

## מלוות דרבנן: UNDERSTANDING TO STAY OR NOT TO STRAY

The American government is famous for being predicated based on checks and balances. Of the three branches of the government, each has another branch "watching over them", making sure their power doesn't go too far. In Judaism, we believe in a governing body, and that is the סנהדרין. Yet, it seems interesting that the תורה doesn't prescribe any checks and balances on the רבנן. Aside from maybe certain deterrents such as זקן ממרא, evidence points to the fact that the רבנן can basically do as they please. What are we to make of this phenomenon? To properly understand this issue, we must look at the concept of rabbinic institutions in general. Specifically for now, we will focus on the מצוות דרבנן of ענין.

Seemingly, the source for מצוות דרבנן is the פסוק of לא תסור מן הדבר אשר יגידו לך ימין פסוק. The פסוקים before tell us that if you have an issue, you have to go to the judges and listen to what they tell you (ועשית על פי הדבר אשר יגידו לך...ושמרת לעשות ככל אשר יורוך). Now, that same charge from the פסוק is given over as a לאו, perhaps even only to strengthen the point even further, so that the תורה be a centralized system and not be left up to everyone to interpret it as they see fit.<sup>2</sup> Therefore, when seeking an alternative source for the fact that we are able to say מצוות on וצונו that come from the רבנן (such as נר חנוכה), רב נחמיה comes to the פסוק of ויגדך פסוק. Why does the גמרא provide 2 sources for the right of the רבנן to command us to do מצוות? This מחלוקת in the גמרא points to the nature of מצוות דרבנן, and helps us better understand what the purpose of the רבנן within the greater halachic system.

One of the most popular ספרים today is the ספר החינוך. The חינוך goes through all of the מצוות, and gives the reasons and דינים behind each and every one of them. This genre of halachic literature started in the times of the גאונים with רב סעדיה גאון and the הלכות גדולות (בה"ג). Among the בה"ג's count of 613 were some מצוות דרבנן, but not others. Noting this apparent inconsistency, the רמב"ם says that all מצוות דרבנן fall under the umbrella of לא תסור, and really we should be counting all of them in תר"ג.<sup>5</sup> Meaning, the fact that the רמב"ם did not count ANY מצוות דרבנן in תר"ג is because they are only sub-categories of לא תסור, and not their own independent categories. If they would be their own independent categories, there would be no reason to count only some and not others. In fact, רמב"ם points out elsewhere<sup>6</sup> that the דין דאורייתא of לא תסור encompasses all types of הלכות and rules put in place by the רבנן, be them סייגים or new מצוות or תקנות. This position of the רמב"ם was not taken well by other ראשונים. The רמב"ן is famous for being the "great defender" of the תורה. He wrote an attack on the ספר המצוות of the רמב"ם to defend the בה"ג. In it, he says<sup>7</sup> that if all דיני דרבנן indeed fall under the umbrella of the דין דאורייתא of לא תסור as the רמב"ם suggests (even if they not be part of the count of תר"ג), then we have a major problem to grapple with. There are rules set in place to help us differentiate between דיני דאורייתא and דיני דרבנן. One of the most famous of these is that in a situation where there is a ספק, we are מחמיר by דאורייתא.

<sup>1</sup> דברים יז.א

<sup>2</sup> עיין ספר החינוך ריש מצוה תלה, ריש מצוה תלו

<sup>3</sup> דברים לז.א

<sup>4</sup> שבת כג.

<sup>5</sup> ספר המצוות שורש א

<sup>6</sup> רמב"ם הלכות ממרים א.ב

<sup>7</sup> השגות הרמב"ן לספר המצוות שורש א

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and דיני דרבנן by מיקל <sup>8</sup>. This is just one נפקא מינה between the two. If we were to view דיני דרבנן as דיני by מחמיר at their core, then there should be no differentiation, and we should be דיני by מחמיר (amongst other things)! How does the תורה respond to this bomb קשיא of the רמב"ן? The תורה tells us only that we must listen to that which the רבנן tell us. Therefore, it must be we are misunderstanding the injunction of the רבנן. It was they themselves who instituted the rule of ספיקא as a means of differentiating between דיני דרבנן and דיני דאורייתא. Yes, the דיני דרבנן are really דיני דאורייתא (that aren't part of תרי"ג), but they are not the same as regular דיני דאורייתא. This rule doesn't apply just to a situation of ספק, but to all differences between דיני דאורייתא and דיני דרבנן.<sup>9</sup>

Once the תורה gave the mandate to the רבנן to govern its laws, it still begs the question of how they are entitled to do that. We have a principle that one cannot add to or subtract from the תורה. This is referred to as תוסף and בגרע. <sup>10</sup> If we know a נביא can't add to the מצוות of the תורה,<sup>11</sup> what gives the רבנן the right? If you were to suggest that a חכם is stronger than a נביא,<sup>12</sup> and therefore can enact דינים that even a נביא can't,<sup>13</sup> that's only regarding using the pre-existing principles of the תורה, but not to create something anew! Therefore, we must take a different approach. The whole concept of תוסף is to add something that the תורה did not say. For example, we know there is an איסור of בשר בחלב. Just looking at the basic דין דאורייתא, chicken does not fall into the איסור. We don't eat chicken and milk because it is אסור מדרבנן. Yet, if the רבנן were to come and say that the תורה says chicken and milk is אסור, that would be תוסף. However, framing it as, and making it clear that it is only, a סייג is not only מותר, but encouraged (as we know from the first משנה in פרקי אבות).<sup>14</sup> Similarly, for בגרע, the איסור would be to say that a דין דאורייתא no longer applies. However, for a הוראת שעה, if it is made clear as such, the רבנן can remove a דין דאורייתא. We will discuss א"ה at a different point other ways the רבנן can get rid of a דין דאורייתא. Essentially, the רמב"ם understands בגרע to be affecting one of the pre-existing מצוות תרי"ג (what we will refer to as the 613+ model). In addition to this, the רמב"ן understands the איסור to be creating a new מצוה. This is based on the פסוק at the end of ויקרא and במדבר saying "אלה המצוות".<sup>15</sup> We have the 613, and we can't add or subtract to them (thus, the איסור would also be what we will refer to as the 614 model).

Based on how the רמב"ם understands תוסף and בגרע, we can explain the answer of the לחם משנה in another light. In the worldview of the רמב"ם, there is only a reality of 613. It's not even דיני to fathom that there would be an additional or lack of a מצוה. Therefore, the concept of דיני דרבנן would perforce only be able to fall under the existing דיני דאורייתא, in this case being תסור. This might have motivated the לחם משנה to defend the רמב"ם by saying that אין הכי נמי, that דיני דרבנן are really דיני דאורייתא, just a watered-down version. However, רמב"ן points to a possibility in which a new מצוה can come into existence, albeit in a wrongful manner. Therefore, דיני דרבנן can be

<sup>8</sup> עיין צילה ג:

<sup>9</sup> לחם משנה הלכות ממרים א.ב.

<sup>10</sup> עיין דברים ד.ב.

<sup>11</sup> עיין מגילה ב:ג-ג.

<sup>12</sup> עיין בבא בתרא יב.

<sup>13</sup> כמוש"כ הפרישה חו"מ טה.כא

<sup>14</sup> רמב"ם הלכות ממרים ב.ט.

<sup>15</sup> רמב"ן דברים ד.ב.

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independent from the already existing דין דאורייתא of לא תסור, which led the רמב"ן to think that if דיני דאורייתא are subsumed under לא תסור, then they must be viewed as full on דיני דרבנן.

We pointed out that the פסוק of לא תסור concludes with the words אשר יגידו לך ימין ושמאל. These words are interpreted by רש"י to mean that even if the רבנן tell you left is right and right is left, you must listen to them, and וחומר קל וחומר if they say right is right and left is left. Many explanations are offered up for this cryptic line of רש"י, but I want to share one. רב אלחנן ווסערמאן הי"ד writes,<sup>16</sup> in light of the סוגיא of תוסיף, that רש"י refers to עקירת דבר מן התורה, when the רבנן have a right to remove a מצוה from the תורה (provided it is done in the proper way, as we mentioned earlier). However, the רמב"ן understands the דרשה of רש"י (really from the ספרי) that על שמאל הוא עקירת דבר מן התורה על שמאל שהוא ימין, דברי תורה עצמה ימין refers to even בקום ועשה. This is a סוגיא we will delve into more in the future, but perhaps this שיטה of the רמב"ן ties up one final loose end. We started off with the גמרא that the source for listening to the רבנן is either לא תסור (מצות לא תעשה), or שאל אביך ויגדך (מצות עשה). If the רמב"ן rejects the רמב"ם's notion of לא תסור being the source, perforce he believes the whole idea of rabbinic authority is only a מצות עשה. If that's the case, this מצות עשה can be דוחה the מצות לא תעשה to give us a case in which the רבנן can remove a מצוה from the תורה when they see fit, and that can even be בקום ועשה.

<sup>16</sup> קובץ שיעורים קונטרס דברי סופרים ד.יג