YESHIVAT HAR ETZION

ISRAEL KOSCHITZKY VIRTUAL BEIT MIDRASH (VBM)

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"My Children have Defeated Me"

Fundamental questions in the study of the Oral Law

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Dedicated in memory of Rabbi Jack Sable z”l and
Ambassador Yehuda Avner z”l,
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**Shiur #02: Chapter One (I)**

**The Antiquity of the Oral Law**

**I. Introduction**

Ostensibly, the tradition regarding the existence of the Oral Law derives from the words of *Chazal.* It was they who coined the term "Oral Law," and it was they who related to it as a concept that existed from the earliest times, parallel to the Written Law. Thus, for example, the Midrash comments on the verse: "These are the statutes and ordinances and Torahs, which the Lord made between Him and the children of Israel in Mount Sinai by the hand of Moshe" (*Vayikra* 26:46):

"The statutes" – these are the midrashic expositions; "and ordinances" – these are the laws; "and the Torahs" – **this teaches that two Torahs were given to Israel,** one in writing and one orally. (*Torat Kohanim*, *Bechukotai* 8, 13, 112c)

Another example: Regarding the verse, "They shall teach Yaakov Your ordinances, and Israel Your law" (*Devarim* 33:10), the Midrash states:

"And Israel Your law" – this teaches that two Torahs were given to Israel,[[1]](#footnote-2) one in writing and one orally. General Agnitus asked Rabban Gamliel, saying to him: How many Torahs were given to Israel? He said to him: Two, one orally and one in writing. (*Sifrei Devarim* 351, p. 408)

The meaning of these and similar remarks of Chazal will be discussed in the coming chapters. This chapter concerns whether *Chazal* were the first in Jewish history to distinguish an Oral Law, or whether there is evidence in Scripture itself for the existence of the Oral Law.

To guide our discussion it will be helpful to keep in mind three (overlapping) notions of the Oral Law.

1. In the simplest sense, the Oral Law is a system of commands that were transmitted by word of mouth and without any official, written codification.
2. The Oral Law also includes orally transmitted glosses on written law.
3. Most broadly the Oral Law includes the total body of additions – some of which emerged organically, some of which responded to circumstance – to the Written Law.

We will see that Scripture deals explicitly with all three of these notions.

At the outset, it should be noted that, of course, written texts address readers who will understand the texts in large part due to their oral facility with the language of composition. For example, when the Torah commands, "You shall dwell in booths [*sukkot*] seven days" (*Vayikra* 23:42), the underlying assumption is that readers, by virtue of belonging to a community of shared language, roughly agree what "*sukkot*" indicates. Likewise, it is clear that the commandment, "A bastard [*mamzer*] shall not come into the assembly of the Lord" (*Devarim* 23:3), addresses those to whom "*mamzer*" picks out a pretty well-defined set. Our focus will not be on this interesting but basic point.

We will now turn to the Oral Law’s life across various Biblical eras.[[2]](#footnote-3)

**II. The Oral Law Prior to the Revelation at Mount Sinai**

We saw above that *Chazal* determined that the Oral Law was given to Israel at the assembly in Mount Sinai. It is evident, however, that even before the assembly at Mount Sinai, a kind of Oral Law took the form of explicit commandments, informal practices, and moral norms, all of which were taken to legally bind certain people.

1. Explicit commandments:

 The people in the book of *Bereishit* are already committed to various *mitzvot*, regarding which they were explicitly commanded by God, even before they were committed to writing. An initial list of commands appears already in the words of God to Noach in the aftermath of the flood:

And God blessed Noach and his sons, and said to them: Be fruitful and multiply, and replenish the earth… Every moving thing that lives shall be for food for you; as the green herb have I given you all. Only flesh with the life thereof, which is the blood thereof, shall you not eat. And surely your blood of your lives will I require; at the hand of every beast will I require it; and at the hand of man, even at the hand of every man's brother, will I require the life of man. Whoever sheds man's blood, by man shall his blood be shed; for in the image of God made He man. (*Bereishit* 9:1-6)

According to the plain meaning of the text, this list includes several laws: an allowance to eat meat, a ban on eating blood, a ban on murder and the death penalty for a murderer.[[3]](#footnote-4) These laws were not put in writing in a binding document, but it is clear from the stories of *Bereishit* that they were perceived as binding. Thus, for example, we can understand why when the brothers were considering killing Yosef, they tried to conceal the matter – "And we will say, An evil beast has devoured him" (*Bereishit* 37:20); and why in the end they refrained from killing him, in the wake of Yehuda's words: "What profit is it if we slay our brother and conceal his blood" (ibid. v. 26). Murder was explicitly banned in God's commandments to Noach and his sons, and, so far as we know, the prohibition was passed down from one generation to the next as part of an oral tradition.

A special commandment was given to Avraham and his descendants - circumcision:

And he that is eight days old shall be circumcised among you, every male throughout your generations, he that is born in the house, or bought with money of any foreigner, that is not of your seed. He that is born in your house, and he that is bought with your money, must needs be circumcised; and My covenant shall be in your flesh for an everlasting covenant. And the uncircumcised male who is not circumcised in the flesh of his foreskin, that soul shall be cut off from his people; he has broken My covenant. (*Bereishit* 17:12-14)

This *mitzva* was also not put in writing until the Torah was given to the people of Israel, but nevertheless it obligated the descendants of Avraham, as is evident from various passages in the Torah.[[4]](#footnote-5) This too was part of the Oral Law of that period.[[5]](#footnote-6)

The people of Israel became parties to an Oral Law even before the theophany at Sinai. After the exodus from Egypt, the people of Israel were given several commandments regarding the observance of Pesach in future generations (*Shemot* 12:14-20; 43-49), and the *mitzva* concerning the firstborn, connected to the plague of the smiting of the firstborns of Egypt (*Shemot* 13:1-15). In the continuation of their journey away from Egypt, they were given the *mitzva* of Shabbat (in the passage dealing with the manna; *Shemot* 16:22-30). These commandments as well were given orally and were viewed as binding even before the revelation at Mount Sinai.

2. Practices without explicit commands:

The system of laws by which the people in the book of *Bereishit* lived included much more than the explicit commands mentioned above. Let us note the institution of marriage, itself evidence for such an non-written legal culture. Sexual relations between a man and a married woman were forbidden, as evidenced by the stories about the Patriarchs.[[6]](#footnote-7) Furthermore, the basic law of levirate marriage, which states that if a married man dies without children, his widow must marry his brother in order to build up the house of the deceased, existed already at the time of the events recorded in the book of *Bereishit*, as explicitly emerges from the story of Yehuda and Tamar (*Bereishit* 37). What is more, if we understand that the verse: "And Yitro, Moshe's father-in-law, took Tzipora, Moshe's wife, after he had sent her away" (*Shemot* 18:2), refers to Tzipora's divorce from Moshe,[[7]](#footnote-8) it turns out that the institution of divorce as well was known even before the Torah was given to the people of Israel.

The same is true for many other areas, for example: the law of inheritance[[8]](#footnote-9) and the special standing of a firstborn with respect to his father's estate,[[9]](#footnote-10) mourning,[[10]](#footnote-11) eulogy and burial,[[11]](#footnote-12) the means of transferring ownership of property from one person to another,[[12]](#footnote-13) the responsibility of a bailee,[[13]](#footnote-14) the binding nature of an oath[[14]](#footnote-15) or vow,[[15]](#footnote-16) as well as the existence of a sacrificial system and the building of altars.[[16]](#footnote-17)

The origin of many of these pre-Sinaitic, un-written norms is of course not clear. Were they given by God in an address that (for whatever reason) went unrecorded in the Torah? Were they instituted by human rulers? Did they evolve organically? The Ramban speculates in his commentary to the Torah (*Bereishit* 38:8) about the original justification for levirate marriage: "The ancient sages from before the giving of the Torah knew that great benefit ensues from levirate marriage performed by the brother of the deceased, and it is fitting that he be given priority, and after him the nearest relative in the family, for benefit is attained through any relative of the family in line for inheritance.” Of course, a justification is not a genealogy. It is not clear from his words how the matter became known to the ancient sages. Today we know that various nations in the ancient Near East practiced these laws.[[17]](#footnote-18) For example, the laws of Middle Assyria (table A, section 33) state: "If a woman is still living in her father's house, but her husband has died, as long as she has sons, she may live in whichever of their houses she chooses. If she does not have a son, her father-in-law is to give her to whichever of his [other] sons he prefers… or if he wants, he may give her as spouse to her father-in-law. If both her husband and her father-in-law are dead, and she has no sons, she is a legal widow, and may go wherever she wants." In any case, these laws and practices were also part of an "Oral Law" that obligated people even though they had not at that time been put in writing.

3. General moral conduct:

Beyond the existence of a system of laws, commandments and practices, we can discern a fundamental commitment on the part of the characters in the book of *Bereishit* to a moral life. God testifies about Avraham: "For I have known him, to the end that he may command his children and his household after him, that they may keep the way of the Lord, to do righteousness and justice" (*Bereishit* 18:19). Thus it was established that doing righteousness and justice is the path of God. Only in this way can we understand how it was possible to punish the people of Sedom, who were "wicked and sinners against the Lord exceedingly" (*Bereishit* 13:13), even if they did not necessarily violate any explicit prohibitions, but lived radically immoral lives. The discussions between Avimelekh and Avraham (*Bereishit* 21:25-26) and between the former and Yitzchak (*Bereishit* 26:27-28) are only intelligible if it's assumed that the Bible understood people to be culpable for immoral behavior. These practices, as well, were not committed to writing, but rather were part of the ancient Oral Law that existed in the world even before the formation of the people of Israel. It seems that also the verse, "because Avraham hearkened to My voice, and kept My charge, My commandments, My statues, and My laws" (*Bereishit* 26:5), is directed at the general moral behavior that characterized the Patriarch Avraham).[[18]](#footnote-19)

That unwritten law was a standard feature of Biblical life before Sinai is itself of interest. Perhaps more interesting is that the Israelites' *Written* Law itself presupposes an oral tradition. The formulation of several *mitzvot* in the Torah indicates that they are based on prior knowledge that should be known to its recipients. The Torah is not formulated as a book that defines the entire system of laws and *mitzvot* from the beginning, but rather as a book that adds stories on top of the foundations passed down as Oral Law from one generation to the next.

Thus, for example, the Torah does not specify a marriage procedure. It does, however, address divorce:

When a man takes a wife, and marries her, then it comes to pass, if she finds no favor in his eyes, because he has found some unseemly thing in her, that he writes her a bill of divorce, and gives it in her hand, and sends her out of his house, and she departs out of his house, and goes and becomes another man's wife, and the latter husband hates her, and writes her a bill of divorce, and gives it in her hand, and sends her out of his house; or if the latter husband die, who took her to be his wife; her former husband, who sent her away, may not take her again to be his wife, after that she is defiled; for that is an abomination before the Lord; and you shall not cause the land to sin, which the Lord your God gives you for an inheritance. (*Devarim* 24:1-4)

The Torah assumes that the procedure by way of which a man takes a woman as his wife is well-known to all. Which isn’t unreasonable, given that the institution had existed for centuries before it was given to the people of Israel. Marriage procedures had been passed down as Oral Law, which is not separate from the Written Law given to the people of Israel. What is more, the wording of the passage implies that its main novelty is the prohibition cast upon a person to remarry his ex-wife who in the interim had married another man. From here we may infer that the Torah does not even necessarily come to teach about the institution of divorce, which probably existed earlier as well.[[19]](#footnote-20)

The law concerning the double portion of inheritance that goes to the firstborn is also not stated directly in the Torah, but rather it is derived incidentally from what is written in the passage dealing with a firstborn, which is mainly concerned with a different principle:

If a man has two wives, the one beloved, and the other hated, and they have borne him children, both the beloved and the hated; and if the firstborn son be hers that was hated;  then it shall be, in the day that he causes his sons to inherit that which he has, that he may not make the son of the beloved the firstborn before the son of the hated, who is the firstborn;  but he shall acknowledge the firstborn, the son of the hated, by giving him a double portion of all that he has; for he is the first-fruits of his strength, the right of the firstborn is his. (*Devarim* 21:15-17)

The law assigning a double portion to the firstborn son is mentioned only as context for the case of a firstborn son of a hated wife. The Torah establishes that, even so, a double portion is awarded, for "the right of the firstborn is his." The phrase, "the right [*mishpat*] of the firstborn," attests to the fact that we are dealing with a regular and well-known practice[[20]](#footnote-21) that did not have to be renewed. It was already known and accepted orally. The novelty lies only in the extension of the practice to an exceptional case.[[21]](#footnote-22)

We see then that the existence of the Oral Law is an inseparable part of the foundation of the Written Law, which is based on knowledge that the reader knows by tradition.

Translated by David Strauss

1. The midrashic exposition indicates that the *Sifrei*'s reading of the verse was: "And Israel Your laws [*vetorotekha*, rather than *vetoratekha*]," in the plural. This was already noted by Finkelstein, ad loc., who brings additional witnesses to the existence of this reading. Regarding the phenomenon of midrashim that are based on Scriptural readings different from the Masoretic reading, see at length in my book, *To This Very Day: Fundamental Question in Bible Study*, Jerusalem 2020, pp. 182-189. [↑](#footnote-ref-2)
2. For discussions of the various aspects of the Oral Law during the Biblical period, see: Ch. Albeck, *Mavo le-Mishna*, Jerusalem 5719, pp. 3-39; E. Z. Melamed, *Pirkei Mavo le-Sifrut ha-Talmud*, Jerusalem 5733, pp. 25-34; M. Elon, *Ha-Mishpat ha-Ivri*, Jerusalem 5752, pp. 183-188. [↑](#footnote-ref-3)
3. In many places, *Chazal* list "the seven *mitzvot* of the descendants of Noach," which include other *mitzvot*: "The descendants of Noach were commanded with seven precepts: to establish laws, [and the prohibitions of] idolatry, blasphemy, forbidden sexual relations, bloodshed, theft, (and eating the limb of a living animal)" (Tosefta, *Avoda Zara* 8:4, p. 473; the addition in parentheses is based on the Vilna edition). Of the commandments on this list, only the prohibition of bloodshed is stated explicitly in the verses that we cited. As for the source of the other *mitzvot*, the Gemara (*Sanhedrin* 56b) brings the exposition of Rabbi Yochanan on the verse: "And the Lord God commanded the man, saying: Of every tree of the garden you may freely eat" (*Bereishit* 2:16): "'And He commanded' – this is [the mitzvato establish] laws, and similarly it is stated: 'For I have known him, to the end that he may command his children, etc.' (*Bereishit* 18:19); 'the Lord' – this is [the prohibition of] blasphemy, and similarly it is stated: 'And he that blasphemes the name of the Lord, he shall surely be put to death' (*Vayikra* 24:16); 'God' – this is [the prohibition of] idolatry, and similarly it is stated: 'You shall have no other gods' (*Shemot* 20:2); 'the man' – this is [the prohibition of] bloodshed, and similarly it is stated: 'Whoever shed's man's blood, etc.' (*Bereishit* 9:6); 'saying' – this is [the prohibition of] forbidden sexual relations, and similarly it is stated: 'Saying, if a man put away his wife, and she go from him, and become another man's' (*Yirmeyahu* 3:1); 'of every tree of the garden' – and not theft; 'you may freely eat' - and not a limb from a living animal." (See there opinions that disagree about some of the details). The Rambam, however, writes (*Hilkhot Melakim* 9:1) about these six commandments: "all of these are a tradition in our hands from Moshe," and the *Kesef Mishneh* (ad loc.) adds: "Our master's words imply that that verse is merely a support." In any event, it seems that most of the seven Noachide commandments are not based on the plain meaning of the verses. See also below, chapter 3, section 3. [↑](#footnote-ref-4)
4. In the story of Shechem and Chamor it is stated explicitly that the sons of Yaakov were circumcised: "Only on this condition will we consent to you: if you will be as we are, that every male of you be circumcised" (*Bereishit* 34:15). Moshe excepted himself from this commandment and did not circumcise his son, but when God was about to kill him, his wife Tzipora quickly performed the circumcision (*Shemot* 4:24-26). So too at the time of the exodus from Egypt, before the revelation at Sinai, it is stated: "No uncircumcised person shall eat of it" (*Shemot* 12:48). [↑](#footnote-ref-5)
5. Another commandment mentioned in the book of *Bereishit*, in the wake of Yaakov's struggle with the "man," is the prohibition to eat the sinew of the thigh-vein: "Therefore the children of Israel do not eat the sinew of the thigh-vein which is upon the hollow of the thigh, to this day; because he touched the hollow of Yaakov's thigh, even in the sinew of the thigh-vein" (*Bereishit* 32:33). However, it is not clear from the verse whether the prohibition was in force from the time of that incident, or perhaps we have here a later comment that notes the existence of the prohibition, but does not deal with its time. Already the Tannaim disagreed about this issue: According to Rabbi Yehuda, "from [the time of] the sons of Yaakov, the sinew of the thigh-vein was prohibited," whereas according to the Sages, this "was stated at Sinai, but written in its place" (*Chulin* 7:6). [↑](#footnote-ref-6)
6. The three parallel stories in which Avraham and Yitzchak say about their wives that they are their sisters all assume that under no circumstances is it legally permitted to have relations with a married woman, and therefore they feared that were it known that they are their wives' husbands, they would be killed, so that their wives could be taken: "They will say: This is his wife, and they will kill me, but you they will keep alive. Say, I pray you, you are my sister" (*Bereishit* 12:12-13). This is also what God said to Avimelekh, who had taken Sara: "And He said to him: Behold, you shall die, because of the woman whom you have taken; for she is a man's wife" (*Bereishit* 20:3). Yosef as well refused to accede to the seductions of Potifar's wife because betraying her husband would be a most stringent offense: "How can I do this great wickedness, and sin against God" (*Bereishit* 39:9). [↑](#footnote-ref-7)
7. As is suggested by the Ibn Ezra in his short commentary to this verse, that the verse means that Moshe gave Tzipora a bill of divorce. [↑](#footnote-ref-8)
8. As it follows from the words of Sara to Avraham: "Cast out this bondwoman and her son, for the son of this bondwoman shall not be heir with my son, with Yitzchak" (*Bereishit* 21:10). [↑](#footnote-ref-9)
9. As it follows from the story of Yaakov and Esav in *Bereishit* 28:29-34. [↑](#footnote-ref-10)
10. As in the mourning over Yaakov: "And he made a mourning for his father seven days" (*Bereishit* 50:10). [↑](#footnote-ref-11)
11. As is evident from the story of the death of Sara: "And Avraham came to mourn for Sara, and to weep for her" (*Bereishit* 23:2, and from Avraham's request of the sons of Chet: "Give me a possession of a burying-place with you, that I may bury my dead out of my sight" (*Bereishit* 23:4), and from the story of Rachel's burial, who was buried along the side of the road, and not among the family graves in the Makhpela Cave, apparently because of constraints connected to the journey, and for this Yaakov apologized to Yosef: "And as for me, when I came from Paddan, Rachel died to me in the land of Canaan in the way, when there was still some way to come to Efrat; and I buried here there in the way to Efrat, the same is Bet-Lechem" (*Bereishit* 48:7). [↑](#footnote-ref-12)
12. As is evident from the story of Avraham's purchase of the Makhpela Cave. [↑](#footnote-ref-13)
13. Yaakov claimed against Lavan: "That which was torn of beasts I brought not to you; I bore the loss of it; of my hand did your require it, whether stolen by day or stolen by night" (*Bereishit* 31:39), that is to say, that he was responsible even for animals torn apart by beasts, and that in such cases he compensated Lavan for his loss. In this way, Yaakov sought to emphasize that he assumed responsibility beyond the basic obligations of a bailee. In fact, when the Torah establishes the law governing a bailee entrusted with animals, it emphasizes the bailee's exemption in the case of an animal torn apart by a beast: "If a man deliver to his neighbor an ass, or an ox, or a sheep, or any beast, to keep, and it die, or be hurt, or driven away, no man seeing it… But if it be stolen from him, he shall make restitution to its owner. If it be torn to pieces, let him bring it for a witness; he shall not make good that which was torn" (*Shemot* 22:9-12). It seems that already in the time of Yaakov it was accepted that a bailee entrusted with an animal was exempt if the animal was torn apart by a beast. Thus we find also in the Code of Hammurabi, sec. 266 (Robert Harper translation): "If a visitation of god happen to a fold, or a lion kill, the shepherd shall declare himself innocent before god, and the owner of the fold shall suffer the damage." [↑](#footnote-ref-14)
14. As follows from various oaths that appear throughout the book of *Bereishit*: 24:9; 25:33; 31:53; 47:31; 50:25. [↑](#footnote-ref-15)
15. Like Yaakov's oath after his dream with the ladder (*Bereishit* 28:20-22). [↑](#footnote-ref-16)
16. See *Bereishit* 8:20; 12:7-8; 13:18; and elsewhere. [↑](#footnote-ref-17)
17. I dealt at length with the relationship between the Torah and the laws of the ancient Near-Eastern peoples in my book *To This Very Day* (above, note 1), in two contexts: the one, strengthening the historical basis of the Torah's stories, which accord with what we know from the ancient legal collections (pp. 257-259), and the second, understanding the Torah's *mitzvot* as coming to reject the practices of peoples living in the region (pp. 303-317). [↑](#footnote-ref-18)
18. As noted by the Rashbam, ad loc.: "According to the plain sense, all of the evident *mitzvot*, such as the prohibitions of theft, forbidden sexual relations, and coveting, and the obligations to establish laws and welcome guests, all of them were in force before the giving of the Torah, only that they were renewed and explained for Israel, and a covenant was made with Israel to observe them." [↑](#footnote-ref-19)
19. It is possible that there is here also a novelty regarding the way by which divorce is carried out – with a "bill of divorce" – but this too appears in a by-the-way formulation. [↑](#footnote-ref-20)
20. In many places in Scripture the word "*mishpat*" is used in the sense of "the regular and well-known practice." See, for example, *Bereishit* 40:13; *Yehoshua* 6:15; *Shoftim* 13:12; I *Shmuel* 27:11; II *Melakhim*1:7. [↑](#footnote-ref-21)
21. A similar phenomenon is found in the verse: "And if he espouses her to his son, he shall deal with her in the manner of daughters" (*Shemot* 21:9). Here too the reference is to a well-known practice that the Torah does not spell out. The same is true about the punishment imposed upon a seducer: "If her father utterly refuses to give her to him, he shall pay money according to the dowry of virgins" (*Shemot* 22:16).  [↑](#footnote-ref-22)