

HALACHIC AND HASHKAFIC ISSUES IN CONTEMPORARY SOCIETY

SERIES 2: 58 - SUBJECTIVITY & OBJECTIVITY IN HALACHA

1 - FOUNDATIONS

OU ISRAEL CENTER - SPRING 2023

- Halacha is primarily a legal system and, as such, aims to establish objective, rather than subjective principles.
- On the other hand there is always an element of subjectivity in the person presenting the she'ela and the specific circumstances of the halachic scenario.
- There will also be an inevitable (acceptable? desirable?) element of subjectivity in the character of the posek deciding the halacha - their training, personality and meta-halachic and hashkafic context.
- Secular law often aims to set objective standards - the proverbial ordinary and reasonable 'man on the Clapham omnibus'.¹ On the other hand, secular law is not a natural phenomenon; rather, it is shaped by social, political, and cultural forces.
- Over the next few shiurim we will examine certain topics which highlight aspects of objective and subjective approaches in halacha, such as the mitzva of *begeed ish*, the question of smoking (especially on Yom Tov), the issue of habituation in sexual prohibitions and the concept of Dat Yehudit in the mitzva of tzniut.

A] THE MECHANICS OF PSAK

1. Hora'ah is comprised of two elements: *pesak* and *pesika*, respectively. The former refers to codification, the formulation of the law pertinent to a given area; and it is most characteristically manifested in the adoption, on textual or logical grounds, of one position in preference to others. As such, it is, essentially, the concluding phase of the learning process proper, whether on a grand or a narrow scale, and its locus is the bet midrash.
Pesika, by contrast, denominates implementation. It bespeaks the application of what has already been forged in the crucible of the learning experience to a particular situation. It does not entail the definitive postulation of the law governing a delimited area or its detail, but, rather, the concurrent and coordinate meshing of all aspects, possibly drawn from widely divergent spheres, obtaining in a concrete situation. Its venue is, publicly, the bet din or, privately, the meeting of inquirer and respondent. It does not necessarily demand of the posek that he take a stand or break fresh ground. Its challenge lies in the need to harness knowledge and responsibility at the interface of reality and halacha.

The Human and Social Factor in Halacha Tradition Journal 36:1 p3-4

- We need to consider objectivity and subjective in BOTH of these processes.

B] HOW OBJECTIVE IS THE PROCESS OF PSAK?

B1] THE OBJECTIVITY OF HALACHIC PRINCIPLES

2. תא שמע דאמר ריש לקיש - טב למיתב טן דו מלמיתב ארמלו.

במות קיח:

In a number of places, Chazal make the statement - 'tav lemeitiv tan du' - a woman would prefer to be married (even under difficult circumstances) than remain single. Is this a sociological observation of their times or a halachic reality independent of social context?

1. Coined by Sir Richard Henn Collins MR in the 1903 English Court of Appeal libel case, *McQuire v. Western Morning News*, [1903] 2 K.B. 100 at 109 per Collins MR. More recently, Lord Reed in the UK Supreme Court (*Healthcare at Home Limited v. The Common Services Agency* [2014] UKSC 49) commented: "The Clapham omnibus has many passengers. The most venerable is the reasonable man, who was born during the reign of Victoria but remains in vigorous health. Amongst the other passengers are the right-thinking member of society, familiar from the law of defamation, the officious bystander, the reasonable parent, the reasonable landlord, and the fair-minded and informed observer, all of whom have had season tickets for many years."

3. This has absolutely nothing to do with the social and political status of the woman in antiquity. The chazaka is not based on sociological factors but on a [verse] in Bereishit "and your desire shall be to your husband" ... It is not a psychological fact, it is an existential fact ... To say that 'tav lemeitiv tan du milemeitiv armelu' was due to the inferior political or social status of women at that time is simply misunderstanding the chazaka ... Not only the halachot but also the chazakot [of our Sages of blessed memory] introduced are indestructible. You must not tamper, not only with the halachot, but even with the chazakot. For the chazakot spoke ... not upon transient psychological behavioral patterns, but on permanent ontological principles rooted in the very depths of the metaphysical human personality, which is as changeless as the heavens above

"Surrendering to the Almighty" - an address delivered by Rav J.B. Soloveitchik to the Rabbinical Council of America in Nov 1975 - printed Jewish Press Oct 16 1998, p32²

Rav Soloveitchik was of the view that this principal is an existential halachic fact, not a social construct³.

4. Objectification⁴ reaches its highest expression in the *halacha*. *Halacha* is the act of seizing the subjective flow and converting it into enduring and tangible magnitudes. It is the crystallization of the fleeting individual experience into fixed principles and universal norms. In short, halacha is the objectifying instrument of our religious consciousness, the form-principle of the transcendental act, the matrix in which the amorphous religious *hylo* is cast.

Halachic Mind - Rav J.B. Soloveitchik p. 85

• For Rav Soloveitchik, objective forms of halacha can then be used to create three types of religious subjectivity:

- (i) philosophical concepts, or components of a word perspective;
- (ii) elements of the religious experience, and particularly the inner experience of mitzvot.⁵
- (iii) halachic values;

5. וְעִשְׂתִּי הַיָּשָׁר וְהַטּוֹב בְּעֵינֵי ה' לְמַעַן יִיטֵב לָךְ וּבָאתָ וְיִרְשָׁתָּ אֶת הָאָרֶץ הַטֹּבָה אֲשֶׁר נִשְׁבַּע ה' לְאַבְרָהָם.

דברים ו:יח

6. ולרבותינו ז"ל מדרש יפה – אמרו 12 פשרה ולפנים משורת הדין. וכמונה ז"ל, כי מתחלה אמר שתשמור חקותיו ועדותיו אשר נאמר, ועתה יאמר גם כאשר לא נאמר תן דעתך לעשות הטוב והישר בעיניו, כי הוא אורח הטוב והישר. וזה ענין גדול, לפי שאי אפשר להזכיר בתורה כל הנהגות האדם עם שכניו ורעיו וכל משאו ומתנו ותקוני הישוב והמדינות כלם, אבל אחרי שהזכיר מהם הרבה, כגון לא תלך רכיל, לא תקום ולא תטור, ולא תעמוד על דם רעך, לא תקלל חרש, מפני שזוהי תקום, וכיוצא בזה, חזר לומר דרך כלל שיעשה הטוב והישר בכל דבר, עד שיכנס זוהי הפשרה ולפנים משורת הדין.

רמב"ן שם

The Ramban explains that, although the Torah includes hundreds of mitzvot and thousands of details, it could not possibly legislate specifically for every case in every time and place. It therefore includes this general mitzva bein adam lechavero which requires us to be fair and honest and use our moral and ethical judgement to derive halachic values which will apply in other circumstances.

7. וְדַבֵּר אֶל כָּל עַדְת בְּנֵי יִשְׂרָאֵל וְאָמַרְתָּ אֲלֵהֶם קְדָשִׁים תִּהְיוּ כִּי קְדוֹשׁ אֲנִי ה' אֱלֹהֵיכֶם.

ויקרא יט:ב

8. והענין כי התורה הזכירה בעריות ובמאכלים האסורים והתירה בהיחל איש באשתו ואכלית הבשר והבין, א"כ ימלא בעל התאור מקום להיות שטוף בזמת אשתו או נשיו הרבות, ולהיות בסובא יין בזוללי בשר למו, וידבר כרצונו בכל הנבלות, שלא הוזכר איסור זה בתורה, והנה יהיה נצל צרשות התורה: לפיכך בא הכתוב, אחרי שפרט האיסורים שאסר אותם לגמרי, ולזה דבר כללי שנהיה פרושים מן המותרות וזה דרך התורה לפרוט ולכלול בכיוצא בזה, כי אחרי אזהרת פרטי דינינו.... אמר בכלל ועשית הישר והטוב וכן בענין השבת – אסר המלאכות בליל והטרחים צעקה כללי שנאמר 'תשבות'.

רמב"ן ויקרא יט:ב

This is a parallel statement of the Ramban relating to the mitzva of 'kedoshim tihyu' and mitzvot bein adam lemakom. A person might be a gross glutton and get drunk all day eating kosher meat and drinking kosher wine and never technically break any mitzvah. Kedoshim tihyu comes to teach that we have an overriding obligations to follow the spirit of the law.

2. My emphasis. Note - this is NOT the only approach to 'tov lemeitiv' and the agunah issue.

3. An important read on Rav Soloveitchik's approach to objectivity and subjectivity in halacha is Chapter 31 of R. Reuven Ziegler's work *Majesty and Humility* (2012). R. Ziegler writes (p335) that "we do not asked 'why' these objectified concepts are as they are, nor do we seek their antecedent causes. Since religion is an autonomous domain, to find a 'cause' would be to subordinate the religious concept to some other, foreign domain. Moreover, we cannot retrace the original subjectivity that gave rise to objective religious concepts and phenomena. Instead, reconstruction accepts the objective data as they are, asking 'what' they entail and what ideas emerge from them".

4. R. Ziegler writes that, for Rav Soloveitchik, "isolating religion's objective elements is therefore a two-step process. First the inquirer must gather all the crystallized, objectified forms of religious consciousness, such as texts, norms, rituals, doctrine and prayers; second, the inquirer must subject these to rigorous, creative analysis so as to draw out and define their conceptual principles (p 334-335).

5. See *Majesty* p 336 and R. Ziegler's expansion of these ideas.

- As such, the methodology of the Torah is to supplement the details of mitzvah with Torah 'meta-principles' which provide the context and backdrop to our practice of the mitzvot generally and set the 'spirit' of the law, enabling the formulation of halachic values.
- For Rav Soloveitchik, the rooting of halachic values in the details of the halacha itself is an even more important source than the midrashic discussions in Chazal which outline hashkafic values and priorities.

(iii) elements of the religious experience, and particularly the inner experience of mitzvot.⁶

9. there is only a single source from which a Jewish philosophical *Weltanschauung* could emerge: the objective order - the Halakha.

Halachic Mind - Rav J.B. Soloveitchik p. 101

10. There is no direct approach to pure religious subjectivity. Objective forms must be postulated as a point of departure, and by moving in the minus direction, one may gradually reconstruct underlying subjective aspects. Objectivity explored in retrospect yields subjectivity; other methods are fruitless.

Halachic Mind - Rav J.B. Soloveitchik p. 81

11. קודשא בריך הוא אסתכל באורייתא וברא עלמא. בר נש מסתכל בה באורייתא ומקיים עלמא ...

זוהר כרך ב (שמות) פרשת תרומה קסא:

One element of the objective reality of halacha is connected with a mystical idea found in the Zohar that the Torah pre-existed the world and God used the Torah as a blueprint for the world. As such, Torah does not reflect the world but rather the physical world is a reflection of the reality of Torah

- Nevertheless, Rav Soloveitchik did not view the process of pesika as an entirely objective one - we will address this below.

B2] THE ROLE OF CHIDDUSH IN REACHING PSAK

- In the model presented above, there are two phases to reaching an objective psak:
 - Gathering the relevant sources. This has a high degree of objectivity since they are usually presented equally to all, usually in texts.
 - Creative analysis to define the conceptual principles and apply them to specific cases. This is a less objective process, and different poskim will bring different meta-halachic tools to that process.

12. חמשה תלמידים היו לרבן יוחנן בן זכאי ואלו הן - רבי אליעזר בן הורקנוס, ורבי יהושע בן חנניה, ורבי יוסי הכהן, ורבי שמעון בן נתנאל, ורבי אלעזר בן ערך. הוא היה מונה שבחן - רבי אליעזר בן הורקנוס בור סיד שאינו מאבד טפה ורבי אלעזר בן ערך מעין המתגבר. הוא היה אומר אם יהיו כל חכמי ישראל בכף מאזנים ואליעזר בן הורקנוס בכף שניה מכריע את כולם. אבא שאול אומר משמו אם יהיו כל חכמי ישראל בכף מאזנים ורבי אליעזר בן הורקנוס אף עמהם ורבי אלעזר בכף שניה מכריע את כולם.

משנה אבות פרק ב משנה ח

The Mishna in Avot contrasts two styles of Torah greatness - R. Eliezer, the sealed cistern that never loses a drop and R. Elazar b. Arach, the ever-flowing spring. The Mishna consciously avoids ruling on which of these is more valuable.

13. תנו רבנן: מעשה ברבי אליעזר ששבת בגליל העליון ושאלוהו שלשים הלכות בהלכות סוכה. שתיים עשרה אמר להם שמעתי, שמונה עשר אמר להם, לא שמעתי. אמרו לו: כל דברך אינן אלא מפי השמועה? - אמר להם: הזקקנוני לומר דבר שלא שמעתי מפי רבותי?! ולא אמרתי דבר שלא שמעתי מפי רבי מעולם.

סוכה כח.

R. Eliezer represented an aspect of Mesora which was rooted in faithful transmission and not innovation. He would never say anything in Torah which he not heard and received from his teachers.

14. תנו רבנן: מעשה ברבי יוחנן בן ברוקה ורבי אלעזר חסמא שהלכו להקביל פני רבי יהושע בפקיעין. אמר להם: מה חידוש היה בבית המדרש היום? אמרו לו: תלמידך אנו, ומימך אנו שותין. אמר להם: אף על פי כן, אי אפשר לבית המדרש בלא חידוש.

חגיגה ג.

However, R. Yehoshua championed 'chiddush' in halacha.

6. See *Majesty* p 336 and R. Ziegler's expansion of these ideas.

15. באותו היום השיב רבי אליעזר כל תשובות שבעולם ולא קיבלו הימנו. אמר להם: אם הלכה כמותי - חרוב זה יוכיח חזר ואמר להם: אם הלכה כמותי - מן השמים יוכיחו. יצאתה בת קול ואמרה: מה לכם אצל רבי אליעזר שהלכה כמותו בכל מקום! עמד רבי יהושע על רגליו ואמר: לא בשמים היא! אשכחיה רבי נתן לאלהו, אמר ליה: מאי עבד קודשא בריך הוא בההיא שעתא? - אמר ליה: קא חיך ואמר נצחוני בני, נצחוני בני.

בבא מציעא נט:

Rabbi Eliezer here famously tried to bring the most objective truth (God) to the halachic process by bringing a proof for his opinion from a Bat Kol. This was rejected by Rabbi Yehoshua who insisted on the right of the human posek to apply a human (and by definition more subjective) approach.

16. כל ימיו של רבי אליעזר היו עושין כרבי יהושע משום דרבי אליעזר שמותי הוא (תוספות - ופירש ר"ת ורש"ז"ס דשמותי הוא כיינו דכוח מתלמידי שמאי)

נדה ז:

The rejection of R. Eliezer is rooted in his origins in Beit Shammai. R. Yehoshua came from Beit Hillel.⁷

17. דרב יוסף סיני (רש"י - שכיח בקי צרייתות כרצו) ורבה עוקר הרים (רש"י שכיח מחודד יותר צפלו). אצטריכא להו שעתא, שלחו להתם: סיני ועוקר הרים איזה מהם קודם? שלחו להו: סיני קודם, שהכל צריכין למרי חטיא.

ברכות סד.

Later, within the scope of accepted normative halacha, these too approaches are represented by 'Sinai' and 'Oker Harim'.

• The Netziv (in Kidmat Haemek) analyses of the ebb and flow of chiddush vs mesorah over the history of the Jewish people through the dynamic of AISH-DAT⁸. Aish is the process of chiddush and Dat is the process of masoretic consolidation and transmission.⁹

B3] CHIDDUSH -VS- SHINUI

18. רבי אליעזר המודעי אומר והמגלה פנים בתורה שלא כהלכה אף על פי שיש בידו תורה ומעשים טובים אין לו חלק לעולם הבא.

אבות ג'יא

Pervverting the course of halacha is one of the most serious sins, for which one loses one's place in Olam Haba!

19. Judaism allows for chiddush, innovation, but not shinuy, change. Despite this emphasis on tradition, Judaism is not frozen in place [see Halakhic Man, Part Two]. Minor practices, such as the design or color of a synagogue's parochet, can change easily. Rules that are more rigid must also respond appropriately to changed circumstances. Someone committed to the *mesorah* must inquire of his *rebbe muvhak* to learn when and how to change practices while remaining within traditional attitudes and patterns of behavior.

Just like science progresses, so too halachah advances. The midrash states, "There is no day in which God does not innovate a halachah in the Heavenly court" (Bereishit Rabbah 49:2). Similarly, *Yalkut Shimoni* (Shoftim 49) explains the verse "*Yivchar elohim chadashim*" - they chose new gods" (Judges 5:8) as "*Yivchar Elokim chadashim*" - God chooses new, that God appreciates Torah innovations. The Rav would often say that Judaism allows for chiddush - innovation, but not shinuy - change. [See Halakhic Mind, n. 98; And From There You Shall Seek, p. 108.]

Not every chiddush, however, is acceptable. *Tosafot* (Pesachim 50b, s.v. ve'kam) note a contradiction between two Talmudic passages. The gemara in *Pesachim* (50b) states that one should learn Torah even without the proper motivation, because from doing so he will eventually arrive at the proper motivation. In contrast, the gemara in *Berachot* (17a) states that he who studies Torah with the wrong motivation would have been better off never having been born. The Netziv (Meishiv Davar 1:46 and other places) resolves this contradiction by explaining that learning extant Torah without issuing a new ruling or an innovative interpretation is certainly permissible, even a mitzvah, regardless of motivation. After all, he is learning Torah. However, chiddushei Torah, creating new interpretations, requires the proper motivation and, if done with the wrong intentions, is spiritually poisonous because the practitioner biases his judgment toward his personal desires.

7. Hillel himself championed the use of hermeneutic principles as part of the creativity of halachic psak. This may also reflect a different in approach between the academies in Bavel (Hillel) and Eretz Yisrael (Shammai).

8. From Devarim 33:2 - ואמר ה' מסיני בא וזרח משעיר למו הופיע מבאר פארן ואתה מרבבת קדש מימילא אשדת [אש דת] למו: -

9. For a summary of the Netziv's thesis see http://www.hashkafacircle.com/journal/R3_RS_AishDat.pdf

The Netziv continues that this applies not only to new interpretations but also to innovations in practice. When one performs a mitzvah, even with improper motivation, he has at least performed an incontrovertible mitzvah act. When one creates a new practice, however, if his intention is not entirely proper then there is nothing by which to establish the practice as a mitzvah. It is not a mitzvah act but a subterfuge for an agenda.

Rav Herschel Schachter - Jewish Action Vol 71 #2¹⁰

B4] INTERNAL AND EXTERNAL DRIVES TO CHIDDUSH

20. Though the Torah is God-given, halacha is neither static nor stagnant; rather it demands human involvement. Active study and participation in deriving the halacha from the Rabbinic sources are fundamental components of the halachic process. These endeavours often produce unexpected conclusions - this is the essence of *chiddush*.

A variety of factors, both internal and external to halachic texts, drive intellectual innovation. Every legal system inherently requires study and interpretation, which lead to incremental changes within the law. As more study occurs, further understanding of and approaches to the law are developed and, ultimately, the law undergoes more change. Partly as a result of the religious responsibility to study and understand Jewish law that is embraced by its adherents, Jewish law has undergone an intensely deep and broad investigation and exploration. Jewish law contain a large corpus of complex laws, including ambiguous and inconclusive primary texts, and a multiplicity of approaches to understanding its concepts. Against the backdrop of these and many other factors, the *posek* seeks to understand and apply the law..... External factors that drive *chiddush* include changes in society, technology and economic conditions. As reality changes, the principles of a particular halacha must be analyzed again and appropriately applied to the new situation.

While poskim universally aim to explore the concepts behind rules, their approaches differ. For example, when faced with a contradiction - between two sources, among several commentaries, or between practice and law - *poskim* exhibit two primary approaches: "harmonization", where a *posek* re-reads the text(s) to minimize and resolve contradictions, and "ruling" where a *posek* simply accepts one opinion over another. Of course, some *poskim* stake out a middle ground, at times using each of these two methods, leading to a more complex understanding of the law

Innovation in Jewish Law - A Case Study of Chiddush in Havineinu (Michael J Broyde 2010 Urim Publications pp133-134)

21. Clearly, interpretation is inherent within halacha; it is a necessary and natural process, not a conscious, unbounded act of modification

ibid p136

- See the Appendix for a longer piece by Rav Soloveitchik on the importance and limitations of chiddush in halachic psak

B5] 'ITMAR HILCHATA' vs 'HALACHA KEBATRAI' - THE ABILITY OF LATER RABBIS TO ARGUE ON EARLIER

- The principle of 'Chatimat HaShas' - that later poskim may NOT argue on the conclusions of the Talmud - is fundamental to the halachic process. However, this potentially means that every halachic ruling AFTER the Shas is in principle capable of being overruled by a later authority, as long as that later authority does not reject the psak of the Talmud.

22. מיהו י"א דאס נראה לדיין ולצני דורו מכה ראיות מוכרחות שאין דיין כמו שהזכר בפוסקים יכול לחלוק עליו מאחר שאינו נזכר בגמרא (מור נשם הרא"ש). (ביאור הגר"א - דעל הגמ' אין רשות להוסיף ולא לגרוע כ"ש לחלוק כמ"ש בפ' הפועל' - רבינא ורב אשי סוף הוראה').

רמ"א שולחן ערוך חושן משפט הלכות דיינים סימן כה סעיף א וביאור הגר"א שם

This is the approach of the Rema who rules that later authorities may indeed argue with earlier one, at least in principle.

23. מעשה ועשה רבי כר' אליעזר, לאחר שזכר אמר: כדי הוא ר' אליעזר לסמוך עליו בשעת הדחק. מאי לאחר שזכר? ... דלא איתמר הילכתא לא כמר ולא כמר.

נדה ט:

10. http://www.ou.org/index.php/jewish_action/article/76593/

However, Chazal also introduce a concept of 'itmar hilchata' - 'the halacha has been stated'. This means that, in some cases where an earlier authority has issued a ruling which has been accepted, this cannot be overruled by later poskim.

24. סוף דבר ההוראה המקובלת מפי רבותינו אשר מפהם אנו חיים - כמו מרן הבית יוסף המגן אברהם והמשנה ברורה ... היא הוראה מקוימת כמו מפי סנהדרין בלשכת הגזית.

קובץ אגרות החוץ איש - תורה בכתב מ"א

Some authorities regard poskim later than the Talmud as effective red lines that cannot be crossed by later poskim.

C] PESIKA AND THE SENSITIVE APPLICATION OF HALACHA TO A SPECIFIC QUESTIONER

25. the cogency and legitimacy of a "human" approach to *pesak*, appears, to many, problematic. They would have us believe that the ideal *posek* is a faceless and heartless supercomputer into whom all of the relevant data is fed and who then produces the right answer. Should this standard not be met, the shortfall is to be regarded as a failing, the lamentable result of human frailty

On this reading, the process of *pesika*, properly conceived and executed, bears no semblance to an existential encounter between seeker and respondent. It entails, rather, the application of text to problem, the coupling of code and situation. This conception does not necessarily preclude reckoning with the specific circumstances of the question and questioner, as these may very well be part of the relevant objective data. The prevailing tendency, however, would be to dwarf this factor; and as to the human aspect of the meshiv, that would be obviated entirely. He, for his part, is to be animated by the precept that "we do not have mercy in judgment," and hence, to pass on the merits of the issue with imperviously stony objectivity.

Purist proponents of this approach often cry it up as the "frum" view of *pesika*. In reality, however, this portrait of a *posek* is mere caricature, limned by those who, at most, *kar'u ve-shanu*, but certainly *lo shimshu*. As anyone who has been privileged to observe *gedolim* at close hand can readily attest, they approach *pesak* doubly animated by responsibility to *halacha* and sensitivity to human concerns. The balance between norm and need may be variously struck. There certainly are ideological differences among *poskim* over how much weight to assign the human factor In principle, however, recognition of this factor is the rule rather than the exception

The Human and Social Factor in Halacha Tradition Journal 36:1 pp 6 ff

26. ...while, of course, for the committed Jew, *halakha*, as a normative order, can never be superseded by external pressures, a specific *halakha* may be flexibly applied and, in a sense, superseded by the internal dynamics of the *halakhic* system proper. And this, in two distinct, albeit related, ways. The first entails recourse to a phalanx of factors, of human and social import, which affect decision as acknowledged halakhic elements. At the apex stands, of course, *pikuah nefesh*, but other factors, local or general, of lesser gravity, also abound. These include physical and psychological pain, financial hardship, social harmony, and human dignity, sensitivity to any or all of which can affect *pesak* measurably. Yet, while the *modus operandi* concerning these factors - the measure of a *posek*'s awareness, how they are defined, and how liberally they are applied - may be of crucial practical significance, they do not constitute, philosophically, the heart of our problem. For their inclusion in the *halakhic* equation means that, even at the formal and technical level, two supposedly identical situations are, in effect, not identical at all. Our primary concern is therefore the second route - the latitude allowed a *posek* for differential decision even when all things are indeed, formally and technically, even.

That latitude is grounded in the pluralistic aspect of *halakha*. The *halakhic* order comprises three distinct tiers. There is, first, an ideal, and presumably monistic, plane, the Torah which is *ba-shamayim*. It is to this that the gemara in *Bava Metsia* alludes when it ascribes to the *Ribbono Shel Olam* a position with respect to an issue in *taharat*. There is, as the final stage, the definitive corpus, the genre of the *Shulhan Arukh*, which, having decided among various views, posits - again monistically - what is demanded of the Jew. Intermediately, however, there is the vibrant and entrancing world within which exegetical debate and analytic controversy are the order of the day, and within which divergent and even contradictory views are equally accredited. The operative assumption is that, inherently and immanently, the raw material of Torah is open to diverse interpretations; that *gedolei yisrael*, all fully committed and conscientiously and responsibly applying their talents and their knowledge to the elucidation of texts and problems, may arrive at different conclusions. License having been given to them all to engage in the quest, the results all attain the status of Torah, as a tenable variant reading of *devar Hashem*: "Both these and those are words of the living God."

ibid p 10

27. It is this concept which undergirds the legitimacy of recourse to minority opinions *bi-sha'at ha-dehak*. Inasmuch as these opinions are not simply dismissed as erroneous but procedurally rejected ... they are very much alive, held in reserve where they can be culled from the shelf in a crisis. In effect, the principle of "Rabbi So-and-so is worthy of being relied on in exigent circumstances," states, that while a given view has been accepted le-halakha, as part of our third tier, in an emergency we envision ourselves back at our middle tier, sans decisive resolution, and hence as authorized to heed another view. Moreover - and this is no less remarkable - under the pressure of circumstance, we are not bound by the general directive of *sfeka de-oraita le-humra*, but are entitled to follow a lenient minority.¹¹

This license raises obvious questions. How liberally and by whom can it be exercised? From how far back can discarded shitot be extracted - from the *mishna*, the *gemara*, *rishonim*, early *aharonim*? Which views, if any, might indeed be treated as error, and on what basis? At the practical plane, these issues need to be clarified, but that task lies beyond my present scope. Here, I content myself with an account of the principle and its rationale, as a manifestation of concern for the human and social element within pesika.

It is sometimes thought that the Rav was opposed to this approach. To the best of my knowledge, this assumption is primarily based upon a page drawn from *Ma Dodekh Midod* in which he emphatically rejects the notion that psychosocial elements are factored into the halakhic process and affect its course. Several sentences in this vein are admittedly sharp and sweeping. And yet, careful examination of this tenuously balanced passage reveals that its primary thrust is not denial of human considerations but insistence upon the autonomy of halakha. Commiseration is acknowledged as a legitimate factor stimulating the *posek's* quest for a solution but is barred as a component of the halakhic process proper, once that has been set in motion

ibid p 11

28. These are immanent questions, to be honestly and conscientiously confronted; and surely we have no right to demand of a posek, almost as a matter of moral and personal right, the most comforting answer. The notion that "where there is a rabbinic will there is a *halakhic* way" both insults gedolei Torah, collectively, and, in its insouciant view of the totality of halakha, verges on the blasphemous. What we do expect of a posek is that he walk the extra mile - wherever, for him, it may be - harnessing knowledge and imagination, in an attempt to abide by his responsibility to both the Torah with which he has been entrusted and to his anguished fellow, whose pangs he has internalized. For insensitive *pesika* is not only lamentable apathy or poor public policy. It is bad halakha. To the extent that *kevod ha-beriot*, for instance, permits a "violation," be it of a de-rabbanan injunction, actively, or of a *de-oraita*, passively, failure to act on that principle undercuts a spiritual ideal. The Rav was fond of quoting the Chafetz Chayyim to the effect that interruption of *keriat shema*, where enabled, *mi-penei ha-kavod*, was not permissible but mandatory.

Human dignity¹² - the Rav would have preferred the term, "human sanctity" - is hardly a neutral matter. *Poskim*, especially in the modern era, are often reluctant to invoke broad axiological *hetterim* when they can construct more narrowly based decisions, in which local and possibly technical factors are more prominent. *Pesika* can congeal into *pesak*, and a decision issued, with trepidation, in light of special circumstances, may then enter the *halakhic* world as a precedent. The danger is particularly acute at a time when many, within and without the pale of commitment, seek to pounce upon every such *pesak* in order to promote an ideological agenda. We should realize, however, that such reserve may exact a practical and educational toll, as awareness of certain values and their place within *halakha* may become jaded. Be this as it may, we can recognize the position of the human and social factor within *halakhic* decision as firmly secure. And, were visible evidence necessary, surely, the two greatest *poskim* of our generation, Rav Moshe Feinstein and Rav Shlomo Zalman Auerbach z.t.l., are prime exemplars

ibid p 13-14

29. In this respect, one factor is, however, critical: the degree of self-conscious awareness which a *posek* brings to his encounter with extraneous considerations. Where that level is low, the danger of distortion is great. A *talmid hakham* needs to examine himself and his situation candidly, to ascertain that whatever cultural forces, possibly unknown to predecessors, he confronts and perhaps absorbs, are filtered through the prism of his Torah personality and do not simply seep through the pores of his semi-conscious being

ibid p 12

11. This position is subject to halachic debate and not universally agreed upon.

12. In addition to the meta-halachic principle of 'kavod haberiyot' consider other meta-halachic principles such as 'deracheha darche noam', 'et la'asot laHashem', 'darchei shalom' and broader halachic/hashkafic principles such as yirat Shamayim and the importance of appropriate chumra, ahavat Yisrael and the importance of appropriate kullah, avoiding machloket etc.

APPENDIX

30.

The freedom of inquiry and investigation in the field of the Halakhah is enormous. Torah scholars have to deduce new ideas from old ones, create new and original concepts and specific methods, and delineate distinct realms of thought. Deepening one's understanding and revealing innovative, enchanting horizons of knowledge – these are of the essence of the Halakhah. There is no change or reform within the Halakhah, but there is unlimited innovation (*hiddush*). When innovation is weakened, the Halakhah becomes sterile. Those who disparage us say that the Halakhah has become fossilized, God forbid, that it contains no creative activity. These people have never studied a page of the Talmud and have not partaken of the creativity and innovation in the Halakhah. They believe that Rabbeinu Tam did not introduce any new ideas, nor did Maimonides, nor Nahmanides, nor the Gaon of Vilna, nor Rav Hayyim of Brisk. How ludicrous this accusation is! The aforementioned *rishonim* and *aharonim* [medieval and modern commentators] created new worlds that are breathtaking in their beauty and sublimity. They were among the greater innovators in halakhic thought. Anyone who is acquainted with the halakhic methodology, so epistemologically complex, that has been transmitted from one generation to the next by the *rishonim* and the greatest of *aharonim*, commentators on the Talmud, must admit that the sweep and scope of its ideal-deductive creative thought, its analytic acuity, its subtlety of abstraction and its systematic consistency are at least the equal of the other abstract and precise intellectual disciplines. Indeed, it is even superior to them. The principle of methodological unity and the coalescence of many free constructs into one conceptual whole – the most fundamental principle of any cognitive understanding – stands at the center of halakhic cognition.

Of course, the freedom of halakhic inquiry is bounded by a categorial restraint. The Halakhah cannot free itself from its subordination to a system of *a priori* postulates; it begins and ends

with this system. Scholarly inquiry, however, is always connected with some system of postulates – it does not begin from a cognitive void. Freedom of cognitive creation means free cognition within a framework of ideal postulates. Transformations of form and content have taken place in recent years in our conception of physical and mathematical reality; and despite the fundamental changes in the epistemological interpretation of the set of axioms that classical theory of knowledge deemed a system of fixed, stable premises underpinning its theories, and which deductive science considers its “absolutely” secure basis, the fact of their [the axioms'] postulation remains. For example, scientific conceptions of space and time, of substance and causality, have been utterly transformed by the theory of relativity and quantum theory; scientific thought, however, has not yet freed itself of these postulates, which underpin the conception of the cosmic drama and leave their mark on the entire enterprise of objectifying the chaos of sensation. Although modern science has dared to attack the categorial system and adapt it to the needs of a “strange” facticity that it has not interpreted, it has not freed itself of having to postulate it. On the contrary, its ideal, *a priori* nature is emphasized all the more.

Deep investigation is not required to see that halakhic thought, rooted in a revelational foundation, cannot control its own postulates as does scientific thought. It has to accept them as they are. Nevertheless, halakhic thought, too, enjoys great, marvelous freedom. There is a combination here of two contrary elements: the revelational and the rational. The Halakhah is opposed to any change in the set of axioms; it is subordinated to tradition. Yet it seeks novel understanding, the veritable apple of its eye. In every generation man must deeply investigate the foundations of the Halakhah: the definitions of its concepts, its epistemic principles, and the ordering of its achievements. The goal of halakhic inquiry is to hew out new ideas and fresh, surprising conceptions. Studying the Torah means innovating and embellishing Torah thought. The framework of postulates is fixed, but within this very

framework halakhic understanding penetrates into the depths erupts and rises to the heavens. It has the freedom to inquire, build, and tear down, to grind mountains to dust with its fine distinctions, to make comparisons and deductions and create ideal concepts and design a new world. Even the postulates themselves, despite their stability, are filled with fresh, vital content. One cannot look at the world of the Halakhah without seeing perpetual motion and continuous flow. Studying the Torah is an act of free spiritual creation. [It involves] epistemological qualities and noetic values that live and are nourished by the creative spirit and mastery of the thinking individual, who thereby gains entry into the revelational sphere and makes it his own. Revelational consciousness is absorbed into cognitive consciousness with its innovative thinking. The Holy One, Blessed Be He, gave the Torah to Israel and commanded us to innovate and create.

From There Shall You Seek - Rav J.B. Soloveitchik p108-110