INTRODUCTION

This paper will set out a tripartite taxonomy of Jewish law. This tripartite taxonomy, I argue, suffices to circumscribe almost the entire ambit of the halakha. In addition to its purely theoretical value, the model is useful for reconstructing what the halakhic authorities of Geonic and later generations perceived the status of the Talmud to be. That is, it enables us to offer a jurisprudential analysis of a key development in the history of the halakha—what I call the ‘second canonization’ of the Talmud. In essence, this second canonization was a major shift in the way halakhic authorities related to the Talmud’s legal determinations. Further, invoking the tripartite taxonomy, I argue, allows us to account for seeming discontinuities in the Maimonidean corpus. More specifically, it may explain discrepancies between Maimonides’ exposition of the law, and the legal rulings he hands down in concrete cases.

The structure of this Article is as follows. The tripartite model is presented in section I, applied to the Maimonidean legal writings in section II, and adduced as a framework for understanding the second canonization of the Talmud in section III.

I. THE TRIPARTITE MODEL

In talmudic jurisprudence, we can distinguish between three levels of binding halakhic statements: Law, law-to-be-applied and concrete judicial rulings. As we are about to see, the first canonization of the Talmud was the adoption of the policy that the Talmud was to be regarded as Law, and the second canonization, the policy that it was to be regarded as law-to-be-applied.

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1 Its applicability as a taxonomy of law in general is remarked on, in passing, below.
At the level of Law, determination of the law is independent of history and hence context-free. Unconstrained by factual contingencies, Law is universal and purely legal in nature. Law-to-be-applied is generated in the course of “translating” this pure Law into law that can be applied within a given factual setting; it thus may vary according to the empirical circumstances of the setting in which it is formulated. The Law/law-to-be-applied distinction, then, refers to distinct modalities of halakhic statements: halakhic statements that articulate the Law but are not meant to be acted upon, and halakhic statements that are meant to be acted upon. Judicial rulings are more specific still, and apply only to particular concrete cases; this class of halakhic statements thus differs from the other two—Law and law-to-be-applied—in that its norms are particular rather than general. Here situations may arise in which the court feels it must deviate from the directives issued at the preceding levels of the law, and this is the main reason the Talmud rejects the doctrine of binding precedent.2 To be sure, in most cases the three layers will overlap each other, but the point is that such congruence need not necessarily obtain. Hence in assessing legal determinations it is essential to keep in mind which of the three levels a given statement pertains to.

The notion of Law with a capital L, that is, law not necessarily intended to be applied, may seem strange to the Western jurist. After all, what point can there be in determining a Law that is not going to be applied? But in attempting to understand talmudic jurisprudence, as is true with regard to the study of any culture, particularly if it is ancient, we must be attentive to its own concepts and ways of thinking. We must be on guard against a subtle form of anachronism, namely, failure to appreciate a legal system’s own concepts due to imposition of our way of thinking. In fact, however, the Law/law-to-be-applied distinction is found in other legal systems and cuts across many different cultures and periods. It has been variously characterized, generally being ascribed to a legal order from the outside by analysts who focused on a particular feature of the dichotomy (mystical law v. pragmatic law, static law v. dynamic law, aspirational law v. regulatory law, law governing the conduct of individuals v. law governing judicial decisions). In the case of talmudic law, though, the distinction is internal, being recognized by the system itself. Its clearest formulation is that of R. Johanan in bBaba Batra 130b.

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R. Asi said to R. Johanan: when our master has said to us, The law is thus-and-so, may we hand down rulings accordingly in actual cases? He said: Do not hand down rulings accordingly unless I declare it law-to-be-applied (halakha lemaase).

It is likely that the locution halakha lemaase originally signified a ruling in a concrete case, that is, originally there were only two layers of halakhic statements—Law, and concrete judicial rulings. But here its meaning has already been expanded: R. Johanan is using the term in a more comprehensive way, as a general directive. The question he was asked was whether his student R. Asi could issue halakhic rulings on the basis of R. Johanan’s teachings. In other words, he was asked whether, if he had declared the law to be thus-and-so, his students could rely on this determination and use it as the basis for decisions in concrete cases. R. Johanan’s answer is that they ought not rely on any teaching unless he explicitly declared it halakha lemaase—law-to-be-applied.

To better appreciate the significance of R. Johanan’s dictum, let us compare it to the teaching in the following baraita: “R. Zeira said in the name of Samuel: We do not learn the law from the Mishnah, from homilies, or from the Tosefta, but from the Talmud.”3 At first sight it would appear that this baraita sanctions reliance on halakhic determinations found in the Talmud, and is at variance with the directive of R. Johanan. But a different concern is being addressed here, namely, the fact that the law as stated in the Mishnah may not be generally accepted, and may reflect the view of just one individual. R. Zeira is saying that in contrast to a Mishnaic determination of the law, an Amoraic determination is indeed to be ascribed the status of Law. What is at issue is the degree of its acceptance as Law by the legal community, not its modality. Note that the baraita does not describe talmudic legal determinations as law-to-be-applied. R. Johanan, on the other hand, is addressing the different modalities of legal statements, rather than the degree to which they are accepted. Now it goes without saying that he would not make a halakhic determination unless he believed it to be derived from the Law. Nevertheless, he astutely points out, the modality of the statement is another matter entirely.

As we see in this passage, the duality of Law and law-to-be-applied may be relevant even with respect to rulings emanating from one and the same source, in this case, R. Johanan. This engenders a certain degree of confusion, as a classic passage in the Jerusalem Talmud attests:

R. Johanan expounded the law to the people of Tiberias in accordance with the view of R. Shimon b. Eleazar. He intended to expound it as Law [viz., theoretical law], but they understood him as

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3 Jerusalem Talmud, Peia 2:4 (17a); see also Babylonian Talmud, Nida 7b, Rashi ad loc. (all references to the Babylonian Talmud translated by author).
[teaching it as] law-to-be-applied. Some say he expounded it as law-to-be-applied, but when they [the Tiberians] came and asked him [about his teaching], he expounded it as Law. When he repeated his exposition, they did not know whether he was expounding it as Law, or as law-to-be-applied. 4

Nevertheless, despite the potential for confusion, the distinction is well rooted in the Talmud, and referred to in numerous sugyot. Here are just a few examples:

- In a discussion in tractate Ketubot, the Talmud concludes: “the Law is in accordance with the view of R. Eleazar b. Azaria, and the law-to-be-applied is in accordance with the view of R. Eleazar b. Azaria.” 5 Now surely, were it the case that the first determination (“the Law is . . .”) implied that this rule was to be followed in practice, the second determination would have been superfluous.

- Similarly, Samuel is quoted as saying that all the rulings at the beginning of the last chapter in tractate Nida are Law but not law-to-be-applied. 6

- In a number of places the Jerusalem Talmud rejects the claim that two apparently contradictory statements are indeed incompatible, explaining: “this one is the Law, that one is the practice [viz., the law-to-be-applied].” 7

II. MAIMONIDES

Maimonides was both a prolific responsist, as is well attested by his extant responsa, and a decisor—his Mishne Torah, the so-called Code, sets out a remarkably comprehensive exposition of the law. As such, he belongs to a relatively exclusive group of responsists who acted in both capacities. 8 This raises the question of the relationship between the positions Maimonides takes in his responsa, and those set forth in the Mishne Torah.

The body of extant Maimonidean responsa, not to be confused with Maimonides’ total output, comprises some four hundred and fifty letters, some of which deal with interpretation of talmudic passages,

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4 JERUSALEM TALMUD, BEITZA 2:1 (61b). An instance of lethal confusion over a halakhic ruling issued by the Babylonian Amora Samuel is related in Moed Katan: “one of Samuel’s students had intercourse and then went and bathed. He said to him, I told you this as [theoretical] law, but did I rule thus with respect to actual practice? He was angry with him, and he died.” JERUSALEM TALMUD, MOED KATAN 3:5 (62d).
5 BABYLONIAN TALMUD, KETUBOT 56a.
6 JERUSALEM TALMUD, BERAKHOT 2:6 (5b).
7 JERUSALEM TALMUD, SANHEDRIN 4:6 (22b); GITTIN 5:4 (47a); GITTIN 8:2 (49b).
8 Other examples include the Rif, R. Isaac Alfasi (1013-1103); the Rosh, R. Asher b. Yehiel (1250-1327); and R. Joseph Caro (1488-1575).
some of which deal with interpretation of Maimonides’ own work, but most of which set forth halakhic rulings on actual cases. In a number of responsa, Maimonides deviates from the ruling we would have—on the basis of the *Mishne Torah*—expected him to hand down. These discrepancies have not by any means escaped the critical eye of those who studied Maimonides’ work, whether in the traditional yeshiva or the world of academic research.

A number of explanations have been proposed to account for such disparities between laws set out in the *Mishne Torah* and rulings in the responsa. The two explanations most commonly offered are that such responsa predate the *Mishne Torah* and reflect an earlier view, or, that they are inauthentic. Formulated more generally, these two considerations—the possibility of a change in the decisor’s opinion, and the possibility of inauthenticity—would seem to cast doubt on the binding nature of any responsum in circulation, and render the responsa literature a not particularly credible medium. We have to remember that in most cases, no formal collection of responsa was issued by the responsist, but rather the responsa were collected long after having been written. Typically, they were passed on to interested scholars both en route to their intended recipients, namely, those who had requested the responsist’s legal opinion, and after reaching them. In the process, they were often copied and altered: names were changed and details omitted to protect privacy, the questions were abridged, inasmuch as most scholars were more interested in the answers, and so on. Transcription errors crept in, and generally, the copies in circulation may not have been identical to the responsa as originally written.

Apprehension that his responsa may not represent a responsist’s true view is voiced in a query, to be discussed below, sent to R. Joseph [Ri] ibn Migash regarding the responsa of the Geonim:

And our lord is aware that the responsa are not all of the same caliber. Particularly the older ones, some of which are diminished by errors introduced by those who transcribed them, or in a few cases, attributed to someone other than their true author. Furthermore, in their responsa many of the Geonim ruled on specific questions, and later they retracted their rulings.

In his answer, the Ri Migash does not address these concerns. This casual attitude to authenticity is characteristic of the genre, and despite

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10 This view is expressed, e.g., in *Responsa Rashbash*, No. 11 (translated by author); *Responsa Beit Yosef*, Laws Concerning Levirate Marriage and Halitza, No. 4 (translated by author).

11 Spain, 1077-1141.
awareness of the aforementioned pitfalls, generally speaking the responsum is viewed as a reliable legal source.

In the case of Maimonides, however, such concerns receive more weight than they do elsewhere: the Mishne Torah is accorded clear priority, and many halakhic authorities are willing to discount any responsum that conflicts with its rulings. This attitude can be understood in view of these authorities’ great admiration for the Mishne Torah and reluctance to entertain the idea that it might fall short of perfection. (Critics of the Mishne Torah, and those opposed to it as a matter of principle, felt differently, of course.)

The aforementioned considerations may, perhaps, constitute a partial explanation for some of the disparities. But might it not be more plausible that the discrepancies are not merely the outcome of historical contingencies such as how often a document was copied, but rather arise out of a fundamental difference in orientation between the responsa and the Mishne Torah? It might be useful to approach the problem by speculating about the nature of Maimonides’ endeavor. Would he have seen any need to reconcile the alleged discrepancies, had they been drawn to his attention? I would suggest that what is called for is, rather, a jurisprudential explanation for discrepancies of the sort in question, an explanation that emerges when we invoke our typology of law, and attend to the different legal modalities that can be identified in the Maimonidean corpus, namely, Law, law-to-be-applied, and concrete judicial rulings.

Awareness of the fact that in the third class, that of concrete judicial rulings, there may well be decisions that diverge from the law, suffices, in my opinion, to account for responsa that are not fully in harmony with the law as formulated in the Mishne Torah. Values such as equity may lead the court to deviate from the general norm when issuing a norm addressed to a particular individual. In such cases, the deviation is accounted for in terms of theory of adjudication, and justified by citing the unique features of the case. In this Article, however, I am focusing on the first two layers of the tripartite model, and their respective roles in halakhic jurisprudence, arguing that the distinction between these roles may account for discrepancies between legal determinations emanating from the different strata.

Let us consider the distinction between Law and law-to-be-applied in the context of Maimonides’ legal thought. Examination of a range of passages from his writings will not only further elucidate the Law/law-to-be-applied distinction, but also illuminate key aspects of Maimonidean jurisprudence. And it will provide an explanation in more general terms for the disparities, discussed above, between decisions in the responsa and the Mishne Torah.
In the Guide, Maimonides justifies a literal reading of “eye for an eye,” on which the punishment meted out to one who destroys his fellow’s eye is that the same is done to him. This reading clearly conflicts with the talmudic interpretation of the said biblical law.12 His justification is as follows: “[y]ou should not engage in cogitation concerning the fact that in such a case we punish by imposing a fine. For at present my purpose is to give reasons for the [biblical] texts and not for the pronouncements of the Talmud.”13

Now compare his treatment of the same law in the Mishne Torah:

If one wounds another, he must pay compensation to him for five effects of the injury . . . .

When Scripture says, “as he hath maimed a man so shall it be rendered unto him” (Lev. 24:20), it does not mean that the injurer himself is to be wounded in the manner he wounded the other . . . .

Although these rules appear plausible from the context of the Written Law, all were made clear by Moses, our Teacher, at Mount Sinai; all have come down to us as law-to-be-applied (halakha lemaase). For thus did our forebears see the law administered in the court of Joshua and in the court of Samuel, the Ramathite, and in every court ever set up, from the time of Moses, our Teacher, until the present day.14

The juxtaposition of these two passages is instructive, bringing the Law/law-to-be-applied distinction into sharp relief. Law expresses the law in its purity, without regard to the societal costs of its implementation. Here, its purpose is to teach us an ethical lesson: “He who deprives someone of a member, shall be deprived of a similar member.”15 The function of law-to-be-applied to translate this lesson into practical terms, taking into account other interests and values, for instance, the concern that the two bodily organs in question—the injured party’s and the offender’s—are dissimilar, or the fear that greater damage, rather than the prescribed “equal” damage, will be inflicted. Note that in this example, law-to-be-applied is not a law governing a concrete case, but rather a general “translation” of Law into practical terms.

In my next example, Maimonides harnesses the distinction to defend his political philosophy.

In his Commentary on the Mishnah, Maimonides cites the talmudic principle regarding the order of redemption: “a scholar takes precedence over a king of Israel, for if a scholar dies, there is none to replace him,

12 BABYLONIAN TALMUD, BABA KAMA 83b.
15 MAIMONIDES, supra note 13.
whereas if a king of Israel dies, all Israel are eligible for kingship.” 16
This talmudic principle is manifestly incompatible with Maimonides’
theory of the superiority of the monarchy, hence he continues:

The Sages’ dictum that “A scholar takes precedence over a king” is
much restricted. This is so because the precedence of a scholar over
a king is theoretical only: the utility of a scholar to the nation is
greater than that of the king. But in practice, no man should arrogate
to himself the king’s honor, even if the king is an ignoramus, as has
been stated regarding the king, “thou shalt certainly set him king
over thee” (Deut. 17:15).17

Here, with respect to a potentially divisive conflict between
scholars and political leaders, Law again teaches us an ethical lesson,
this time about the importance of learning, but law-to-be-applied gives
us practical directives as to how to deal with such a potentially
destructive conflict.

So too in my next example. The talmudic rule governing the
“lethal” wife, two of whose husbands have died, is that she may not
marry a third. Maimonides includes this rule in the Mishne Torah,
but in a responsum we are told that he did not, as a matter of practice,
follow it: “and the law-to-be-applied (halakha lemaase) in all the lands
of Andalusia has always been that if the husbands of a woman die one
after the other—a number of husbands—she is not prevented from
remarrying.”18 Here again, Maimonides explicitly acknowledges that
there are two different types of law: Law and law-to-be-applied, and
concrete rulings are made on the basis of the latter.

We can readily surmise Maimonides’ motivation for formulating
the matter thus: the Talmud is very explicit on this issue, and he
apparently felt that he could not ignore its ruling. The distinction
between Law and law-to-be-applied is, once again, the mechanism that
enables him to achieve divergent interests: preservation of the talmudic
ruling by its inclusion in the Law, and implementation of a regimen that
is fair to the “lethal” wife.

Let us now consider an instance where Maimonides invokes the
distinction between Law and law-to-be-applied to explain an apparent
contradiction between the position he upholds in the Commentary on
the Mishnah, and that set down in the Mishne Torah, on the question of
whether or not the laws of tithes apply to the produce of land owned by
a Gentile.19 He explains that in the Commentary he was presenting the
law-to-be-applied, and seeing as at present (that is, since the destruction

16 BABYLONIAN TALMUD, HORAYOT 13a.
17 MOSES MAIMONIDES, COMMENTARY ON THE MISHNAH, commenting on Horayot 3:8
(translated by author).
18 MOSES MAIMONIDES, RESPONSA, No. 218 (J. Blau ed.) (translated by author).
19 MOSES MAIMONIDES, RESPONSA, No. 129 (J. Blau ed.) (translated by author).
of the Temple, and until it is rebuilt) the laws of tithes in general are only of Rabbinic status, it makes no difference what position is taken regarding the liability of produce owned by a Gentile. But in the *Mishne Torah*, he was stating the Law, and thus had to be precise, hence the disparity. For our purposes, the actual reasons for the disparity between the two works need not be determined; what matters is the rationale given by Maimonides.

In a number of places, Maimonides also uses the term “law-to-be-applied” in a slightly stronger sense, more specifically, he uses it to stress that a ruling is not merely Law, but law-to-be-applied, and was actually followed in practice. Thus, for instance, in the *Commentary on the Mishnah* he asserts:

> It must be known that according to our ancient masoretic tradition, the rule that capital punishment has lapsed in our present Diaspora existence only applies to practicing Jews who commit an offense that warrants this punishment. But with regard to sectarians, Sadducees, Boethusians and all similar sects, one who is the instigator of such a sect may be executed so that he does not mislead Israel and spoil its faith. This has indeed been the law that was applied (*halakha lemaase*) in a number of instances in the Western lands [the Maghreb].

Similarly, in his responsa on travel by riverboat on the Sabbath, Maimonides explicitly says that the dispensation to travel is law-to-be-applied.

There are also places where Maimonides does not refer to the concepts of Law and law-to-be-applied explicitly, but the distinction is operative behind the scenes, so to speak, and invoking it allows us to resolve difficulties and apparent contradictions, as the next example illustrates.

The principle that any spouse may compel his or her mate to move to the land of Israel is stated categorically in the *Mishne Torah*, but qualified significantly in responsum No. 365. Now reading the *Mishne Torah*, one gets the impression that the rule according priority to the wishes of a spouse seeking to live in the land of Israel is consequence-oriented, that is to say, it is intended to advance a particular objective, namely, populating the land of Israel, and one’s motive for observing it is immaterial to this priority. But in the responsum we are told that the said rule is motivation-oriented, and one’s reasons for going to live in the land of Israel determine its applicability. The distinction between consequence-oriented rules and motivation-oriented rules can easily be formulated and could have been incorporated in the *Mishne Torah* where relevant. Yet the motivation-oriented characterization is not found in the *Mishne Torah*, where the rule is, as I said, presented as

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20 MAIMONIDES, supra note 17, commenting on HULIN 1:2 (translated by author).
consequence-oriented. The *Mishne Torah*’s categorical formulation of the rule that a spouse may compel his or her mate to move to the land of Israel must therefore be viewed as Law and not law-to-be-applied. Its purpose is to convey the importance of the land of Israel in principle. It should again be noted that in the responsum, Maimonides’ ruling in not justified in terms of the unique circumstances of the case, but rather in terms of the law-to-be-applied understanding of the precept.

Let me conclude this section by calling attention to a responsum in which R. Abraham, the son of Maimonides, who was himself a great scholar and responsist, matter-of-factly states that the *Mishne Torah* is not law-to-be-applied. He makes the remark in discussing a concrete ruling in which he seemed to deviate from the law as set out in the *Mishne Torah*. Explaining that he had not deviated from his father’s teachings, he distinguishes between works by his father that were intended to be followed for a number of generations, and rulings issued as law-to-be-applied.

### III. The Talmud: Law or Law-to-be-applied?

The tripartite model of the halakha I have set out can hardly be disputed. The actual classification of a particular text, though, may be subject to dispute. While the identification of concrete judicial rulings is not problematic, disagreement as to whether given legal statements should be construed as Law or as law-to-be-applied is not at all uncommon. For example, which of the two modalities is characteristic of the *Mishne Torah*? Or, to put the question more radically, which of the two modalities is characteristic of the halakhic determinations of the Talmud?

Rav Yehudai Gaon, a prominent Geonic authority in the mid-eighth century, is said to have understood the scope of R. Johanan’s teaching—“Do not hand down rulings accordingly unless I declare it law-to-be-applied”—to be universal, and to have used it as the basis for the following assertion:

Mar Yehudai has further said: “in answering your questions, I never told you anything, except when there was proof for the matter from the Talmud, and I was instructed by my teacher—and my teacher heard it from his teacher—that this was the law-to-be-applied. But as to any matter regarding which there is proof from the Talmud, but my teacher did not assert that it was the law-to-be-applied, or I was

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21 Cairo, 1186-1237.
22 See Hazon Ish, commenting on Babylonian Talmud, Horayot, at the beginning (translated by author).
told by my teacher that it was the law-to-be-applied, but there was no proof for it from the Talmud—I did not relay the matter to you. I relayed to you only that which was a talmudic law and I had been told by my teacher that it was the law-to-be-applied. 23

Pirkoi b. Baboi, who is reporting this tradition, may be exaggerating a little. Perhaps it was not the case that R. Yehudai Gaon had such an oral tradition with regard to every single halakhic ruling he issued. Nor need we assume that the oral tradition was always couched in the rubric “law-to-be-applied.” But clearly, some indication was required to establish that the ruling was not merely an inference from Law, 24 but was to be regarded as law-to-be-applied.

Yet some time later, we find the view expressed that R. Johanan’s directive should be taken as referring only to his own teachings, and not to the Talmud in general. The Rashbam, 25 for instance, writes:

But we do rely on the rulings of the Talmud, because they were law-to-be-applied. Now R. Johanan was circumspect with regard to his own rulings, and told his students that they should not put his rulings into practice until he told them to do so. He was afraid that he might change his mind about some rulings. Nevertheless, they could rely on his opinions after his death, because evidently he did not change his mind about them during his lifetime. Even more so, we can rely on rulings written down in the Talmud redacted by R. Ashi, because it is accepted that R. Ashi and Rabina finalized its teachings. 26 Who else could we ask in [adjudicating] an actual case if we did not rely on the rulings of the Talmud redacted by R. Ashi? 27

These post-talmudic interpretive positions constitute two very different approaches to the Talmud. One sees the Talmud’s rulings as in need of confirmation by means of some additional oral guidance to the effect that they are indeed law-to-be-applied. The other sees the Talmud as self-confirming, that is, as providing the guidance necessary for actual practice; its rulings are to be followed as stated, on the authority of the talmudic text itself.

When did the shift from the former approach to the latter occur? That is, when was it that the Talmud as a whole came to be regarded as law-to-be-applied? Evidence suggests that this move, which can be regarded as the second canonization of the Talmud, was made around

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23 PIRKOI B. BABOI in 2 L. Ginzberg, GINZEI SCHECHTER 558-59 (1928). Pirkoi b. Baboi was the student of R. Yehudai Gaon.

24 The Sefer Hamaasim (Palestine, 6th century), in which halakhic statements are introduced by “kakh hamaase,” which is an abridged form of “kakh hakahalaka lemaase,” also attests to the fact that halakhic rulings intended for implementation were so identified. See SEFER HAMAASIM LIVNEI ERETZ YISRAEL: MEKOROT UMEHKARIM (Zion 1971) (translated by author).


26 BABYLONIAN TALMUD, Baba Metzia 86a.

27 RASHBAM, commenting on BABYLONIAN TALMUD, Baba Batra 130b. The original text is found in HIDUSHEI RISHONIM, commenting on TALMUD, Baba Batra (translated by author).
the time of Maimonides. The writings of R. Joseph ibn Migash and the Rashbam, who preceded Maimonides by one generation, and those of R. Joseph b. Judah Aknin,28 and R. Meir Abulafia,29 who were his contemporaries, attest to a conscious effort to establish the claim that the Talmud as a whole is law-to-be-applied.

The shift was motivated by the desire to preserve the Talmud’s authority and ensure that its rulings would be seen as conclusive with respect to actual cases. A prominent feature of the historical background against which this development emerged was the decline in the authority and status of the Geonim, the heads of the Babylonian academies. The last Gaon who was still influential was Rav Hai Gaon (d. 1038), and though the institution of the Gaonate continued for some one hundred seventy years after his death, subsequent Geonim did not enjoy the same authority.

The contribution of the Geonim to the development of the halakha was twofold: they transformed the Talmud from a document recording the local halakhic discourse and deliberations into “the book of the nation,” that is, into Law (this being the first canonization of the Talmud), and, by way of their oral instructions regarding its implementation, into law-to-be-applied. This sustained their authority.

However, in the normative vacuum that emerged in the wake of the decline of the Gaonate after the death of Rav Hai Gaon, the idea that the Talmud was Law was no longer tenable, and the view that it was law-to-be-applied gradually came to be accepted. It appears that the shift was accompanied by hesitation and caution. The length and argumentativeness of the Rashbam’s remarks, for example, make it clear that the Rashbam himself was well aware of the fact that this was a new and protectionist move that qualified the original intent of R. Johanan. Note in particular the defensiveness of his query: “who else could we ask in an actual case if we did not rely on the rulings of the Talmud redacted by R. Ashi?” This pragmatic justification attests to the novelty of the Rashbam’s conception, and to his own doubts about it. Indeed, these remarks were made as a gloss on a citation from Rabbenu Hananel’s commentary on the Talmud, yet Rabbenu Hananel himself does not qualify R. Johanan’s dictum.

The Ri Migash, Maimonides’ father’s teacher, who Maimonides often cites with great admiration and respect, is quoted in Sefer Haner as saying: “and our Talmud is law-to-be-applied, since it was committed to writing only after thorough deliberation and careful examination over

28 Spain-Fez, c. 1160-1226. The change in attitude is readily apparent in his Mevo Hatalmud. (Care must be taken not to confuse this R. Joseph b. Judah with R. Joseph b. Judah, Maimonides’ student, to whom the Guide is addressed.)
29 Spain, c. 1170-1244.
several generations, and after several drafts, and it is as if they told us that it was law-to-be-applied, since they wrote it to be acted upon."30

One of his responsa, however, suggests that he was nonetheless of two minds regarding this question.

What would our lord say about someone who never studied the law with a teacher, and is ignorant of the ways of the Talmud, its interpretations and its plain text, but is quite familiar with the responsa of the Geonim, of blessed memory, and law books?

. . .

Would our lord please clarify for us what the law really is on this issue?31

ANSWER

Know that it is more appropriate to permit this man to issue rulings than many others who take it upon themselves to issue halakhic rulings nowadays. Most of them do not have even one of the said two qualifications, namely, understanding of the talmudic sources, and knowledge of the opinions of the Geonim, of blessed memory. Indeed, those who purport to rule by analyzing the law, on the basis of the talmudic sources, are the ones who should be deterred from doing so, because in our times there is no one who is qualified for this, and there is no one who has reached that stage in understanding the Talmud where he is able to issue rulings based on his own analysis, without knowledge of the opinions of the Geonim. But as for one who issues rulings on the basis of Geonic responsa, and relies upon them—even though he cannot understand the Talmud—he is acting in a more proper and praiseworthy way than one who thinks he knows the Talmud and relies on his own judgment. Such an individual, though he rules on the basis of an incorrect opinion argued for by the Geonim, of blessed memory, in any event does not err in this, in that he acts according to the decision of a great and expert court. But one who judges on the basis of his own analysis of the law might think that the halakha entails a certain ruling, yet it does not, for his analysis may be erroneous, or his interpretation in error. And in our times there is no one who has reached the level in his study of the Talmud where he can rely on his own rulings.32

It seems to me that in this responsum the Ri Migash is saying, in effect, that the Talmud cannot be relied upon when rendering halakhic rulings, because its rulings were not intended as law-to-be-applied, and “translating” Law into law-to-be-applied requires greater sophistication

31 This is the first part of the responsum quoted supra Part II. In his reply, the Ri Migash ignores the part of the question that mentions the deficient preservation of the Geonic responsa, and rules that they are to be relied upon.
32 RESPONSAS RI MIGASH, No. 114 (translated by author).
and judgment than could be found in contemporary judges. Reliance on Geonic responsa, on the other hand, does not, he argues, call for that kind of extrapolation and translation, as they are already law-to-be-applied.\textsuperscript{33} We should note, however, that the conclusions set out in responsa do of course need to be applied to the case before the judge, a process that calls for sound judgment.

The lengthy treatment of this question by R. Meir Abulafia, the Rama, is particularly interesting. He first argues that the view that the Talmud is Law was correct as long as the Talmud was studied only orally, but when it was committed to writing (and we don’t know exactly when that took place), it became law-to-be-applied. But as if not convinced by his own argument, he then adds: “furthermore, during the time of the talmudic Sages, one could indeed accept that the Talmud was Law, since it was possible to seek the Sages’ opinion on any given matter. But now, if we do not rely on the Talmud, on whom are we to rely!?”\textsuperscript{34} Here we again encounter the pragmatic argument that was put forward by the Rashbam, in very similar terms. But the Rama, still unable to wholeheartedly accept the conclusion that the Talmud is law-to-be-applied, adds the following proviso: it applies only to a scholar who is qualified to render halakhic rulings, and to no one else. Only a scholar who is qualified to render halakhic rulings, the Rama asserts, can rely on himself; a student may not do so. It turns out, then, that the Talmud is law-to-be-applied only if applied by a scholar who in any event has the authority to issue halakhic rulings, and not by virtue of any intrinsic feature of the Talmud itself. Underlying this view is the idea that the “translation” of Law into law-to-be-applied requires maturity and sophistication possessed only by qualified judges. The Rama’s theory calls to mind the Ri Migash’s responsum, and reinforces my reading of it.

The hesitation about definitively asserting that the Talmud as a whole is to be regarded as law-to-be-applied is well warranted. The distinction between Law and law-to-be-applied, we saw, is found throughout the Talmud and by no means peculiar to the teachings of R. Johanan.

Maimonides’ own position on the status of the Talmud is not explicitly stated in any of his works. But if the \textit{Mishne Torah} was meant to substitute for the Talmud, logic dictates that its normative status must have been on a par with that of the Talmud. From our analysis of several Maimonidean responsa, and their relation to the \textit{Mishne Torah}, it appears that Maimonides was somewhat perplexed about this, and his perplexity appears to have been projected into the

\textsuperscript{33} \textsc{Responsa Ri Migash}, No. 71 (translated by author).

\textsuperscript{34} \textsc{Yad Rama}, commenting on \textit{Babylonian Talmud}, Baba Batra 130b (translated by author).
Mishne Torah. The intellectual circles within which he lived, as we noted above, evinced much hesitation about this question. As a result, the Mishne Torah contains both Law and law-to-be-applied. The tripartite typology can thus be helpful in analyzing the various modalities in the Mishne Torah, just as it is helpful with respect to the Talmud.