THE UNWRITTEN LAW IN THE
PRE-RABBINIC PERIOD

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One of the long-standing questions in the methodology of halakha concerns the normative nature and the scope of the ban against writing the Oral Law. Despite rabbinic dicta such as that of the school of R. Yishma‘el based on Exodus 34, 27 that only “these (the words of the Torah) you are to write, but not halakhot” and that of R. Yoḥanan b. Nappaha that “those who commit halakhot to writing are considered as if they burnt the Torah”, there has been no unanimity with regard to the extent of this restriction and its antiquity 1).

Divergent opinions were already found among medieval authorities. Rashi and some Tosafists believed that the Mishnah, the Gemara, and the halakhic midrashim were not committed to writing until the period of the Sabora‘im (6th-7th cent.), while Saadia, Maimonides, and other scholars held that the early sages individually recorded their teachings and the Mishnah was edited in writing by R. Judah the Nasi’. In contemporary scholarship it is generally recognised that individual writings on halakhic matters were employed throughout the talmudic period, though it is emphasized that these were not for public use 2).

1) b. Gittin 60b and Temurah 14b. The dictum of R. Johanan parallels the wording of a similar baraita (b. Shabbat 115b and Tos. Shabbat 13, 4) with regard to the writing of blessings: “Those who write down blessings are considered as if they burnt the Torah”, the technical reason being that such writings, though they contained scriptural quotations, would not be evacuated from a fire on the Sabbath. R. Yishma‘el is also said to have censured a scribe in Sidon who wrote down blessings (b. Shabbat 115b). In the following discussion we have, however, dealt only with halakhic writings since the sources for the pre-rabbinic period refer specifically to halakhot and ordinances.

According to LIEBERMAN, the publication of the Mishnah was accomplished through oral promulgation ¹).

With regard to the existence of written texts in the pre-rabbinic period there is an even greater degree of obscurity. The view of those who consider the restriction on writing to have been almost absolute may be illustrated by the words of I. ELBOGEN ²):

Between the completion of the Hebrew canon and the rise of Jewish literature there is an interval of several hundred years, and the reason why the literary activity of the Jews was so long in abeyance is that they regarded it as unlawful to commit their teachings to writing. The Scripture, as the Book par excellence, could suffer no other book to approach it; all supplementary doctrine must be imparted orally; “to set down in writing the oral teaching is forbidden.” Thus even the Biblical Apocrypha were regarded as “extraneous books”. The idea that the production of new works was unlawful must have been prevalent by the time of the elder Sirach, and hence his collection of proverbs could not be received into the canon . . . Thus all the creations of the Jewish mind in this epoch remained unwritten; translations of the Bible, prayers, academic and popular instruction, the development of law and custom, of ethics and religion—all these were carried on by oral instruction only.

While ELBOGEN apparently took into account the apocryphal books, he categorized them as “extraneous” and not pertinent to his assumption of a general ban on writing. This may be compared with the assertion of STRACK that the interdict on writing was “obviously unknown to the translator of Ecclesiasticus into Greek” ³). Both scholars do not raise the question whether there might have been some distinction between the writing of wisdom or narrative literature and the writing of halakhot. The existence of Megillat Ta‘anit, for example, is justified by Rashi as a calendaric record of festive dates not subject to the restrictions on halakhic texts ⁴). The Wisdom of Ben Sirā, despite its non-canonical status, is frequently cited in the Talmud ⁵). Moreover, one must ask to what extent we are justified in applying the rabbinic categories of Written Law and Oral Law with their

³) STRACK, ibid.