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TELEOLOGICAL DECISION-MAKING IN *HALAKHAH*: EMPIRICAL EXAMPLES AND GENERAL PRINCIPLES

by

ZVI ZOHAR*

Introduction

In this paper I will discuss teleological decision-making in *halakhah*, cite examples of such decisions, analyze these examples and discuss some of the important implications of such decision-making. By "teleological decision-making" I refer to halakhic deliberations that explicitly take into consideration the probable consequences of ruling according to conventional *halakhah*, and allow these consequences to affect the decision in the matter under consideration.[1] This may be contrasted with rulings that present themselves as "pure" application of the halakhic literature of past generations, based on standard interpretations of texts and precedents.[2]

* Zvi Zohar is Chauncey Stillman Professor of Sephardic Law and Ethics at Bar Ilan University, where he teaches at the Faculty of Law and the Faculty of Jewish Studies, and is a Senior Research Fellow at the Shalom Hartman Institute of Advanced Judaic Studies in Jerusalem. I would like to thank Yahav Zohar who translated an earlier version of this paper that formed the basis for the current publication. I also thank the anonymous reviewer for his comments and critique, which were helpful in formulating the final version of this article.

1 It may well be that in many (all?) rulings that present themselves as "straightforward *halakhah*" and that make no use of explicit teleological arguments, the authors have in fact considered the consequences, but chose to conceal this from their readers for strategic or tactical reasons. That is why I focus here only on halakhic rulings in which the teleology is explicit. A further note: The term "teleological" seems appropriate to me, although I do not have a great stake in its use, nor do I seek to preclude the use of other, similar terms to describe the halakhic phenomenon discussed in this paper.

2 Such decision-making is sometimes referred to as "formalistic decision-making"; the approach that advocates such a mode of decision-making is known as "formalism". With regard to formalism in Israeli law, see Menachem Mautner, *The Decline of Formalism and the Rise of Values in Israeli Law* (Tel Aviv: Ma'aglei Da'at, 1993 [Heb.]). Many legal scholars maintain that for a significant part of the 19th century, American courts practiced formalism. Recently it has been argued that historically this was not so. See Brian Z. Tamanaha, "The Bogus Tale About the Legal Formalists", April 2008 (*St. John's Legal Studies Research Paper No. 08-0130* (http://papers.ssrn.com/sol3/papers.cfm?abstract_id =1123498).

Be that as it may, I make no empirical claim about the prevalence of formalistic rulings in halakhah. My focus here is upon a particular type of non-formalistic decision-making in halakhah, i.e., teleological decision-making.

One must of course distinguish between teleological decision-making and the formulation of ordinances; the formulation of halakhic ordinances (*takkanot*) is aimed at effecting results, and bears some similarities to the matters discussed below. However, this paper relates only to teleological decisions regarding existing halakhic norms.[3] First, I will classify teleological decisions by the extent of the change they aim to effect: amending the entire halakhic sphere, amending a certain realm of *halakhah* or amending one specific matter. Subsequently, I will discuss decisions of the latter type, and cite seven such examples, analyzing each. Finally, I will suggest some tentative generalizations regarding the teleological decision-making process that seem to follow from the cases discussed.

Differing Extents of Aims and Effects

One may distinguish between the aims of halakhic decisions according to the scope of the results sought by the decisor. I shall first briefly mention considerations that relate to a result affecting more than just one specific case. Thus, for example, some rabbis aspired to *reform the entire sphere of halakhah by putting it in overall order*.

A premier example of this is Rabbi Yosef Karo's express purpose in his monumental project of the *Beit Yosef* and *Shulḥan 'Arukh*.[4] In his introduction to the *Beit Yosef* Karo laments the fact that following the trials and tribulations of the diaspora "the Torah has become not as two Torahs but as innumerable ones" and explains that in his work he wishes to present the scholars of his generation with a digest of the writings of all great halakhic scholars of the past on every halakhic issue. However, he continues, his aim is not merely encyclopedic: "I have resolved that after this I will make a halakhic decision, deciding between the different opinions since *this is the goal: that there shall be for us one law and one manner*".

This goal was seen by Karo as an overarching religious and cultural *desideratum* of self-evident validity – although the meaning he attributes to the biblical phrase "One law and one ordinance shall [there] be" is relatively rare in the Jewish tradition.[5] He goes on to write that this purpose cannot be achieved by

3 In one sense any decision is aimed at a result: resolving the issue at hand. The need for halakhic decisions creates the demand for the function of the decisor. However, this is obviously not what I mean to discuss here.

4 Joseph Karo (1488-1775) is considered one of the pre-eminent halakhic authorities. The *Beit Yosef* includes a detailed précis and discussion of the unfolding of *halakhah* on all topics relevant to Jewish life in Karo's time (16th century), following the order of topics employed in Rabbi Ya'akov bar Asher's 14th century work *Arba'ah Turim*. The *Shulḥan 'Arukh* presents the "bottom line" of all this, i.e., the norms which obligate Jews today.

5 This expression "one law and one ordinance shall be for you [and for the stranger that sojourneth with you]" is a quote from *Num*. 15:16. In its original context it does not mean that there is no room for variety in the normative life of the Jewish people, but that whatever the normative state of

deciding every disagreement between great rabbis of the past based on the relative merits of each position, since such a decision is beyond human capabilities, both because of the amount of time this would require and due to our intellectual limitations. But he did not therefore abandon the realization of this ultimate goal. Rather, he proposed to achieve it by a completely formal process. Karo's innovative solution was to create an imagined *Beit Din* whose members were "the three pillars of teaching upon whom the House of Israel rests" and to rule on every halakhic issue according to the "majority" of these three.[6] When one or two of these rabbis was silent on a specific issue, Karo "sat" other leading decisors on the "bench" of this "court". It is notable that the method is formal – but Karo's goal is not formal at all, but rather the realization of what he regards as an ultimate religious value: the unification of *halakhah*.

A second example of an explicit overall religious-social *telos* guiding halakhic decision-making is Rabbi Ovadia Yosef's (b. 1920) project of "restoring the crown to its ancient glory". This project aims at correcting the religious-normative situation among Jews in Israel, so as to end the current multiplicity of norms. Rather, all should follow the decisions of Rabbi Karo. Rabbi Yosef sees this as the realization of a basic religious duty: that of following the rulings of the *Mara De'Atra* [Aramaic: "the master of the place"] of the land of Israel. For Sephardi Jews there is the added duty of obeying the sage whom the great Sephardi rabbis of the past "accepted". But Rabbi Yosef believes that above and beyond these formal obligations to Karo's authority, the acceptance of Karo's rulings by all Jews in Israel will promote the realization of a transcendent religious-historical aim, since it foreshadows the situation in messianic times, when "they [the people of Israel] shall be no more two nations, neither shall they be divided into two kingdoms any more at all" (*Ezek*. 37:22) but rather all shall follow the same halakhic path – as set forth by Rabbi Karo.[7]

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the Jews is, that of the "sojourners" living with them must be identical. This is how Maimonides understands it in his *responsa* (§293). In rabbinic texts composed before the 16th century, only a few rabbis interpreted this verse in a manner similar to Karo. These include, e.g., Rabbi Yehuda HaLevi (Kuzari, III, 38 and 49) and Naḥmanides (*novellae* to *Meg*. 2a).

6 These three authorities were R. Isaac Alfasi (d. 1103), Maimonides (d. 1204) and R. Ya'akov bar Asher (d. 1340). Since each lived in a different century, the notion that they could constitute a *Beit Din* (halakhic court) is not in consonance with any standard definition of this legal institution, but rather an imaginative move.

7 In my book *He'iru Pnei Hamizraḥ* (Tel Aviv: Kakkibutz Hameuchad, 2001), 312-352 (Heb.), I discuss R. Ovadia Yosef's project to reinstate the authority of Karo's rulings over all Jews residing in Israel. Rabbi Dr. Benny Lau holds a different interpretation of the scope of Yosef's project, and wrote in his Ph.D. dissertation (Bar Ilan University 2002) that Rabbi Yosef aims only for all the Sephardi Jews to follow Karo's rulings, and acknowledges that Ashkenazic Jews may act otherwise. He notes, *inter alia*, that Rabbi Ratson Arussi's view on this matter is identical to mine. In any case, even a teleological principle that applies "only" to all Sephardi Jews is of quite broad scope.

A third example of an overall *telos* governing the considerations of a halakhic decisor is the goal reflected in the strategic principle "the new is forbidden by the Torah" as applied by the Ḥatam Sofer. Rabbi Sofer (1762-1839) had a general aim, i.e., the negation of initiatives by various "reformers" to change the norms governing Jewish life. Some of the reformers did not see themselves as operating within the bounds of *Halakhah*, and these Rabbi Sofer did not view as a serious threat. The more significant threat was posed, as he saw it, by reformers who perceived themselves as acting within *Halakhah*, who justified their innovations by recourse to halakhic arguments and sources. Instead of replying to their various specific arguments, Rabbi Sofer invoked a strategy of total disqualification of any proposal for change, even if it appeared to be based on precedents and halakhic argumentation. The principle "the new is forbidden by the Torah" (as advocated by Rabbi Sofer) ascribes a uniform status to a whole set of halakhic changes without exploring their individual merits; by this method he sought to achieve an overall *telos* – negation of reform.

Organizing or Reforming a Wide Realm of Halakhah

Above I related to rules or aims that apply to the entire halakhic system. I shall now present teleological considerations aimed at amending a wide but limited realm of *halakhah*. One well known example is the general leniency in evidentiary law and other matters, instituted expressly in order to ease the release of *agunot,* women whose husbands are missing.[8] Another example is the improved treatment of idolaters or non-Jews "to prevent hatred" or "to promote peace". In this last case many halakhic rules expressing a stringent or hostile attitude towards Gentiles are moderated or entirely suspended because of wider considerations, beyond the specific decision within which the rule is applied.[9]

In both these cases the amendments are contrary to the rules of halakhic decision-making that would govern them if not for these general policies. Following the establishment of this policy, individual decisions based on the merits of each case are no longer required, but rather the very identification of the case as belonging to one of these categories ('*iggun* or gentiles) entails the activation of the general policy.

8 "Because of '*iggun* the rabbis were lenient*"*; see, e.g., *Yeb.* 78a; *Gitt.* 3b. This maxim appears numerous times in the *responsa* literature. There is extensive discussion of this issue in both halakhic and academic texts.

9 Once again, there is extensive literature on this topic. See, e.g., Eliav Shochetman, "Jewish Gentile Relations: 'In the Interest of Peace' and 'Because of Hate'", *Maḥanayim* 1 (1992), 52-73 (Heb.).

Teleological Considerations in Specific Halakhic Issues

As I wrote in the introduction, this paper focuses on the appearance and use of teleological considerations in specific halakhic cases. The following examples are mostly from Sephardi/Mizraḥi halakhic writings of the 19th and 20th century, which are relatively familiar to me. This is not to say that the phenomenon of teleological decision-making does not exist in the decisions of other rabbis of the same period and earlier periods.[10] After presenting these examples I will seek to offer some more general observations.

[10] I will cite two examples. One is the decision of Rabbenu Tam, accepted in Europe and later throughout almost the entire Jewish world, not to force a man to divorce his wife if she says that her husband is repugnant to her, despite the fact that the great rabbis who preceded Rabbenu Tam had ruled that if a woman says her husband is repugnant to her he should be forced to divorce her. The decisions of Ashkenazic rabbis on this matter are clearly teleological. Rabbi Asher Ben Yeḥiel explains what he considers to be the relevant teleological consideration: "Jewish women in this generation are conceited, and if a woman could free herself from her husband by saying 'he is not to my liking', you would have nary a daughter of Abraham left sitting beneath her husband. They would fix their eyes on other men and revolt against their husbands; therefore it is better to refrain from forcing (husbands to) divorce" (Rabbi Asher Ben Yeḥiel, *Resp*. §43.8). In order to prevent a result that these rabbis viewed as intolerable, they ruled against what had been standard *halakhah* for hundreds of years. A second example can be found in a *responsum* by Rabbi Ya'akov Breisch, who was rabbi of the *ḥaredi* community in Zurich (d. 1976). He was consulted with regard to the case of a woman about to be married, who according to views current in the ultra-Orthodox community might be considered "damaged" because her parents did not observe ritual purity: should a person aware of her parents' lifestyle inform the woman's fiancé of this? After citing a few sources indicating that such information must indeed be revealed to the fiancé, Rabbi Breisch wrote:

> ... despite this, in this case one should remember that the rabbis wrote "their God would not like you to talk of them thus" (*Sanh*. 111a; see Rashi *ad loc*.). In recent times, thank God, the generation has become more observant, and many daughters of reform Jews are being educated according to *ḥaredi* Judaism. If we apply the law stringently, what will happen to these girls? Would we send them to marry reform men and prevent them from leading an observant life? Furthermore, after the terrible destruction [of the Holocaust] many surviving children were raised as observant Jews and in some cases we don't know much about their parents. Therefore it should suffice that according to the letter of the law they are permitted to marry, and not to apply supra-legal norms of piety. For while of course these are important matters reaching to the highest heaven, but on the other hand, if we preach these matters in public we would be giving a hand in pushing them out of the observant world (*Resp*. *Ḥelkat Ya'akov*, *Even Ha'Ezer* §1).

I.e., following *ḥaredi* custom in rejecting people with such "defects" of parentage would under current circumstances be so destructive that it is better to avoid it, despite the firm base for such rejection in standard halakhic sources that Breisch himself had quoted earlier in his *responsum*. Rabbi Breisch adds another sentence implying that he was still undecided whether to rule against full disclosure to the fiancé: "Appropriate to this case is what Rabbi Yoḥanan Ben Zakkai says in Tractate *Baba Batra* of the Babylonian Talmud 89b: 'I will be wrong to say it and wrong not to say it.'" But the conclusion of the *responsum* indicates that he ultimately ruled according to the teleological consideration.

1st Example: The Decision of Rabbi Eliyahu Mani and Rabbi 'Abdallah Somekh Regarding Public Domain in India

Halakhah distinguishes the "private domain" from "public domain": on Shabbat it is forbidden by Torah law to move any object from one of these domains to the other, as well as to carry any object in the public domain for more than four cubits (about two meters).[11] In order for an urban area to be considered a "public domain" it must be more than 16 cubits (some 8 meters) wide. According to traditional Sephardi-Eastern *halakhah*, this condition alone suffices to define any public urban area as a "public domain". Ashkenazi halakhic tradition, however, posits that width *per se* does not create a "public domain"; only if 600,000 people pass through this area every day is it considered a public domain. Needless to say, this radically reduces the instances of "public domains".

In the 18th and 19th century many Iraqi Jews emigrated to British ruled India and established thriving communities there. They continued to view the rabbis of Baghdad as their halakhic authority. Baghdad rabbis ruled, in accordance with the Sephardi halakhic tradition, that any street wider than 16 cubits is a public domain; accordingly, on Shabbat a Jew may not leave his house for such a street, or walk along it, when carrying any object. 'Abdallah Somekh (1813-1889), chief rabbi of Baghdad in the second half of the 19th century, was therefore surprised to learn that his distinguished student, the eminent halakhic scholar Eliyahu Mani,[12] had visited India and ruled that the streets of its cities should be considered *karmelit*. This ruling enabled Jews to transport objects on these streets with the assistance of a "Shabbat gentile" and to travel on Shabbat in a palanquin carried by gentile porters.

When Mani passed through Baghdad on his way home from India to Hebron, Rabbi Somekh called him in for a discussion of the matter. The crux of this conversation was conveyed by Somekh in a letter to his nephew in India, and thus it reached us:[13]

> And now I shall write you of the discussion with my dear friend the aforementioned rabbi [Rabbi Eliyahu Mani] […] first I asked him: Is it true what I heard about the esteemed rabbi, that you have allowed being carried in a palanquin by a gentile and the carrying of objects by a gentile?

11 The rabbis assigned to certain areas an intermediate status as *karmelit*. Moving objects from another domain into a *karmelit* and vice versa is forbidden, but only by rabbinical decree.

12 Rabbi Eliyahu Mani (1818-1899) was born and educated in Baghdad, and married Rabbi Somekh's sister Samraa. In 1856 he emigrated with his family to Erets Israel, where he became chief rabbi of Hebron.

13 Rabbi 'Abdallah Somekh, *Resp. Zivhei Tsedek Hahadashot*, §99 (Jerusalem 1981). All the following quotations of Rabbis Somekh and Mani are taken from this source.

And he [Rabbi Mani] answered:

> This is true and I will not deny it. I allowed the Jews of Bombay these things. The scholarly Rabbi Moshe Pardo[14] (may God protect and save him) who was a member of the Jerusalem rabbinical court under Rabbi Avraham Ashkenazi[15] (may God protect and save him) and is now rabbi in Alexandria, wrote a long halakhic decision on this and allowed the palanquin and the carrying of objects by a gentile. He wrote that this is the tradition in all European cities, based on the "some say" opinion mentioned by our master Rabbi Karo in *Shulḥan 'Arukh Yoreh De'ah* §345, that roads where less than 600 thousand people pass every day are not "public domains". Moreover, it could be said that our master Karo concurs with this. Thus Rabbi Pardo allowed these two things and wrote a long decision on this, which is printed in his book.

I [Rabbi Somekh] replied:

> We know you as one who takes decision-making very seriously. How is it then that you went against the opinion of the three great rabbis[16] who wrote that our master (Karo) considers such roads "public domains"?! How did you follow the decision of Rabbi Pardo against the opinion of our teacher and rabbi Ḥayyim Yosef David Azulai[17] of blessed memory, who expressly forbade travelling in a palanquin on Shabbat?!

He [Rabbi Mani] answered:

> Once again your honor is repeating to me your [formal] criticism of my decision? Now, hear my words and you will admit that truth is on my side: I saw that the Jews of Bombay each carry a parasol – without which it is impossible to walk the roads there for even one minute – and they all carry parasols on Shabbat more than four cubits in the public domain. They also carry with them snuff and handkerchiefs, which is forbidden by all opinions. If we rule that these roads are public domains,

[14] Born in Jerusalem around the year 1810, he was a *dayan* in Jerusalem, and in 1871, having returned from an assignment in North Africa, was appointed rabbi of Alexandria in Egypt, a post he filled until his death in 1888. His rabbinic writings include: *Hora'ah Debeit Din* (Izmir: Rodetti, 1872), on the laws of divorce (*gittin*); *Tsedek Umishpat* (Izmir: Di Segura, 1874), *novellae* and commentary on the *Shulḥan 'Arukh Yoreh De'ah*; and *Shmo Moshe* (Izmir: Rodetti, 1874), halakhic *responsa*. See further about him in Z. Zohar, *Halakhah Umodernizatsiah* (Jerusalem: Shalom Hartman Institute, 1981), 171-172; Moshe David Gaon, *Ḥakhmei Hamizraḥ Be'Erets Yisrael* (Jerusalem, 1938), II.541-542; Arie Leib Frumkin, *Sefer Toldot Ḥakhmei Yerushalayim* (Jerusalem: Solomon, 1930), III.312.

[15] Turkey 1811–Jerusalem 1880. When he was 9, his parents moved to Jerusalem, where he received an excellent education and filled several rabbinic posts culminating in his appointment as *Rishon Letsiyon* (Chief Rabbi of Jerusalem) in 1869. See Gaon, *supra* n.14, at 121-122; Frumkin, *supra* n.14, at 283 (note); *Sh'elot uTeshuvot mahaRA Ashkenazi* (Jerusalem: Ahavat Shalom, 1991), 15-34.

[16] These rabbis were cited by Somekh in an earlier part of his *responsum*, and include Rabbi Ḥayyim Joseph David Azulai (ḤIDA); Rabbi Ḥayyim Benveniste (Turkey, 17th century); Rabbi Raphael Meizlisch (Europe, 18th century, author of *Tosefet Shabbat*).

[17] Rabbi Azulai (1727-1806) was the greatest Sephardic rabbi of the 18th century.

> then Bombay Jews would be actively breaking a rule for which the Torah punishment is death by stoning […] Therefore I relied on Rabbi Pardo, may God protect and save him, and on the European custom, and allowed them the palanquin and the carrying by a gentile; since if we declare these roads *karmelit* this is allowed.

What we can learn from this discussion regarding our issue is that Rabbi Mani agrees with Rabbi Somekh that the standard (and reasonable!) interpretation of Rabbi Karo's position is that the streets of Bombay are public domains by Torah law. Any scholar deciding "by the book" would rule this way. However, the norms of the expatriate Iraqi Jewish community of Bombay include going out on Shabbat with a parasol, tobacco and a handkerchief – and anyone who supposed that they would give this up would be deluding himself. The result of a standard decision, then, applied to the reality of Jewish life in India, would be to define the entire community as violating Torah law regarding Shabbat. Rabbi Mani considered this result unacceptable and intolerable. In order to reach a better decision he consciously chose to rule according to Rabbi Pardo, a respected scholar but of much less authority than those who held the accepted position. Rabbi Pardo decided that his community in Alexandria should adopt the European praxis in this matter, i.e. the Ashkenazi position, in place of the accepted Sephardi tradition.

Rabbi Mani's tone in addressing Rabbi Somekh indicates that he considers such teleological considerations as ones that Rabbi Somekh should and would accept. Perhaps because of the "obviousness" of these considerations, Rabbi Mani did not see fit to explicate them. Rabbi Mani's reasoning permits two explanations, which are not mutually exclusive. The first: Rabbi Mani is concerned for the community members' standing "in the eyes of God": if they knowingly violate what they acknowledge to be laws of Torah, God will consider them as intentional sinners and deal with them accordingly. By ruling that Bombay streets are merely *karmelit* the Jews will be able (without breaking any law!) to benefit from the assistance of "Shabbat gentiles" to perform such actions in the city streets. If they nevertheless continue carrying objects themselves, they will be defined as violating only a rabbinic prohibition rather than a direct Torah command.

A second explanation is that the rabbi was concerned for the community members' standing in their own eyes. One who knows that he is regularly violating Torah commandments regarding Shabbat may begin to see himself as a complete sinner against Torah and *Halakhah*. From here on he may find himself on a slippery slope, thinking that since in any case a chasm already exists between his behavior and Torah norms, why not violate other halakhic norms? Defining the violation as one of rabbinic law only and showing a way out of it by relying on a "Shabbat gentile" allows the community members to improve their religious self image and reaffirm their subjective sense of being loyal to the Torah and following its commands.

Rabbi Mani's words indicate that he recognizes a tension between the obligation to take such matters into consideration and the obligation to rule according to the standard and reasonable halakhic interpretation regarding the status of Bombay streets. In his view, it is clear that such religious and social considerations must override the obligation to apply standard *halakhah* to the case at hand. It is also noteworthy that Rabbi Mani here expresses a non-ontological understanding of halakhic norms: he does not hold that he must *discover* whether the streets of Bombay are *karmelit* or public domain, buthe must *determine* this. Thus, once he rules with proper halakhic argumentation that these streets are *karmelit,* the community members' standing will be improved not only in their own eyes, but in God's eyes as well. Similar consideration and outlook are also found in the next example, the decision of Rabbi Mesas regarding the butchers of Tlemcen.

2nd Example: The Decision of Rabbi Mesas Regarding the Butchers of Tlemcen

Rabbi Yosef Mesas was born in 1892 in Meknes in Morocco and acquired his education as Torah scholar there. In 1924 he was invited to serve as rabbi to the community of Tlemcen in Western Algeria, a post he held until 1940.[18] The Jews of this community, like all Algerian Jews, had lived under direct French rule since 1830 and had enjoyed full French citizenship since 1870; they were exposed to considerable French-European influences and underwent a significant process of secularization. In the first years of his service in Tlemcen, Rabbi Mesas learned that most community members were careful to buy kosher meat, but did not observe Shabbat according to *halakhah*. Even the Jewish butchers of Tlemcen who sold meat slaughtered in the kosher manner (as well as non-kosher meat for gentile customers) did not observe Shabbat, and kept their shops open on that day. Some self-righteous Jews pointed out that according to *halakhah,* those who publicly violate Shabbat lose their halakhic credibility; thus, one could not rely on the butchers' claim that the meat they were selling to Jewish customers had been slaughtered in accordance with *halakhah*. That being the case, said these Jews, one could not buy verifiably kosher meat in Tlemcen, and all the meat consumed by the community could not really be considered kosher.

Rabbi Mesas tried to convince the butchers to close their shops on Shabbat, but following many efforts concluded that this would be impossible.[19] Subsequently,

[18] In that year he returned to Meknes, where he continued a distinguished career as one of Morocco's leading rabbis. In 1964 he moved to Israel and served as chief rabbi of Haifa until his death in 1974.

[19] Rabbi Mesas's *responsum* about the butchers of Tlemcen appears in his book *Resp. Mayyim Hayyim*, part I §143 (Fez 1934). For an extensive discussion of this matter see my article "*Halakhah* as a Non-Fundamentalist Religious Language: Rabbi Yosef Mesas and the Case of the Tlemcen Butchers",

he adopted an alternate strategy: the construction of halakhic argumentation according to which the butchers of Tlemcen did not lose their credibility regarding *kashrut*, despite opening their shops on Shabbat. A major component of this argumentation was that the butchers are not to be considered "public violators of the Shabbat", and thus their credibility remains as that of any other Jew. Rabbi Mesas noted the existence of a halakhic position from the medieval period which held that one is considered a public violator of the Shabbat only if one was observed "working the land".[20] Many halakhic scholars strove to explain this unique position, ascribed to *Ba'al Ha'Ittur*.[21] Mesas suggests that this position be understood to mean that only those who commit very serious violations, ones punishable by death,[22] should be considered public violators of the Shabbat, and he cites another scholar who also held such a view with regard to who should be considered a public desecrator of Shabbat.[23] Rabbi Mesas was aware that scholars over the generations disagreed about this matter, and that many held that even those who violate lesser Torah prohibitions regarding Shabbat, or even rabbinic prohibitions, are considered public violators of Shabbat. Nevertheless, Rabbi Mesas writes that halakhists should adopt the position that applies such sanctions only to the narrowest circle of sinners, i.e., only to those who commit the most severe transgressions, that in ancient times were punishable by death. He explains his choice thus:

> Reason tends towards leniency […] especially since in this time, when the

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in Avi Sagi & Nahem Ilan (eds.), *Jewish Culture in the Eye of the Storm: A Tribute to Yosef Ahituv* (Ein Tsurim: Hakibbutz Hameuchad and Merkaz Yaakov Herzog, 2002), 569-591 (Heb.).

20 This was the decision of Rabbi Shim'on Ben Tsemaḥ Duran, based on the *Ittur*. See *Tashbets*, part III, §§43, 47.

21 On this issue see Zvi Zohar & Avi Sagi, *Circles of Jewish Identity: Public Desecration of the Sabbath in Jewish Law (From Talmudic Times to the Present)* (Tel Aviv: Hakibbutz Hameuchad, 2000), 60-66 (Heb.). Note that although many rabbis have quoted the *Ittur* in this fashion, the published text we have today says the exact opposite: someone who works the land on Shabbat is *not* considered to have violated the Shabbat in public and his marriage and divorce are valid (*Sefer ha'Ittur*, letter *kuf,* s.v. *kiddushin* (New York: American Academy of Jewish Studies, 1955), 78 (Heb.). The *Sha'ar Ḥadash* commentary had trouble explaining this and concluded "perhaps he meant: one working the land in a field outside the town; and so the violation is not considered public since there is nobody there". Be that as it may, it is the version of the *Ittur* as it appears in the *Tashbets* that serves as the basis for the halakhic position Rabbi Mesas refers to here.

22 Punishable by death, meaning something that might have been punishable by death in the days of the *Sanhedrin*. According to the sages of the *Mishnah* and the *Talmud*, in order to pronounce a death sentence the *Sanhedrin* required irrefutable evidence, so that even in those days the death penalty was very rarely imposed. Thus, the expression "punishable by death" does not necessarily refer to the actual punishment, but indicates the severity of the offence.

23 The reference is to the *Pitḥei Teshuvah* commentary on the *Shulḥan 'Arukh*, which quotes the book *Mishnat Ḥakhamim* (Lvov, 1790-92): "Even if he violated a prohibition regarding Shabbat […] he is not considered as having rejected the entire Torah until he violates prohibitions punishable by death".

> generation is unobservant, it is impossible to compel maintenance of all religious rules. If we were to consider one who publicly violates Shabbat even by a prohibition that is not punishable by death as a violator of the entire Torah, we shall find many such persons in this generations, and we would not be allowing life to go on.[24]

Rabbi Mesas seems to feel that defining someone as "a public violator of Shabbat" has such grave implications that it is reasonable only if not widely applied. In pre-modern times the number of Shabbat violators was small enough to allow categorizing even minor infractions not punishable by death as bearing radical consequences. As the circle of violators grows, such categorization must be changed so as to ensure that the number of community members defined as public violators of Shabbat will not grow intolerably high. Why is such a dynamic categorization needed? Because without it, life would not be allowed to go on, i.e., the community would not be able to function as a joint framework.[25]

The logic at the foundation of Rabbi Mesas's approach is consonant with the sociological concept of social deviance, where defining a person as a criminal has the function of drawing the line separating those "outside" upright society from the "normal" majority. In every social situation such a line will be drawn, as its existence is necessary for the affirmation of the positive identity of the "normal" majority: without "bad guys" there can be no "good guys". However, a functioning community can exist only if most of its members are "within bounds" and only a fringe minority is considered criminal and "outside" the community. The degree to which the community's members in general observe or disregard a specific norm will lead to the movement – in one direction or the other – of the line separating "proper" from "criminal" behavior.[26]

In the past, writes Mesas, some scholars ruled that violating a rabbinical Shabbat prohibition was enough to earn one this status; others said only violating a Torah prohibition would count, and still others held that only a Torah prohibition punishable by death entails a status of "public violator of Shabbat". Rabbi Mesas knew that each of these positions was firmly grounded in halakhic sources composed by great scholars of previous generations. However, he had the responsibility of making a concrete decision for the (assimilated and non-observant) Jews of Tlemcen. He did not want the community to splinter, but rather

24 *Resp. Mayyim Ḥayyim*, *supra* n.19.

25 The expression "you would not be allowing life to go on" originates in the Talmud (*B. K.* 91b). A search of the Bar Ilan University database shows widespread use of this argument in halakhic literature, especially in matters of business law, but also in matters of ritual law. See for example *Resp. Radbaz*, part I, §2.

26 See for example, the first chapter of Kai T. Erikson, *Wayward Puritans* (New York: John Wiley and Sons, 1966). For an application of this thesis to matters of Jewish law, see our *Circles of Jewish Identity* (*supra* n.21), especially chap. 11, at 188-205.

attributed great importance to the continued existence of a united Jewish community in his city. With this in mind, he ruled that only the most lenient definition of "public violation of Shabbat" must be adopted, since this was the only way to avoid categorizing too many Jews as outside the community's pale. Mesas, it seems, holds that the choice of halakhic definition should follow not merely from the analytical strength of the theoretical argumentation supporting it, but from an understanding of the actual social-religious implication of the hermeneutic choice.

The assumption embedded in this argument deserves note: because "in this time, when the generation is unobservant, it is impossible to compel maintenance of all religious rules," one must rule *leniently*, so that almost all Jews, including most Shabbat violators, are not cast out of the community. This conclusion does not necessarily follow from a teleological approach, for one might just as reasonably argue for an opposite conclusion: because "the generation is unobservant," one must take special care to protect religion, and making *halakhah* more *stringent* would best preserve the integrity of Torah. Rabbi Mesas's argument that a different ruling "would not be allowing life" expresses his rejection of such an approach. Proper halakhic policy, he says, is not to maintain a loyal but small community of strictly observant Jews, but rather to allow the whole community to continue belonging to a joint Jewish-religious framework, by preferring the less stringent and more inclusive halakhic alternative.

The reality faced by Rabbi Mesas was more radical than that faced by Rabbi Mani: in Tlemcen of 1928, unlike Bombay in 1880, most community members were not committed to observing Shabbat. In these circumstances, eating kosher meat functioned as one of the main practical indications of affinity to Judaism. In order not to undermine this marker of Jewish identification, Rabbi Mesas chose to adopt the most limited definition of public violation of Shabbat. Like Rabbi Mani, Rabbi Mesas presents with complete transparency the tension between following the standard (stringent) halakhic ruling, on the one hand, and enabling the inclusion of all Tlemcen's Jews within the bounds of the normative community as far as possible, on the other hand. Like Rabbi Mani, Mesas takes a non-ontological view of halakhic prohibitions; like Mani, he also rules that the standard decision must be abandoned in favor of a more lenient choice enabling the realization of an important social-religious aim. However, in the next example we discuss, the teleological decision taken in the face of secularization leads to choosing the more stringent interpretation.

3rd Example: The Ruling of Rabbi Raphael Aharon Ben Shim'on in Response to the Cairo Suicide "Epidemic"

Rabbi Raphael Aharon Ben Shim'on (c. 1845-1928) was born in Morocco, grew

up in Jerusalem where he received his education, and served as Chief Rabbi of Cairo during the years 1891-1921. Following the opening of the Suez Canal in 1869 and the British occupation in 1881-1882, Egyptian politics and economy were changing and the Jewish community too was becoming more Westernized and secular. Upon beginning his work in Cairo Rabbi Ben Shim'on discovered that one result of these changes was a considerable rise in the rate of suicide:

> My heart melted like wax and I was seized with trembling, because of the evil that I beheld. For suicides were a very prevalent sorrow. And many destroyed themselves because of some petty reason, or because of loss of so-called honor, or because they had failed to fulfill a lust after some filthy fornication, or for other similar reasons marked with the sign of ignominy ...
>
> For I saw that this affliction had infiltrated from the cities of Europe; and that they had learned from the sons of aliens to imitate the most degenerate of the nations whose way is for hundreds and thousands to destroy themselves for reasons of slight significance.[27]

Halakhic literature takes a very negative approach to suicide, expressed *inter alia* in defining minimal, almost humiliating, burial ceremonies for people who took their own life. Nevertheless, the accepted practice was to take a more forgiving approach, either under the assumption that the suicide was performed under psychological stress, so the deceased was not morally and religiously responsible for his actions, or on the assumption that s/he had repented just before death.[28] In practice, those who committed suicide were buried in the ordinary manner. Rabbi Ben Shim'on was well aware of the accepted practice, but decided to depart from it in order to achieve a more important social-religious aim:

> I girded my loins, and decided in my heart to repair this breach, if Heaven be with me, He Who seated me upon the seat of judgment. And when the first such case came before me, and after I had verified that he had destroyed himself in anger and in froth and was not drunk or confused, I applied to him the full severity of the law, as detailed by MaHaRiCas of blessed memory.[29] And I did not endeavor to scout

27 Rabbi Raphael Aharon Ben Shim'on, *Nehar Mitsrayim,* Cairo 1908, 141a. For a more in-depth discussion of Rabbi Ben Shim'on and the suicide problem in Cairo see my article "Halakhah, Suicide and Social Policy", *Hagar: International Social Science Review* 3.1 (2002), 85-102.

28 See Rabbi Y.M. Tukachinsky, *Gesher Haḥayyim* (Jerusalem: Solomon,1960), vol. 1, 269-273. Citing a plethora of sources from tractate *Semaḥot* through leading *Rishonim* and *Aḥaronim,* Rabbi Tukachinsky states that while "on the books" suicide calls for a very harsh response, the consensus that emerges from halakhic sources over the generations is that in almost all cases in which a person intentionally took his own life, the harsh halakhic norms should *not* be applied. Indeed, Rabbi Ben Shim'on himself notes that the Jews of Cairo were stunned by his actual application of these norms.

29 MaHaRiCas is an acronym for Rabbi Jacob Castro, Cairo, c.1525-1610. Rabbi Castro authored several halakhic works, one of them (*'Erekh Leḥem*) consisting of elaborate annotations and commentary on Rabbi Joseph Karo's *Shulḥan 'Arukh* (cf. *supra* n.4). In his notes to section 345 of *Shulḥan 'Arukh Oraḥ Ḥayyim*, he explicates the rites denied to a suicide: The body is not washed or

> and to search out the words of the *poskim* [=rabbinic decisors] to find an aspect of leniency which I might discover in their words. For my heart was exceedingly distraught.[30]

Rabbi Ben Shim'on concludes with the statement that after he took a stringent approach with regard to a second case of suicide, the number of suicides dropped sharply:

> And when those of slight faith saw all this, that this severe punishment would bring disgrace/shame [=*ḥerpah*] upon them and upon their families after them, for they would be denied all manner of honor towards the dead – since then, they ceased their travail. And, thank God, the breach was almost totally sealed.[31]

The standard ruling that treats a suicide *de facto* like any other death is rooted in consideration for the dead person and even more so for his family: why punish someone after death, and why should the family suffer public humiliation for the rash decision of a dead relative? Rabbi Ben Shim'on analyzed the situation in late 19th century Cairo and concluded that there was an irresolvable tension between *ad hoc* consideration for the individual and family and a forward-looking teleological consideration for the future well-being of young people in danger of being affected by the European "fashion" of suicide. He concluded that precedence must be accorded to this future good, and so knowingly departed from the accepted (and lenient!) ruling, preferring an alternate (more stringent!) ruling that was "on the books" but had not been applied in practice. As in the two previous examples, so too rabbi Ben Shim'on sets out his considerations with complete transparency, and holds a non-ontological view of halakhic determination.

4th Example: Rabbi Eliyahu Ḥazan's Decision to Have Kiddush Recited in Alexandrian Synagogues on Shabbat Eve

Rabbi Eliyahu Ḥazan (1845-1908) was born in Izmir, grew up and received his religious education in Jerusalem (where his grandfather, Ḥayyim David Ḥazan, served as chief rabbi), was chief rabbi of Tripoli (Libya) from 1874 and subsequently served as chief rabbi of Alexandria from 1888 until his death. As in Cairo, many Jews in Alexandria were affected by westernization and

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clothed in shrouds; the funeral procession is not to be led by candle-bearers, nor is the burial service to be recited. The suicide is buried in a Jewish cemetery, but at a significant distance from the graves of community members, and the traditional circumambulations of the grave are not performed. Rabbi Castro stresses that all this should be publicly accentuated, "so that the rest will hear and take fear".

30 Ben Shim'on, *supra* n.27.

31 *Ibid.*, 141b-142a.

secularization, among them European Jews who settled in Egypt to take part in its economic growth. A short time after taking up his post, Rabbi Ḥazan learned that

> many honorable speakers of foreign tongues who come to synagogue on the eves of the Sabbath and of the Festivals to hearken to the singing and the prayer, subsequently return to their residences and when they come to their homes they sit down to eat without making *kiddush*. Some of them [do so because they] do not have kosher wine. And also, many of the folk today do not know how to pronounce even one word in the holy tongue.[32]

The term "speakers of foreign tongues" refers here to European Jews living in Egypt. On the one hand, they come to the synagogue on Friday night, meaning they are not estranged from Judaism. On the other hand, they do not perform *kiddush* at their Shabbat table. Two reasons are given for this: they have no kosher wine and think that it is better not to say *kiddush* at all; they don't know any Hebrew, and think that *kiddush* can only be said in Hebrew. Neither of these reasons stands up to halakhic scrutiny.[33] It seems likely that Rabbi Ḥazan wished to represent the subjective motivations of these Jews without attributing disrespect or disregard for the *kiddush* ceremony to these Jews. The information he received about them as people who care enough to attend synagogue services but do not perform the Friday night *kiddush* led him to this halakhic assessment of the situation.

The great Talmudic scholar Samuel asserted that "*kiddush* may be recited only at the site of the meal".[34] Therefore, the ceremony must be performed at home and not in synagogues. However, in ancient times it was usual for travelling Jews to lodge in rooms adjacent to the synagogue, and since the synagogue was "the site of their meal" and since they might not have had their own wine, it was ordained that the cantor recite the *kiddush* in the synagogue for the benefit of these guests before the end of the Sabbath evening prayer. In later times the synagogues no longer served for lodging. The custom of reciting *kiddush* in the synagogue was nevertheless maintained among Ashkenazi Jews, on the assumption that even when the original reason for an ordinance is no longer relevant, the ordinance remains in force. However, in the *Shulḥan 'Arukh* Rabbi Yosef Karo ruled that: "it is better to establish the custom not to recite *kiddush* in the synagogue".[35] In his opinion, since

32 Rabbi Eliyahu Ḥazan, *Resp. Ta'alumot Lev* (Alexandria: Farag Hayyim Mizrahi, 1903), Vol.III, fol. 39d. I also discuss this ruling by Rabbi Ḥazan in the seventh chapter of my book (*supra* n.7), 146-148.

33 First, if there is no appropriate wine, the evening *kiddush* can be said over bread. Secondly, according to *halakhah*, *kiddush* can be said in any language. It seems, therefore, that these Jews did not consult anyone on these matters, but rather followed their own intuitions. It is also possible that their actual reasons for not saying *kiddush* were different and were not known to Rabbi Ḥazan.

34 *Pes.* 101a.

35 *Oraḥ Ḥayyim* 169, 1.

circumstances had changed and the synagogue was no longer the site of anyone's meal, the situation regarding which the rabbis instituted their ruling no longer obtained, and they had never intended this ruling to apply under such changed circumstances. The synagogues of Cairo and Alexandria followed Rabbi Karo's ruling and refrained from performing the *kiddush* ceremony.

As a Sephardi rabbi, it would have been the natural and accepted option for Rabbi Ḥazan to rule in accordance with Karo, especially since the actual practice in Alexandria was not to recite *kiddush* in the synagogue. However, the *Shulḥan 'Arukh*'s reasoning for refraining from reciting *kiddush* in synagogues was that times have changed and travellers no longer eat in the synagogues following the service. Rabbi Ḥazan considered it permissible and worthy to renew this ancient ruling on account of a similar consideration – changed social-cultural conditions:

> It was good in my eyes to ordain that in the Eliyahu HaNavi and Menashe synagogues,[36] where these people attend services, *kiddush* should be recited on Shabbat and holidays […] for it seems to me that – contrary [to Karo's advice] – it should be considered a *mitsvah* to establish the custom of saying *kiddush* in the synagogue […] to enable the fulfillment of this commandment by a person who is unknowledgeable and by a person who has no wine, and also to benefit those women (who are obligated by Torah to have *kiddush*) who come to synagogue to hear *kiddush* […].[37]

Rabbi Ḥazan decided to (re-)instate recital of *kiddush* not because the original situation (of travellers lodging in the synagogues) obtained now, but in response to the development of new and unprecedented conditions, including *inter alia* the arrival at the synagogues of women living without a family framework where a man says *kiddush*. Rabbi Ḥazan thus made use of a halakhic option that originated in a particular (now defunct) context in order to address a new and different reality. To provide a basis for his decision to rule contrary to Samuel and the *Shulḥan 'Arukh* he cites other scholars (whose opinions had previously been sidelined) and concludes:

> These scholars are worthy to be relied upon in such an hour of pressing need (*she'at hadeḥak*) and in current times when our generation does not look good, and so that the practice of *kiddush* not be forgotten by these people, and, of course, by their young children.[38]

As in the previous examples, so too here, ruling in accordance with standard *halakhah* (i.e., according to the *Shulḥan 'Arukh)* was at odds with ensuring the

[36] For photos of these synagogues, which were architecturally the most attractive in Alexandria, see http://www.nebidaniel.org/documents/Synagogue%20Alexandrie%202006.pps.

[37] Ḥazan, *supra* n.32.

[38] *Ibid*., 40a.

realization of Jewish values, such as having women who live without a husband (or someone else who might say *kiddush* at home) hear *kiddush* and enabling these people's young children to become accustomed to hearing *kiddush*. In order to achieve the desired result, Rabbi Ḥazan decided to rule against the *Shulḥan 'Arukh*, and he instituted the practice of reciting *kiddush* in the synagogues, a practice originally ordained for a different situation than the one he faced. In this respect, Rabbi Ḥazan's thinking was analogous to that of Rabbi Karo when deciding to reject the original ruling: both held that a change in historical conditions can and must affect the practice of *halakhah*, even entailing a decision contrary to the conventional ruling, in order to ensure the realization of the goals of *halakhah* in the new, changed reality of their time.

5th Example: The Ruling by Rabbi Moshe HaCohen Dreihem Regarding Conversion of a Person Who Will Not Live According to Halakhah

Rabbi Moshe HaCohen (1906-1966) was born in the Jewish community on the island of Djerba in Tunisia and received his religious education there. He became the chief rabbi of the "small quarter" of the island and head of its *yeshivah,* and was considered one of the leading scholars of this special community.[39] In 1958 he immigrated to Israel and was appointed a member of the rabbinical court in Tiberias, a post he held until his death.[40] An interesting case that came before the court in Tiberias concerned a young Israeli couple who wanted to get married, but the man's mother was not Jewish.[41] The young man had grown up as an Israeli and, when made aware of his non-Jewish halakhic status, sought to become a Jew via *giyur*.[42] However, he made his living as a soccer player and intended to

39 He published two scholarly works in his lifetime: a book of novellae on Tractate *Pesaḥim* entitled *Yedei Moshe* (Djerba: Khmis 'Azizi Cohen, 1943) and *Vayagged Moshe*, insights on the Passover *Haggadah,* which was published as part of the volume *Simḥah Vesason* (Djerba: Khmis 'Azizi Cohen, 1939). After his death more of his writings were published: a volume of *responsa – Veheshiv Moshe* (Tiberias: Hava'ad Lema'an Harav, 1968); two volumes of *novellae* and sermons: *Darash Moshe* (Tiberias: Hava'ad Lema'an Harav, 1974-1976); *Ohel Moshe* (Tiberias: Hava'ad Lema'an Harav, 1979) – *responsa*, *novellae*, interpretations and halakhic deliberations on the four parts of the *Shulḥan 'Arukh*; and a second volume of *Yedei Moshe* (Tiberias: Hava'ad Lema'an Harav, 1984).

40 For a detailed biography of Rabbi Moshe Ben Shim'on HaCohen, see Shulamit Noam, *Veha'ish Moshe* (Jerusalem: Bnei Harav, 2002).

41 Rabbi HaCohen discusses this case in his book *Veheshiv Moshe* (*supra* n.39), §§50-51. I discuss Rabbi HaCohen's halakhic approach extensively in my article "Accepting a Convert Who Will Not Lead A Religious Life: The Halakhic Position of Rabbi Moshe HaCohen, Chief Rabbi of Diget (Jerba)", in Rivka Horovitz (*et al.*), eds., *Prof. Ze'ev Falk Memorial Volume* (Jerusalem: Meisharim, 2005), 333-353 (Heb.).

42 *Giyur* is a procedure whereby a Gentile becomes a Jew. The term is usually translated as "conversion to Judaism". In our book *Transforming Identity* (London and New York: Continuum, 2007) Avi Sagi and I explain why it is better to refrain from such translation and rather employ the original term.

continue in that profession. At that time, all soccer games in Israel were held on Shabbat, so that his intention to continue to as a professional player meant that he planned to violate Shabbat after converting. According to the *Shulḥan 'Arukh* one of the stages of *giyur* is "acceptance of the commandments" (*kabbalat mitsvot*), and a widely held halakhic opinion with which Rabbi HaCohen was familiar held that there is a clear contradiction between acceptance of the commandments and intention to violate Shabbat. Additionally, a *baraita* cited in the Talmud indicates that a gentile should not be accepted for *giyur* if he specifically rejects even one halakhic norm. Finally, when soccer matches are played on Shabbat this entails desecration of the holy day by the thousands of fans travelling from near and far to attend the match. The players thus lead others into sin, thereby violating the commandment "thou shalt not put a stumbling block before the blind".[43] The foregone conclusion that presented itself to Rabbi HaCohen was that the soccer player could not be accepted for *giyur*; thus, there seemed to be no possibility of marriage for him to his beloved:

> Having clarified that this is a violation of Shabbat and the prohibition to "put a stumbling block before the blind", it seems clear that he cannot be accepted for *giyur*. It is an explicit *halakhah* in *Bekhorot* 30b: "A Gentile who accepts all the Torah with the exception of [even] one thing is not to be accepted. Rabbi Yossi son of Rabbi Yehuda says: Even [if he rejects] the most minute of rabbinical bylaws" […] thus, since he says that he will not stop playing [professional soccer] after his *giyur*, it is as if he declared that he accepts all the Torah except one thing, and he cannot be accepted.[44]

But Rabbi HaCohen noted a tension between this conclusion and its possible implications:

> They say that it is very necessary, and that there is a possibility of mortal danger, because the Jewish young woman that fell in love with him is already pregnant by him, and there is concern that if we do not permit her to marry him, she might commit suicide, God forbid! And there is also concern lest her relatives might kill her, for they are from a rabbinical family of distinguished lineage and this would be a major blemish on their name.[45]

Applying the conventional halakhic ruling would deny the possibility of the soccer player's *giyur*, thereby jeopardizing the life of the young woman pregnant by him, either at her own hands or at the hands of her family. Needless to say, these two actions – murder and suicide – are completely forbidden by *halakhah*.

43 Cf. *Lev*. 19:14, interpreted by the rabbis as meaning: do not create a situation leading another person to inadvertent sin.

44 *Veheshiv Moshe* (*supra* n.39), 193-194.

45 *Ibid*., 194.

The dilemma was, then, whether to depart from standard halakhic practice in order to avoid the danger of a Jew committing a grave offence.[46] Rabbi Moshe HaCohen's answer to this question was unequivocal: "Therefore I searched far and wide for a way to be lenient and convert him".[47] In other words, an outright teleological consideration led the rabbi to seek an alternative to the standard ruling forbidding *giyur* in such a case. Logically, it would have been enough to find a solution for this specific case. In fact, however, Rabbi HaCohen's search led him to a deep reconsideration of the meaning conventionally attributed to central halakhic sources cited as grounds for the standard ruling. Ultimately, he reached what he considered to be a better overall interpretation of the primary sources, concerning two major issues regarding *giyur*.

The first issue was the meaning of the halakhic requirement that a proselyte "accept the commandments". Based upon painstaking analysis of the sources, Rabbi HaCohen wrote:

> The requirement of *kabbalat mitsvot* does not mean that he commits himself to observe all the *mitsvot*. Rather, [it means] that he accepts the commandments of the Torah with the recognition that if he violates some of them, he will be punished accordingly. Thus, even though subsequently [=after the conversion] he violates some of the commandments of the Torah, this does not impugn his acceptance of the yoke of mitsvot [=*kabbalat 'ol mitsvot*]. Because "even though he sinned, he is a Jew".
>
> Indeed, even if at the moment when he accepts the *mitsvot* he intends to violate some of them, he did accept them – on the knowledge that if he transgresses, he may be punished.
>
> Therefore, he is a good, fine convert.[48]

On this interpretation, the halakhic demand that the convert "accept the burden of the commandments" does not mean that he commit to observing them. Rather, he is required to recognize that as a Jew he will be subject to the system of *halakhah*, and he is prepared to accept the consequences of not fulfilling the Torah's commandments. This interpretation has direct bearing on the case of the soccer player: if he accepts in principle his subordination to the system of

46 This problem has been discussed with regard to a Jew who says that if the community will ostracize him he will convert to Christianity. Rabbi Isserles (*Rema*) says that the community should not give in to such threats, as it would otherwise be impossible to enforce the authority of the *halakhah*, since everyone will know that the rabbis cave in under such threats. Other rabbis wrote that the matter is more complicated and that each case must be considered individually. See *Shulḥan 'Arukh, Yoreh De'ah*, §334 and the comments of the *Turei Zahav*, *ad loc.,* disagreeing with the Rema and stating that awareness of a possible grave result should dissuade us from applying sanctions that would lead to such a result.

47 *Veheshiv Moshe* (*supra* n.39).

48 *Ibid.*

halakhah, he may be accepted for *giyur* despite his intention to later violate the Shabbat. Moreover, this interpretation has far-reaching consequences for all future cases of Gentiles seeking to convert: the halakhic duty of the court would be to ascertain the gentile's awareness of the system of *halakhah*, rather than his intent to follow its rules.[49]

The second major issue that emerged from Rabbi HaCohen's analysis of the demands and expectations of the halakhic system with regard to the convert was: if *halakhah* does not make *giyur* conditional upon the convert's intent to fulfill all the commandments, is there some other intent *halakhah* requires as a condition for accepting a Gentile as a potential convert? His answer was positive: accepting a person for *giyur* is conditional upon the existence of a real intention to become part of the Jewish people. Such intent becomes apparent if after the *giyur* the proselyte follows a lifestyle that – in the context of his time and place – marks him/her as a Jew. Rabbi HaCohen's assessment of the lifestyle normally followed by secular Jews in Israel was that they indeed behaved in ways that were markedly Jewish. Therefore, he ruled that according to *halakhah* the children and spouses of secular Jews in Israel may unhesitatingly be accepted for *giyur*, even if afterwards the family continued to live in a secular neighborhood, to send its children to secular schools and to conduct a Jewish-Israeli-secular lifestyle.

Rabbi HaCohen's deepfelt sense of his responsibility to find a non-standard solution to one particular case led him to general conclusions regarding basic principles; teleological need triggered a comprehensive halakhic re-assessment.

6th Example: Rabbi Nissim Ohana and the Karaites

Rabbi Nissim Binyamin Ohana served as head of the rabbinical court of Cairo in the 1930s and 1940s.[50] In the first half of the 20th century the Karaite and Rabbinite Jewish communities of Cairo grew closer, and more than once the rabbis were asked to permit a marriage between a member of their community and a

[49] In passing, it should be noted that Rabbi Moshe HaCohen's interpretation was much less novel than he thought, and that what he previously had considered the "obvious" interpretation of the *Shulḥan 'Arukh* was far more modern than he realized. As Rabbi Ḥayyim Amsallem has recently demonstrated in his monumental work *Zera' Yisrael* (and as Avi Sagi and I had previously shown in our analysis of the sources), the notion that the *Shulḥan 'Arukh* posits that *giyur* lacking *kabbalat mitsvot* is invalid has always been disputed by great halakhic scholars. Similarly, the notion that the meaning of the term *kabbalat mitsvot* is identical with "a sincere commitment to observe the mitsvot after *giyur*" is not consonant with the views of most pre-20th century *poskim*.

[50] Rabbi Ohana was born in Algeria in 1882. As a child he came to the Land of Israel and was educated in Jerusalem. He served as rabbi to various communities in Israel and abroad. After completing his term of office as chief justice of Cairo's rabbinical court in 1947, he was appointed chief rabbi of Haifa, a post he held until his death in 1962. For more about him see Aharon Raḥamim Ohana-Ronen, *The Book of Rabbi Nissim Binyamin Ohana's Family: Anecdotes, Memories, Stories* (Jerusalem, 2001, published by the family) (Heb.).

Karaite; one of those faced with this question was Rabbi Ohana.[51]

Students of *halakhah* have always recognized that Karaites are Jews. However, the conventional view accepted by rabbis in recent centuries was, that the halakhic status of Karaites was "possibly illegitimate" (*safek mamzerim*), so it was forbidden to marry them even if they were to accept the laws of Rabbinite Judaism. In answer to a request for permission to marry a Karaite, Rabbi Ohana formulated an amazingly innovative ruling, according to which Karaites are not illegitimate Jews but rather completely non-Jewish:

> The Karaites (*bnei mikra*) who separated themselves from the community of Israel and made up interpretations of the Torah according to their imagination and do not believe in the oral Torah that was transmitted to us generation from generation […] and so too their sons and descendants to this day, who have deviated from the paths of the transmitted Torah and do not believe in the Oral Torah and changed the standards established by the rabbis – they have ceased to have the status of apostate Jews, and they are regarded as complete Gentiles.[52]

On the face of it, this statement reflects complete estrangement between Karaites and Rabbinite Jews. The reader of Rabbi Ohana's *responsum* might well ask himself at this point: after centuries of alienation, the two Jewish communities of Egypt had begun growing closer to each other, and some form of reconciliation was in the air. What motivated Rabbi Ohana at precisely this point in time to compose such a radical ruling, denigrating the status of the Karaites and creating a chasm between them and Rabbinite Jews as deep as that between Jews and Gentiles? However, Ohana's next sentence reveals that his *telos* is the complete opposite, for he concludes the above argument by ruling:

> Therefore if they recant and come to convert and accept the yoke of commandments like the rest of the Jews – they are to be accepted.

This conclusion reveals that Rabbi Ohana held that Karaites are halakhically non-Jews, and if manifests the specific goal of enabling them and Rabbinite Jews to give concrete expression to their joint yearning for unification. Rabbi Ohana proceeds to relate to the very same Karaites he has just defined as Gentiles, pleading:

> May the *bnei mikra*[53] not blame me for considering them Gentiles. For this was for the good of the entire people (*letovat haklal*), to mend the torn fabric (*le'aḥot et*

[51] For more on the views of Rabbinite Jewish scholars in Egypt regarding marriage with Karaites, see my "Lowering Barriers of Estrangement: Rabbinite-Karaite Intermarriage in Twentieth Century Egyptian Halakhah", in Shimon Shamir (ed.), *The Jews of Egypt: A Mediterranean Society in Modern Times* (Boulder and London: Westview Press, 1987), 143-168.

[52] Rabbi Nissim Ohana, *Resp. Na'eh Meshiv* (Jerusalem 1958), 115.

[53] Lit. "sons of scripture", i.e., Karaites.

> *hakra'im*) and to release them from their imprisonment, so that they may enter the community from now on without any problem.
>
> And we find a similar instance with regard to King David, of blessed memory. For in the time of King Saul they wanted to distance him and to prevent him from entering the community, until they investigated and found that they had received a tradition from the *beit din* of [the prophet] Shmuel HaRamati: "A male Ammonite and not a female Ammonite, a male Moabite and not a female Moabite",[54] and they permitted him. And about this King David, of blessed memory, said: "I am your servant the son of your maidservant, you have released my bonds".[55]
>
> And what led me to this was that "All the ways of Torah are ways of pleasantness, and all her paths are paths are of peace".[56] And so too He says: "Peace, peace to him that is far off, and to him that is near [saith the LORD; and I will heal him]".[57]

This short paragraph is full of phrases and quotations that reveal Rabbi Ohana's teleological considerations and the sources and values on which he relies. In the first sentence he clearly establishes that he recognizes a human entity (*klal*) that includes all Karaites and all Rabbinites; Rabbi Ohana's goal in this halakhic ruling is to promote the good of this entity (*tovat haklal*). Clearly, this entity is not coterminous with those who are halakhically Jewish, since Ohana has just argued that halakhically, Karaites are not Jews. It follows that in his mind's eye Ohana recognizes a broader human group, including both people who are halakhically Jews and those who are not, but who ought to be brought into the fold. As long as Karaites were considered "possibly illegitimate" (*safek mamzerim*), their status was frozen as liminally Jewish. Rabbi Ohana's hermeneutic innovation enables a positive dynamic: paradoxically, the formal exclusion of the Karaites has the *telos* of their complete inclusion.

Rabbi Ohana more than hints that the Talmudic-midrashic account of the halakhic tradition that was "discovered" in the time of King David and allowed him to be accepted as a Jew should be understood as a teleological ruling; the "discovery" that this had been the tradition of Shmuel's court is analogous to Ohana's "discovery" that the *Shulḥan 'Arukh* itself maintains that the descendants of the original Karaites are not "possibly illegitimate" Jews but complete gentiles. Such interpretive-teleological discoveries, Rabbi Ohana writes, are an expression of halakhic scholars' way of actualizing God's will to liberate the deserving from the "imprisonment" and distress that stem from conventional halakhic interpretation. That this is God's will is shown by two biblical verses that

54 Are forbidden to enter the Jewish people. Cf. *Deut*. 23:4, *Yeb*. 76b ff.

55 Cf. *Ps*. 116:16, *Yeb*. 77a.

56 Cf. *Prov*. 3:17.

57 Cf. *Isa*. 57:19.

formulate overarching principles of the halakhic system.

The first verse, "Her ways are ways of pleasantness, and all her paths are peace", is interpreted by Talmudic and extra-Talmudic sources both as a general principle and as a directive that interpretive options leading to negative consequences be rejected in favor of alternative interpretations that promote peace.[58] The second verse is the word of God spoken by the prophet Isaiah: "Peace, peace to him that is far off, and to him that is near, saith the LORD; and I will heal him". It seems that Rabbi Ohana is alluding to the midrashic interpretation of this verse: "to teach us that God brings those who are far nearer to him and supports the far as he does the near, even greeting the far with peace before so greeting the near, as it is written (*Isa*. 57:19) 'Peace, peace to him that is far off, and to him that is near [saith the LORD; and I will heal him]'".[59]

The will of God, says the *midrash*, is to grant peace first of all to those who are far, according them preference over those who are already near.[60] Rabbi Ohana sought to improve the status of the Karaites, but their nearness (being part of the Jewish people but possibly of illegitimate status) prevented their inclusion. Paradoxically, it is their characterization as far-off (i.e., their definition as non-Jews) that can enable them to be brought fully near – though *giyur*.

7th Example: The Scholars of Aleppo and the Challenge of "The Law of the Kingdom is the Law" in Matters of Real Estate

Halakhah obligates Jews to obey Torah law and not the laws of other faith communities. Until the 19th century all courts in the Ottoman Empire were religious ones. Under these conditions, the Jews in the Empire were directed by their rabbis to conduct their financial litigation in Torah courts, and not in the Muslim Shari'a courts.[61] In the 19th century the Ottoman Empire initiated

58 As a principle characterizing the entire Torah, see for example *Gitt.* 59b. As a directive to prefer halakhic interpretations that promote peace, see for example *Sukk.* 32a-b; *Yeb.* 15a; *Resp. Rabbenu Gershom Me'or Hagolah*, §31; *Resp*. Maharam of Rotenberg, part 4, §926 (Prague ed.); *Terumat Hadeshen*, part 1, §223.

59 *Bemidbar Rabba, parashah* 8 (Vilna ed.).

60 This verse is the midrashic basis of the famous statement that those who have repented (those who were "far" and came "near") are closer to God than the righteous (who were always "near"). See Rabbi Abbahu's dictum in *Sanh.* 99a and parallels.

61 It is important to differentiate between this principled demand and what was done in practice. Research in the archives of the Jerusalem Shari'a court from the 16th century onwards by Amnon Cohen and his colleagues has revealed that in fact Jews turned to the Shari'a court in a wide variety of matters. See Amnon Cohen, Elisheva Simon-Pikali, *et al*., *Jews in the Moslem Religious Court* (Jerusalem: Yad Ben Zvi, 1993-2003, 3 vols. [Heb.]). An important consideration leading Jews to this practice was the Shari'a court's power to enforce its decisions, which was considerably stronger than that of the rabbinical court.

extensive secular legislation and gradually reorganized the court system, granting extensive authority to newly established secular legal institutions at the expense of the various religious courts. An important example of this was the land registry law, enacted in 1858 for public land (*miri*) and expanded in 1874 also to private real estate (*mulk*). This law established, *inter alia*, that all real-estate deals must be registered at the land registry office (*tapu*) at which time a tax and other fees would be paid to the state treasury. The law implied that a deal not so registered would not be recognized by the Ottoman legal authorities.[62]

Jewish law holds that "the law of the kingdom is the law", thus recognizing the authority of non-Jewish state laws. In the Middle Ages and in modern times rabbis have been divided over the extent of the application of this rule; in any case, real estate was universally agreed to be a realm where *halakhah* recognizes state law.[63] Since the land registry law was a non-religious state law regarding real estate, one would expect Jewish scholars to consider it halakhically valid. Such a decision would mean a change of the former practice (that real estate transactions between Jews should be conducted only according to the rules of the relevant sections of the *Shulḥan 'Arukh Ḥoshen Mishpat*), to recognizing the new secular state legislation. Indeed, this was the initial response of Rabbi Yitsḥak Moshe Abulafia (1823-1910),[64] chief rabbi of Damascus in the last decade of the 19th century:

> In our times the king has legislated, for his own pleasure and benefit, with regard to all immobile property, that the purchaser or the beneficiary cannot be acknowledged as owner until the previous owner transfers ownership to him in the Registry of Properties and Tapu. And the king disqualified all other types of deeds, except for the Tapu deeds, as is known. That being so, the decree of the king cannot be rejected, and the law of the kingdom is the law (*dina demalkhuta dina*). And there is now no difference at all between [Ottoman] Law and [Torah] law.[65]

Similar or identical rulings on this matter were issued by leading rabbis of Jerusalem, Hebron, Safed, Izmir and Baghdad.[66] Against the background of these completely conventional decisions applying the rule "the law of the kingdom is the law", the position taken by the rabbis of Aleppo stands out in stark contrast. These rabbis completely rejected any halakhic recognition of the Ottoman land registry.

62 The literature on the 19th century Ottoman legal reforms is extensive. I have discussed these developments and rabbinic responses to them in my book *Masoret uTemurah* (Jerusalem: Yad Ben Zvi, 1993 [Heb.]). Regarding the Ottoman legal reforms noted above, see *ibid*., 145-149, 152-153.

63 See Shmuel Shilo, *Dina DeMalkhuta Dina* (Jerusalem: HaMakhon Leḥeqer Hamishpat Ha'Ivri, 1975 [Heb.]).

64 For Rabbi Abulafia, see Yaron Harel, *Bein Tekhakhim leMahapekhah* (Jerusalem: Makhon Ben Zvi, 2007), 143-235.

65 Rabbi Yitsḥak Abulafia, *Resp*. *Pnei Yitsḥak*, part 5 (Izmir, 1898), fol. 40c.

66 Zohar (*supra* n.62), 156-157, 162, 164-165, 170.

Their views are set forth in a communication by Rabbi Moshe Ben Yitsḥak Harari of Aleppo to Rabbi Abulafia in Damascus:[67]

> This ruling has not been accepted in Aleppo (may the Most High strengthen its Jewish community). For many continue to purchase by [halakhic] deeds alone, as well as [deeds] of benefit or lease, despite the fact that they were not registered in the Tapu or in the Registry of Properties. And they make deeds of Tapu only for [convenience of] evidence, as with the *hujjet*[68] previously. As a matter of fact, any person who holds a [halakhic] deed of purchase, the *Beit Din* [rabbinical court] forces the seller willy-nilly to register the property in the Tapu in the name of the purchaser, and they pursue him relentlessly [if he refuses to do so].
>
> I have heard that the honorable rabbis of Jerusalem and of Izmir [may the Most High strengthen those communities] fully accept the above position [=recognizing the Tapu as halakhically valid]. But the rabbis of Aleppo have yet to accept it in their minds: for if so, you will have negated most transactions based on Torah. And with regard to such, we do not say *dina demalkhuta dina*.[69]

The rabbis of the Aleppo halakhic court continued to attribute legal authority to the halakhic property laws, refusing to grant any halakhic status to the state registry. They viewed registration in the Tapu offices as a practical measure only, and when necessary they forced recalcitrant Jews to change the Tapu registration so that it would conform with their halakhic decision regarding ownership. The scholars of Aleppo did not even attempt to justify their praxis on formal halakhic grounds, as they were aware that halakhic sources and tradition recognize real estate matters as being under the realm of state law. Rather, they justified their position on the basis of halakhic policy: "surrender" to the new Ottoman legislation on this issue might lead to further capitulation and to the *de facto* annulment of most of halakhic real estate law.

When we consider this case from the perspective of halakhic teleology, we can see that the rabbis of Aleppo predicted that halakhic recognition of the Ottoman land registry would (from their point of view) lead to a very negative result. They fully recognized that there was a conflict between application of the standard *halakhah* that had been accepted since Talmudic times and assurance of the continued sovereignty of *halakhah* in the financial realm. These rabbis decided to prefer the desired result over the accepted law, and were therefore prepared to take a stand in opposition to that implied by halakhic tradition regarding the law of the state. Again we see, as in the case of Rabbi Ben Shim'on's ruling on suicide, that

67 Rabbi Moshe Ben Yitsḥak Harari was a member of the rabbinical court of Aleppo. In the 1890s he moved to Jerusalem, where he died in 1917. For a very brief biography see David Benzion Laniado, *Likedoshim Asher Ba'arets* (Jerusalem, 1980 [Heb.]), 41.

68 A *hujjet* is a document of certification issued by an Islamic court.

69 *Pnei Yitsḥak* (*supra* n.65) fol. 46d. *Hujjet* = deed of ownership from the Shari'a court.

teleological decisions are not necessarily more lenient ones.

Because teleological decision-making involves weighing and considering if and when general principles and values should override the application of standard *halakhah*, there are no definite rules about the matter, and disagreements between rabbis as to whether to reject standard *halakhah* for the realization of specific goals is entirely possible. In this case the rabbis of Aleppo managed to convince the rabbis of Damascus to reverse their previous stance favoring the state land registry, but the other rabbis of the Ottoman Empire were not at all convinced. Thus, Rabbi Raḥamim Franco[70] of Hebron wrote to the scholars of Aleppo regarding their position on the land registry law:

> This information [regarding the policy of the scholars of Aleppo] is new to me, and anyway […] certainly Jewish judges cannot rule against the laws of the state, and if they do they will heap blame upon their head, God forbid […] no Jewish judge under the government of our exalted king can protest against a person who seeks litigation according to government law.[71]

Rabbi Yosef Ḥayyim of Baghdad[72] wrote in a similar vein to Rabbi Abulafia, after the latter had adopted the Aleppo position and declared that only in Europe were Jews permitted to invoke "the law of the kingdom is the law" in matters of property:

> In our city [Baghdad] and its surroundings, everyone conducts themselves in accordance with the government's laws and customs, as specified in the Qanun [civil law] of our exalted king […] Thus, we in our city and its surroundings, which is ruled by the Ottoman empire, have made this our praxis, and we have become [regarding this aspect of *halakhah*] like the Jews of Europe, [in that] we halakhically follow the laws and customs of our exalted king. I don't see why your honour's [Rabbi Abulafia's] city should be different from all others and buy and sell by halakhic laws and Jewish witnesses. Why, are you not under the authority of the Ottoman government? What then is the difference?[73]

Rabbi Abulafia was not at all impressed by the words of the great Baghdadi rabbi, and he replied:

> If in your city they behave thus, it is not in accordance with the laws of the Torah, as I wrote above […] this must be because the generation is lacking and prefers

70 Rabbi Franco (1835-1900) was born in Rhodes, moved to Israel in 1868 and lived in Hebron and Jerusalem. For more about him see *Encyclopedia of the Scholars of the Land of Israel* (Jerusalem: Mossad Harav Kook, 1975), III, 52 (Heb.).

71 Rabbi Raḥamim Yosef Franco, *Resp*. *Sha'arei Raḥamim*, fol. 90b.

72 Rabbi Yosef Ḥayyim (1835-1909) was the greatest Iraqi rabbi in modern times.

73 Rabbi Yosef Ḥayyim is quoted in *Pnei Yitsḥak* (*supra* n.65), fol. 150d.

> wantonness. Of this it is written "the Torah will be forgotten by the Jews".[74] It is not the custom of the pious of yore, and we will not obey it.[75]

Great, eminent rabbis of the Ottoman empire apply the teachings of the Talmud and grant halakhic validity to the state law in matters of real estate, in accordance with the rule that "the state's law is the law" – and the rabbi of Damascus characterizes them as people who prefer wantonness, who make Jews forget the Torah and who act against Torah! Clearly, to those who adopt a teleological perspective, the goals that embody the true values of the Torah can seem so obvious that they regard those who rule according to standard *halakhah* as undermining the existence of Torah law.

The Stages of Teleological Decision-Making

Step 1: Establishing That a Standard Halakhic Ruling is Unacceptable

Analysis of the above-cited examples raises some general issues that deserve attention. In discussing the stages of a teleological ruling, it must be noted at the outset that the decisive stage of such a ruling is the recognition by a halakhic scholar that the consequence of applying the standard ruling to the case at hand will be (or already is) unacceptable. Without such recognition there is no teleological ruling, but once this stage has occurred, teleological ruling follows almost necessarily.

I wrote "almost necessarily" since there are several cases in classic halakhic literature where rabbis admitted that a certain halakhic state of affairs is ostensibly unacceptable, and yet they refrained from changing it. A clear example of this can be found in the *midrash* on the words of Ecclesiastes (4:1) "Behold the tears of such as were oppressed, and they had no comforter; and on the side of their oppressors there was power; but they had no comforter". Daniel the Tailor interpreted this verse as regarding *mamzerim*:[76]

> "Behold the tears of such as were oppressed" – their fathers are sinners and these poor souls, what concern is it of theirs? This man's father had illicit sex, but he, what has he sinned and what concern is this of his?
> "They had no comforter" but rather: "on the side of their oppressors there was power" – on the side of the Great Sanhedrin of Israel that came upon them with the authority of the Torah and drove them out because "A *mamzer* shall not enter into

74 See *Shab.* 138b.

75 *Pnei Yitshak* (*supra* n.65), fol. 151d.

76 A *mamzer* is a child of an adulterous or incestuous union.

the congregation of the LORD". And "they had no comforter".[77]

This daring *midrash* states that preventing those of illegitimate birth from joining the congregation is "oppression", a morally unacceptable action, and that this oppression is the result of a decision by rabbinic scholars; the Sanhedrin here does not act to change the unacceptable result, but actually creates it.[78]

Be that as it may, I brought this *midrash* as an exception to the rule. In fact, many rabbis throughout the generations have done all they could to avoid designating a person as a *mamzer*, even when circumstances made it very hard to claim that the newborn was fruit of a non-taboo union.[79] Generally speaking, the very recognition by a scholar that a particular halakhic result is unacceptable creates pressure that is hard to withstand to change the ruling – pressure which the scholar himself does not wish to withstand.

It should be stressed here that such recognition does not invariably take place, and it may well be that some rabbis always ruled "by the book", never having felt that the results of any standard ruling were unacceptable. It appears that this would depend largely on the education and world view the rabbi received from his teachers and the atmosphere of the Jewish and universal cultures that shaped his world. One of the necessary ingredients of such a world view, without which teleological decision-making cannot exist, is a hierarchical view of *halakhah* and of Judaism.

A Hierarchical View of *Halakhah* and of Judaism

Above I wrote of the recognition by a scholar that a particular halakhic consequence is unacceptable. In other words, the rabbi considers such a result to contradict values and principles whose status and authority override the obligation to follow the standard ruling. The existence of such "overriding" values or principles that can block the application of a standard norm presumes a hierarchical view of *halakhah* and of Judaism. I suggest that four levels of hierarchy can be perceived:

1. The existing halakhic praxis, i.e., what was normally done by the relevant members of the Jewish community in the situation under discussion.

77 *Kohelet Rabba* 4:1 and *Vayikra Rabba* 32 (Vilna ed.). In M. Margaliot (ed.), *Vayikra Rabba* (Jerusalem: American Academy of Jewish Studies, IV, 1958), the tradent is Hanina the Tailor.

78 Daniel the tailor might be hinting at the possibility that an alternative interpretation of "shall not enter into the congregation" could prevent the injustice done to *mamzerim*: consider what might have happened if the rabbis would have understood this phrase according to its apparent meaning in *Lam*. 1:10: "they should not enter into thy sanctuary" (the Temple in Jerusalem).

79 On *halakhah's* approach to *mamzerim*, see Avi Sagi, *Judaism Between Religion and Morality* (Tel Aviv: Hakibbutz Hameuchad, 1998), 241-255 (Heb.).

2. The specific written *halakhah* that relates to such situations
3. The *telos* (purpose or rationale) of this specific *halakhah*.
4. The overall aims or values of the *halakhah* or the Torah.

Not all these four levels are evident in every halakhic deliberation. I will try to clarify the notion of these four levels by referring to some of the cases I discussed above. In the fourth example (*kiddush* in the synagogues of Alexandria) the halakhic practice (level 1) was not to say *kiddush* in the synagogues on Friday night. The *halakhah* behind this practice (level 2) was the ruling of Rabbi Yosef Karo in the *Shulḥan ʻArukh*. The *telos* of Rabbi Karo's ruling was to prevent the recitation of an unnecessary and inappropriate *kiddush* (i.e., not at the site of the meal), because such recitation would entail taking the Lord's name in vain.[80] The relevant overall aim of the *halakhah* or of the Torah (level 4) is marking the sanctity of the Shabbat by recital of *kiddush*, *inter alia*. Another value (level 4) mentioned by Rabbi Ḥazan is bringing marginalized Jews (foreign, lacking in Jewish education, the young children of the uneducated and single women) closer to traditional life. Rabbi Ḥazan's position was that the realization of these overall aims and values should supersede adherence to what had been the halakhic practice in Alexandria and to the written ruling of the *Shulḥan ʻArukh* against reciting *kiddush* in the synagogue.

The third example (stopping the suicide "epidemic" in Cairo) is more complex. The existing halakhic practice was to bury those who committed suicide in the normal manner. This practice was itself contrary to the formal rules stated in written *halakhah* (level 2), which reflected harsh attitudes toward suicide; the *telos* of these written rules (level 3) is to express distaste towards and rejection of the act of suicide. The accepted practice was thus contrary to the formal *halakhah* "on the books" and to its *telos*; that practice seems to have been the result of teleological decisions by halakhic scholars, who preferred to assign greater value to the dignity of the living (level 4), i.e. of the surviving family, than to rejection of the deceased's actions. Rabbi Raphael Aharon Ben Shimʻon believed that in the new situation in Cairo following the wave of suicides, the value of preventing future suicides (level 4) by discouraging those considering suicide outweighed the consideration of the families' dignity. Note that in this case we face the problem of conflicting overall values, all of which I have designated as part of the fourth level. Are there clear rules that regulate the hierarchy of overall values? In my opinion it is hard to answer this in the affirmative. In any case, the subject merits further research, and here I can only direct attention to the question.

80 In other words, according to Karo, one cannot argue that if Kiddush is not required, what harm is there in reciting it? For the text of the Kiddush includes God's name, and mentioning His name unnecessarily is prohibited. Indeed, Karo's general view is that refraining from taking God's name in vain is an overriding concern (and hence his general ruling *safek berakhot lehakel*).

The seventh example (the scholars of Aleppo and the land registry) is very interesting. The halakhic practice (level 1) was to litigate matters of real estate in a Jewish court rather than in a Muslim one,[81] in accordance with the *halakhah* (level 2) of not turning to courts of other religions. The *telos* of this specific *halakhah* (level 3) was not to grant legitimacy to other religions. But a historic change took place: secular Ottoman laws instituted the land registry and gave it the authority for land registration. In these circumstances the relevant halakhic norm (level 2) was "the law of the state is the law". This norm required a change in practice (level 1) and halakhic recognition of the land registry's authority. All this was agreed upon by all Jewish scholars in the Ottoman empire; indeed, most of them changed their practice and halakhically recognized the land registry. The rabbis of Aleppo chose a different route. They ruled that this outcome was unacceptable and therefore the rule that "the law of the state is the law" should not be applied; rather, the current practice should continue. Their ruling was explained by what functions here as an overall goal of Torah (level 4), the idea that one must not bring about the overriding of "most transactions based on Torah". They cited no source text for this principle, and none of the great rabbis with whom they were in correspondence indicated awareness of any such source.[82] The rabbis of Aleppo, then, defined a value that seemed to them "obvious" – and, relying upon it, they refused to change halakhic practice (level 1), even when this change would seem to follow necessarily from the (level 2) rule that "the law of the state is the law". Thus, this case is another example of the problematic noted above, i.e., the highest hierarchical level (level 4) is not characterized by clear order and unambiguous formulation.

Step 2: Formulating the Desired Result

The determination that the standard halakhic outcome is unacceptable in the case at hand obligates the rabbi to formulate the desired result or halakhic norm. One way to do this, of course, would be by passing an ordinance (or *haskamah* in the parlance of Sephardi and middle-eastern rabbis) that creates a new norm. However, as I mentioned earlier, this article does not deal with such ordinances. How then is an alternative halakhic result achieved without an ordinance?

From the examples we have discussed it seems that halakhic decision-makers

81 This was the practice in many cases, though it was not observed strictly by all. See *supra* n.45.

82 There are sources that employ a similar principle to constrain wholesale importation of non-halakhic norms into halakhic legal deliberations in a manner that would effectively overwhelm and almost completely replace the "native" norms of *halakhah*. See, e.g., *Resp. Rashba* 3, §109; *Siftei Kohen* on *Ḥoshen Mishpat* 73 (§39). However, these sources do not deny the applicability of "the law of the kingdom" to those realms that *halakhah* does recognize as being under state jurisdiction – and, as I noted (*supra* n.63, based on Shilo), real estate is one such realm.

have a strong tendency to select the desired result from the spectrum of norms extant in the relevant halakhic literature, either on the level of practice (level 1) or that of written norm (level 2). The wealth and variety of options embedded in generations of halakhic literature offers the rabbi who searches for a non-standard decision a variety of choices; the wider his knowledge of the literature, the more freedom he has.[83] I will demonstrate this by reference to the examples above: after Rabbi Eliyahu Mani identified the application of standard Sephardi *halakhah* regarding "public domains" as unacceptable (for the current situation in Bombay) he searched for a ("Sephardi"!) alternative, and found it thanks to his familiarity with a recently published and little known book (level 2) by the Alexandrian scholar Moshe Pardo. After Rabbi Mesas decided that the standard ruling regarding the definition of "public violators of Shabbat" was unacceptable because of its current implications ("we would not be allowing life"), he chose an alternative interpretation that very much narrowed the application of that definition. This interpretation was based on the writings of a little known 18th century Ashkenazi rabbi and on Mesas' original interpretation of an unusual and strange assertion in the *Sefer Ha'Ittur*. Similarly, an independent interpretation of mainstream halakhic sources (level 2) provided scholars Moshe HaCohen (5th example – *giyur* in modern Israel) and Binyamin Ohana (6th example – acceptance of the Karaites) with an appropriate alternative to the standard ruling. Rabbis Ḥazan (*kiddush* in synagogues) and Ben Shim'on (fighting suicide) employed precedents that were not conventionally relied upon to offer appropriate alternatives to unacceptable standard solutions.

In other words, the desired result is reached by selecting an appropriate option from within the range of norms already "existing" in halakhic literature. However, this can happen in two different ways: the first – choosing a (previously) marginalized opinion; the second – "finding" such an opinion in the heart of the consensus by providing a new interpretation of well-known and central sources. The one striking exception is the case of the scholars of Aleppo and the land registry. Their ruling that the registry office must be ignored rests neither on a marginal opinion within halakhic literature nor on a new interpretation of a central text. Citing no sources, they "simply" ruled that because of the unacceptable consequences of recognizing the halakhic implications of Ottoman law, this must not be done and the existing practice must remain unchanged. This (non) "argument" stunned the other rabbis of the Ottoman empire – but the rabbis of Syria (for example Rabbi Abulafia) did not hesitate to characterize the other rabbis of the empire as not acting in accordance with the Torah and as people who "prefer wantonness". In my opinion, the fact that halakhic decisors who regard themselves

[83] This was noted also by Rabbi Yosef Ḥayyim of Baghdad in the preface to his *Resp. Rav Pe'alim;* see my discussion of his view in the third chapter of *He'iru Penei HaMizraḥ* (*supra* n.7).

as operating within the realm of halakhic discourse could take a position like that of the scholars of Aleppo, without recourse to any precedent and without legislating an ordinance, raises many interesting questions about the limits of halakhic decision-making. These matters deserve extensive discussion, but this is not the place for that.

Conclusion

At the beginning of this paper I distinguished between different types of teleological decision-making based on the range of the desired purpose: affecting the entire halakhic system, affecting a specific realm or affecting a particular case. Most of the paper focused on the third type, bringing detailed examples from the work of seven Sephardi-Oriental halakhic scholars of recent generations. After individually analyzing each example, I offered some general remarks that to my understanding follow from these examples. First, I indicated that recognition of the standard halakhic result as unacceptable is the critical moment in teleological ruling, and I suggested that the capacity to do so stems from the scholar's education and cultural environment. Second, I asserted that in order to understand and analyze the phenomenon of teleological decision-making, it is useful to posit a model of four levels in *halakhah*. Third, I pointed out that in formulating an acceptable alternative to the standard ruling, halakhic scholars go one of two ways: the first – locating a marginalized or rejected opinion and applying it to the case at hand; the second – providing an original interpretation of a central halakhic source.

I hope that analysis of the phenomena presented in this paper will encourage others to further consider these issues, so the study of the general characteristics of *halakhah* will advance not on the plane of abstract or declarative principles, but through a careful examination of the implications of many concrete empirical cases.