use the phrase 'custom overrides the law', [...] But in the Yerushalmi it is impossible to explain it thus, since it makes use of this phrase specifically. Its intention, therefore, is to say that even should Elijah come, and the Truth will be revealed retroactively—that the halakhah in the mishnah regarding a sandal is fundamentally mistaken—nevertheless he will not have the authority to correct it, because the many [רבים] have already acted according to it, and their custom overrides the halakhah. The Babylonian Talmud disagrees with this and therefore did not cite this phrase, dropping it [...]<sup>50</sup>

Whether it is possible to find other material to substantiate Ta-Shma's claim that an *halakhic* decision by Elijah would be viewed as a retroactive revelation of the true *halakhah* requires further study. It would seem that most authorities see Elijah's role as accomplishing the clarification of the law in the future<sup>51</sup>, or as representing unassailable *halakhic* authority.<sup>52</sup> What is impressive about Ta-Shma's argument is the marshalling of supportive instances in other *סוגיות* which, individually considered, tend to be viewed as anomalous, but which, taken together, are suggestive of a definite tendency to grant greater consideration to custom. In addition, it is important that Ta-Shma claims that these differing tendencies operate in the formulation of the traditions as recorded in each Talmud. He points to the editing of phrases. But the possibility suggests itself that such differing stands may also express themselves in the overall construction of the *sugya* as well as in the presence or absence of a particular phrase.

#### THE PRESENTATION OF THE *סוגיא* IN THE YERUSHALMI AND THE BAVLI

In order to investigate this possibility, it is appropriate here to single out certain differences that obtain between the organization of the *סוגיא* in the Yerushalmi and its parallel in the Bavli. As set out above, the Yerushalmi begins by ascertaining the relationship between R. Meir and the Mishnah (A). It then quotes a version of the *Nezivin* *ברייתא*, which includes a question about R. Meir's position (B). Finally, it quotes the two traditions from Rav about Elijah, concluding each with the provocative phrase—*את ההלכה מבטל*—(C,D).

The Bavli is organized differently. It begins with C and D, rather than ending with them. It omits the rule about custom. It then includes an element not found in the Yerushalmi—a re-evaluation of the meaning of the Mishnah in light of its own analysis of C and D. Finally it uses its version

of the *Nezivin* ברייתא to establish that there are two tannaitic opinions about the use of a shoe *ab initio* (B).

The differences between the Yerushalmi and the Bavli extend past organization of elements to variant readings as well. We propose to accept Urbach's understanding of the Yerushalmi's phrase, and we also take seriously the lack of that phrase in the Bavli. We further propose that this difference is the result of two different editorial stances which shall become evident in the following analysis of the two סוגיות:

The Yerushalmi begins by establishing to its satisfaction that R. Meir prohibits the use of a shoe for הליצה. It then challenges R. Meir from the *Nezivin* ברייתא. The Yerushalmi's version differs from the Tosefta and the Bavli, as noted above. The important difference lies in the response of the elder of *Nezivin* to R. Yose's question about what footwear was used there. Only in the Yerushalmi is the elder's response couched in terms of realia—במקומינו? וכי יש סנדל? This makes the practice of preferring a shoe to a sandal realia-based rather than *halakhically* based, giving it the character of mere custom. In this version it is established that in *Nezivin*, people, not having access to sandals, were accustomed to using a shoe. It is in the face of this custom that R. Meir's position is found untenable, the implicit objection being that the custom overrides any law to the contrary. To this the Yerushalmi adds the traditions of Rav. His traditions reflect a different custom—the use of a sandal. Again, the Yerushalmi explains that no one, not R. Meir, and not even Elijah the Prophet, can rule against a custom.<sup>53</sup> (However, Elijah may be allowed to supplement the custom by permitting a shoe as well.)

The Bavli is interested in undermining custom from the start. Thus, though it begins by acknowledging the tradition that the custom is to use a sandal, it immediately shifts the discussion to the preferred use of a shoe. It eliminates the valorization of custom from Rav's traditions and proceeds to reread the Mishnah so as to have it advocate the use of a shoe *ab initio*. It is with this agenda in mind that we may understand the use the Bavli makes of the *Nezivin* ברייתא. Like the Tosefta, and unlike the Yerushalmi, the Bavli places the elder's response concerning the footwear used in that place within a *halakhic* discussion—וכי הולצין? וכי הולצין? במנעל. But, as Halivni has pointed out,<sup>54</sup> the Bavli's question concerning R. Meir differs from the Tosefta's, and reads awkwardly. As quoted by the Bavli, there is really no necessary question against R. Meir. Halivni points out that the Bavli's version is a hybrid of the Tosefta and the Yerushalmi. But this does not explain the difficulty. However, if we accept the program of the Bavli in this *sugya*, we can understand why it had to awkwardly alter the Tosefta's text.

The way the Tosefta reads, R. Meir was originally understood to allow use of a shoe for *halizah* in the first instance. But this is modified by R. Ya'akov in the face of the elder's statement. R. Meir is finally understood to allow the use of a shoe only *post facto*. This will not do for the Bavli. Based on its interpretation of the Mishnah, it needs a tradition that R. Meir allows the use of the shoe *ab initio*. By changing the starting point of R. Meir to a statement of allowance *post facto*, R. Ya'akov's statement can be reconstrued so as to be in argument with the elder of *Nezivin* rather than as a capitulation. This gives the Bavli the positions it requires. Thus the Bavli's variations on the Tosefta are not the product of confusion with the Yerushalmi's tradition, but are a product of a conscious rejection of the Yerushalmi's position that valorizes

custom in general, and the custom of using a sandal, in particular.

## CONCLUSION

Analysis of the *סוגיות* lends support to Ta-Shma's claim that there is a difference in *halakhic* philosophy between the Bavli and the Yerushalmi. However, reading the *סוגיות* as a whole indicates that Elijah is not seen as a revealer of *halakhic* truth retroactively, as Ta-Shma claims. It is enough to see him as the ultimate future *halakhic* authority for the Yerushalmi to be understood as making a claim for *מנהג* that the Bavli would be uncomfortable with *halakhically*. The Yerushalmi's claim is that custom does not have to bow before *halakhic* authority. By implication it is stating that custom does not derive its authority from the *halakhic* system. Such a claim would naturally be unacceptable to the advanced system of *halakhah* which was the Babylonian project.<sup>55</sup> It is precisely to this claim that the Palestinian community remained faithful in its exchange with Pirqoi ben Baboi.

<sup>1</sup> Menahem Elon, *Jewish Law: History, Sources, Principles*, JPS, Philadelphia/Jerusalem, 1994, vol. II, pp. 880-882.

<sup>2</sup> Ibid., pp. 883.

<sup>3</sup> Ibid., p. 882. And see pp. 883-885.

<sup>4</sup> Ibid., p. 895. In the original, *המושפט העברי*, Magnes Press, 1973, vol. 2, p.726, the terms are: *חקיקה* *גלייה/נסתרת* and *מכוננת/אנונימית*.

<sup>5</sup> Ibid., p. 896.

<sup>6</sup> BT *Rosh Hashanah* 29b.

<sup>7</sup> See his discussion op. cit., pp. 883-885. The question of the tacit acquiescence of the rabbinic establishment to certain customs, thus granting them implicit authority ("covert legislation"), is the subject of the various stances set forth in BT *Ta'anit* 26b, with regard to R. Meir's position on the recitation of the Priestly Blessing during Yom Kippur afternoon. See pp. 891-892. See also Alexander Guttman, "בצרון לשאלת היחס: מנהג - הלכה בתקופת התלמוד", 14 (1946), p. 195, who claims that, historical and sociological issues aside, from the perspective of the *halakhah* all custom derives its authority by rabbinic command. (It is unfortunate that Guttman's essay, however arguable its points may be, is not referred to by the other authorities consulted on this topic.)

<sup>8</sup> Ibid., p. 896. Elon is following Benjamin De Vries, *תולדות ההלכה התלמודית*, Tel Aviv, 1962, pp. 159-160. Guttman, op. cit., p. 197, makes the same point.

<sup>9</sup> Israel M. Ta-Shma, *מנהג אשכנז הקדמון: חקר ועיון*, Jerusalem, 1992, pp. 61-74.

<sup>10</sup> Ibid., pp. 70-71. B. Lifschitz, "מנהג מבטל הלכה", in סיני 1980, p. 8, note 4, already quotes Ta-Shma on this.

<sup>11</sup> Ta-Shma, op. cit., pp. 61-62.

<sup>12</sup> PT *Yevamot* 12:1 (12c) and PT *Bava Mezia* 7:1 (11b). See below.

<sup>13</sup> Translated in Elon, op. cit., p. 905.

<sup>14</sup> Elon, op. cit., p. 896.

<sup>15</sup> The understanding of PT *Bava Mezia* as referring to a case of civil law is shared by other scholars. See: Y. Z. Kahana, "היחס בין ההלכה למנהג", in his *מחקרים בספרות התשובות*, Mossad HaRav Kook, Jerusalem, 1973, p.109; Joel Roth, *The Halakhic Process: A Systemic Analysis*, JTS, New York, 1986; E. E. Urbach, *The Halakha: Its Sources and Development*, Massada, Ramat Gan/Jerusalem, 1986, p. 38.

<sup>16</sup> See De Vries, op. cit., p.164; B. Lifschitz, op. cit., p. 9 and his reference to Kahana, op. cit., who sees no difficulty with this.

<sup>17</sup> See Elon, op. cit., p. 909, note 48.

<sup>18</sup> Tosafot ad. loc., s. v. *Ha-sokher*, and see the gloss to the Rosh, quoting the *Or Zaru'a*, and the Meiri, ad. loc.

<sup>19</sup> BT *BM* 83a.

- <sup>20</sup> Quoted in בבא מציעיא – שיטה מקובצת – ad. loc., Jerusalem, 1996, p. 619.
- <sup>21</sup> Commentary of Mahara Foulda to PT *Bava Mezia*, ad. loc. The other possibilities he quotes are Tosafot (without discussing how it would fit with the Yerushalmi), and the suggestion that the custom overrides the obligation from the Torah that laborers work early and late if there is no explicit stipulation. Again, the difficulty is that the custom functions as such a stipulation, and so is not annulling the law.
- <sup>22</sup> Guttman's discussion of this case (op. cit., pp. 97-98, 197) is somewhat unclear. While he makes no mention of Mahara Foulda, it would seem that Guttman's reading of the case is identical. However, Guttman claims that this does not really indicate that custom overrides the law because had the employer abided by the custom the custom would not have come in conflict with the law. Furthermore, he notes that the law—המוציא מהכרו—is not abrogated except in this case, so as not to allow the employer to take advantage of the law in his attempt to contravene established custom –שלא יהא החומא נשכר. Guttman thus dismisses the phrase "custom overrides the law" as essentially meaningless. He also sees no difference between the Bavli and the Yerushalmi. Compare also his discussion of the difference between the two talmuds on the custom of priests to avoid marriage with the children of converts (p. 99) and that of Ta-Shma (op. cit., p.63).
- <sup>23</sup> B. Lifschitz, op. cit., pp. 10-11.
- <sup>24</sup> The legal standards for workers' hours is somewhat unclear. In the Bavli, see Tosafot, *Bava Mezia* 83b, s. v. פועל, and other *rishonim*. In the Yerushalmi see especially the *Sede Yehoshu'a*, ad. loc.
- <sup>25</sup> The Rif, ad. loc., cites R. Hosha'ayah without R. Immi's statement, apparently avoiding the interpretation that a dispute (requiring the presentation of evidence) is involved. On the other hand, the Rosh, ad. loc., reverses the order of these two statements, placing R. Immi first, and then having (the earlier) R. Hosha'ayah apparently continuing R. Immi's thought!
- <sup>26</sup> De Vries, op. cit., pp. 164-165.
- <sup>27</sup> S. Lieberman, ed., הלכות הירושלמי לרמב"ם ז"ל, JTS, New York, 1947, pp. 55-56.
- <sup>28</sup> *Bava Mezia* 87a-b.
- <sup>29</sup> See the discussion in the *Derishah* to the Tur, H. M. 331, s. v. והרמ"ה.
- <sup>30</sup> Neusner translates: "a slipper." J. Neusner, *The Mishnah: A New Translation*, Yale, NewHaven/London, 1988, p. 364.
- <sup>31</sup> Neusner: "a felt sock", *ibid*.
- <sup>32</sup> m *Yevamot* 12:1. Translated in Elon, op. cit., p. 907.
- <sup>33</sup> Reading – דר' מאיר. " So emended by De Vries, op. cit., p. 163, and S. Lieberman, תוספתא כפשוטה, – יבמות – JTS, NY, 1967, p. 135.
- <sup>34</sup> PT *Yevamot* 12:1 (12c), sections C and D are translated by Elon, op. cit., p.907.
- <sup>35</sup> Elon, op. cit., pp. 908-909. See, also, De Vries, op. cit., pp. 162-164.
- <sup>36</sup> See B. Lifschitz, op. cit., p. 10.
- <sup>37</sup> See De Vries, op. cit., pp. 162, 167, and Urbach, op. cit., p. 368, note 23.
- <sup>38</sup> This would reflect the simple understanding of the rule—סתם משנה ר' מאיר—as having attributive significance. But Fraenkel pointed out that this is not necessarily what the phrase means. Furthermore, the Yerushalmi does not cite this rule with the same blanket acceptance as does the Bavli. See Z. Fraenkel, דרכי המשנה, Sinai: Tel Aviv, n.d., pp. 223-224 and notes 6 and 7, there. See also, C. Albeck, מבווא למשנה, Mossad Bialik, Dvir: Jerusalem/Tel Aviv, 1959, pp. 74-75.
- <sup>39</sup> BT *Yevamot* 112a.
- <sup>40</sup> The Yerushalmi's tradition for C goes from Rav to R. Judah to R. Abba; the Bavli has Rav-R. Kahana-Rabbah. The Yerushalmi has for D: Rav-R. Yirmiyah-R. Ze'eira. The Bavli has: Rav-R. Kahana-R. Yosef. This is repeated in BT *Menahot* 32a.
- <sup>41</sup> Nahmanides, in his novellae to BT *Yevamot*, ad. loc., s. v. ומנעיל, tries to make sense of the phrase *tanna' l' hi'*, which usually indicates a dispute between two different tannaim. (A dispute about the position of one sage should carry the added phrase – ואלביא דר' פלוני –)
- <sup>42</sup> *Ibid*.
- <sup>43</sup> תוספתא נשים, ed. S. Lieberman, JTS, New York, 1964, p. 43. Neusner's translation of the Yerushalmi obscures this crucial issue by simply replacing the Yerushalmi's tradition with the Tosefta

text.

<sup>44</sup> So in Neusner, *The Tosefta -Nashim*, KTAV, New York, 1979, p. 45. The phrase reads either: בקי לך ריב"ב (in Lieberman's Tosefta text) or היה לך ריב"ב (as in certain variants and in the Yerushalmi) or כלום אתה בקי בריב"ב (in the Bavli).

<sup>45</sup> See D. Weiss-Halivni, *יבמות - מקורות ומסורות*, Dvir: Tel Aviv, 1968, p. 111, who sees the Bavli as a mixture of the Tosefta and the Yerushalmi. See below.

<sup>46</sup> De Vries, op. cit., p. 164.

<sup>47</sup> He admits (p. 8, n. 4) that the phrase has a normative meaning in the third source in which it appears, Tractate *Soferim* 14:18. (See Ta-Shma, op. cit., p. 66, n.85.) Additionally, A. Guttmann, op. cit., had already pointed out that we find in *BT Avodah Zarah* 36a- the combination of the term בטל—in a normative sense—with the invocation of the coming of Elijah: אמר רבה בר בר חנה אמר ר' יוחנן בכל יבוא אליהו ובית דינו אין שומעין לו יכול לבטל ב"ד דברי ב"ד חבירו חוץ מ"ח דבר, שאפילו יבוא אליהו ובית דינו אין שומעין לו

<sup>48</sup> Urbach, op. cit., p.39.

<sup>49</sup> Ibid., p.38.

<sup>50</sup> Ta-Shma, op. cit., pp. 65-66.

<sup>51</sup> See, for example, De Vries, op. cit., p. 164

<sup>52</sup> See, for example, Elon, op. cit., p. 908, n. 46.

<sup>53</sup> Guttmann, op. cit., p.96, writes:

Rav decided that should Elijah come to annul a common custom, that is, *halizah* with a sandal, we do not heed him, for the custom overrides the law. Which custom overrides which law? The custom to perform *halizah* with a sandal does not override any existing law. Only, should Elijah come to override the widespread custom to do *halizah* with a sandal, and this annulment is what is here called 'halakhah', then we do not listen to him. That is to say that there is no authority to enact new laws to annul a widespread custom."

However he understands this as a limited protection of custom that is fully in accord with the law's greater authority:

This means that our case does not serve as proof that custom overrides an existing law, nor does it serve as an obstacle to enacting new laws, for it is merely an obstacle to the uprooting of a widespread custom.

Our analysis of the *sugyot* in the two talmuds indicates that Guttmann's apologetic conclusion was not adopted by the Bavli.

<sup>54</sup> Halivni, op. cit.

<sup>55</sup> Roth, op. cit., p.207, quotes *Salmond on Jurisprudence* :

Nothing, therefore, is more natural than that, when the state begins to evolve out of the society, the law of the state should in respect of its material contents be in great part modelled upon, and coincident with, the customs of society. (p. 191)

This influence of custom upon law, however, is characteristic rather of the beginnings of the legal system than of its mature growth. When the state has grown to its full strength and stature, it acquires more self-confidence, and seeks to conform national usage to the law, rather than the law to national usage. (p. 191)