Commercial Custom and Jewish Law

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June 30, 2020

One of the central questions in any *din Torah* is the extent to which the outcome should be determined by secular law.[1] Why should a *din Torah* ever consider secular law? Does choshen mishpat not provide its own set of rules and principles?

One of the principles within the system of choshen mishpat is to recognize commercial norms (*minhag ha-sochrim*) when people do business in a manner that implicitly relies upon them. Jewish law therefore incorporates *minhag ha-sochrim* when the background assumptions of the deal are framed by the norms of commerce.

In such cases, a *din Torah* would have to consider the prevailing rules and laws of the marketplace–not because it's the *law*, but because halakhah incorporates the commercial practices of the marketplace. This post discusses the normativity of *minhag ha-sochrim*, the halakhic case law, the basis of its normativity, and the scope of its application.

1. Situmta

Several areas of choshen mishpat reflect the principle of *minhag ha-sochrim*. Let's begin with the rules of property. In Jewish law, property is transferred by performing a *kinyan,* and the Talmud specifies which *kinyanim* are valid for different types of conveyances (e.g. real property can be transferred through payment (*kesef*) or through transfer of the deed (*shetar*), small personal property is conveyed by lifting (*hagbahah*), domesticated animals transfer by handing over the reins (*mesirah*)).[2] But in addition to these halachically indigenous *kinyanim*, the Talmud recognizes the prevailing commercial methods of transfer as valid according to Jewish law.

The Talmud (Bava Metzia 74a) discusses a commercial practice of marking wine barrels (*situmta*) to signify the conveyance of title from the merchant to the customer. Marking barrels is not a *kinyan* specified by Jewish law. But the Talmud holds that it would constitute a halakhically valid conveyance of title if the commercial norms recognize it as such.[3] Poskim view *situmta* as an application of the general principle that Jewish law incorporates the prevailing commercial practices.[4]

2. When Jewish Law Conflicts with Established Commercial Norms

Situmta establishes that commercial norms can validate transfers that would otherwise not be recognized by Jewish law. Does commercial custom also cut the other way? Can commercial custom *invalidate* a transfer that is otherwise halakhically valid? Suppose you try to convey real property through the halakhic *kinyan* of payment (*kesef*) when commercial norms require you to transfer the deed. The Talmud (Kiddushin 26a) rules that the conveyance is invalid (unless both parties stipulated that the halakhic mechanism by itself should suffice to execute the transfer). As Rashi (s.v. *lo kanah*) explains, commercial custom invalidates the halakhic mechanism of conveyance because, by doing business in a commercial environment, the parties implicitly rely on the commercial norms to execute the transfer, not on the *kinyan* native to halakhah.[5]

3. Ha-Kol Ke-Minhag Ha-Medinah

The Talmud (Bava Metzia 83a) offers another example of Jewish law yielding to commercial custom in its discussion of employment agreements. When an employment contract fails to specify some provision of the agreement, such as the expected work hours and whether the employer will provide meals, the ambiguous provisions should be filled out according to the prevailing custom and practice in the area: *ha-kol ke-minhag ha-medinah*.

Strikingly, the Talmud defers to *minhag ha-medinah* even when the prevailing norms diverge from the halakhah's internal set of rules. The workday as understood within Jewish law begins at sunrise and concludes at sunset. If you were to hire a worker and specify that the work hours are defined by *din Torah*, the workday would commence at sunrise and conclude at sunset.[6] Similarly, if you were to hire a worker in a town with no workplace norms and you fail to specify the work hours, the agreement is filled out by *din Torah*, and the worker is obligated to work from sunrise to sunset.[7]

Yet the presence of workplace norms overrides the default rule of *din Torah*. If you hire a worker in a town with established workplace norms but failed to specify work hours, the unspecified content of the employment agreement is filled out by the workplace norms, not the default workday of *din Torah*.[8] *Minhag ha-sochrim* overrides the other provisions of choshen mishpat.[9]

Having surveyed three applications of *minhag ha-sochrim* in the Talmud, let us turn to the literature of the poskim and see how the principle is applied there.

4. Rashba's Case of Spousal Inheritance

Let's begin with Rashba's (d. 1310) decision (Teshuvot 6:254) in a case of disputed inheritance. A couple had married in Perpignan, but the wife died shortly thereafter. A dispute broke out between the husband and the deceased-wife's father over who would inherit the wife's assets. Under Jewish law, the husband inherits his deceased wife.[10] But the deceased-wife's father argued that the established custom and practice amongst the Jews of Perpignan was to follow the non-Jewish law, which provided for the deceased-wife's father to receive the assets, not the husband.

Rashba rules in favor of the deceased-wife's father, contrary to the general rule of inheritance in Jewish law. Rashba points to the established custom and practice (*minhag*) amongst the Jews of Perpignan to revert the assets to the deceased-wife's father and reasons that any couple who married there without specifying to the contrary implicitly adopts the local custom ("*kol ha-nose setam al da'at ha-noheg sham be-yisrael nose*"). Rashba therefore maintains that the couple, at their marriage, had implicitly agreed to transfer the wife's assets back to her father in the event of her death.[11]

5. Maharshakh and Rabbi Akiva Eger on the Merchants of Venice

Another important decision on *minhag ha-sochrim* arises from a dispute between two Jewish merchants in seventeenth century Venice. The core of their dispute was whether their business dealings were governed by the provisions and rules of choshen mishpat or by the customary laws and practices of Venitian merchants. Their dispute was sent to Maharshakh (d. 1601), who ruled (Teshuvot 2:229) that the business dealings were to be governed by the commercial customs of Venitian merchants (*be-din ha-sochrim ke-fiy minhag venetzyah*) and not by the internal provisions of choshen mishpat. Maharshakh reasons that because the business deal in question would be incoherent if interpreted according to Jewish law, the parties clearly intended to operate under the rules of the Venitian mercantile custom. He bases his decision on the Talmud's incorporation of commercial custom in its *situmta* ruling (see above, section 1).[12]

R. Akiva Eger (Choshen Mishpat 3:1) approvingly cites the Maharshakh's decision and notes the general rule that commercial custom overrides the default provisions of the halakhah.[13]

6. Rav Moshe Feinstein on Rent Control

Our final example is a more recent application of *minhag ha-sochrim*, drawn from R. Moshe Feinstein's analysis (Iggerot Moshe, Choshen Mishpat I:72) of the rules governing a Jewish landlord and tenant in New York City. Jewish law has few restrictions on a

landlord's power to evict a tenant at the end of a lease term.[14] The city's regulations, however, substantially limit a landlord's legal right to do so. From the perspective of Jewish law, are Jewish parties bound by halakhah's internal landlord-tenant laws or by the city's regulations?

R. Moshe Feinstein held that the parties are bound by the city's regulations. R. Moshe declines to address the issue through the lens of *dina de-malkhuta dina*.[15] Instead, he reasons that when a landlord and tenant enter into a lease agreement in New York City they implicitly accept the background rules and customs that govern commercial practice there. Unless the parties had agreed to be bound exclusively by Jewish law's own set of rules for landlord-tenant relationships, they have implicitly accepted the rules and practices of the jurisdiction and are bound by them ("*de-'ada'ata de-minhag ha-'ir nechshav ke-hitnu bestama*").[16]

R. Moshe extends his analysis to other areas of choshen mishpat. For example, the fourth and fifth chapters of Bava Batra discuss the halakhic rules regarding what items are included in the sale of property (e.g. if you sell a house, is the oven included? If you sell a donkey, does the saddle go with it?). R. Moshe argues that these *mishnayot* simply establish default rules for cases where there is no prevailing commercial norm. But in a jurisdiction governed by clearcut commercial rules, the halakhah yields to the norms of the marketplace over its own delineated set of default rules. If you sold your home in Teaneck and are unsure whether the chandelier goes with the house, the answer will usually depend on New Jersey law, not the fourth chapter of Bava Batra.

7. The Normativity of *Minhag Ha-Sochrim*

On what ground does halakhah incorporate commercial custom to override the internal provisions of choshen mishpat? What gives *minhag ha-sochrim* its normative force?

Some *poskim* suggest that *minhag ha-sochrim* is grounded in the halakhic principle of *kol tenai she-be-mammon kayam* (Jewish law confers upon parties the power to make their own provisions and stipulations to govern their private agreements).[17] The theoretical basis for *minhag hasochrim* is that parties to an agreement can agree to explicitly contract in a wide array of provisions that would override the default rules of choshen mishpat. This power of the parties to explicitly make their own provisions is then extended to the realm of the implicit. Where there are prevailing commercial norms, the parties need not agree to these provisions explicitly because they have *implicitly* adopted them by doing business in a certain manner and context and under certain assumptions. By entering into an agreement under these background conditions, it is *as if* the parties had explicitly adopted those provisions.

8. Scope

If *minhag ha-sochrim* has normative force through the parties having tacitly adopted commercial norms as terms in their agreements, then *minhag ha-sochrim* will generally be limited to claims that arise in contracts. For without a contractual relationship, there is no binding agreement between the parties; and without a binding agreement, the parties could not have agreed to be bound by a particular set of commercial norms. It follows that a claim arising in tort will generally not incorporate *minhag ha-sochrim*. Two drivers who collided on the turnpike have no antecedent agreement and therefore never agreed, explicitly or implicitly, about the terms that would govern their collision.

Even within the realm of contracts, it is not trivially straightforward that an agreement will always be governed by the norms of the marketplace over the specific provisions of choshen mishpat. Since the normativity of *minhag ha-sochrim* flows from the parties having implicitly adopted commercial norms through their business practices, it becomes a question of fact to determine whether and to what extent the parties intended to be bound by *minhag ha-sochrim* or the provisions of choshen mishpat. A choice of law clause would usually be dispositive in evidencing the parties' intent. Absent a choice of law clause, the background system of norms would have to be reconstructed by the manner in which the parties did business.[18] For instance, a complicated deal transferring Manhattan real estate orchestrated by teams of attorneys is most likely operating under New York law and common law principles of contract.

The incorporation of *minhag ha-sochrim* is less straightforward when it comes to smaller scale transactions. Consider an agreement between a pesach program and a customer, a rental agreement between two *frum* parties, an employment contract between a rebbe and a yeshiva day school, or a short term babysitting agreement between a family and a religious baby-sitter. In these cases it is less obvious that the parties intended to be bound by commercial norms, and it becomes a factual question for the dayanim to determine whether and to what extent the agreement was framed by background assumptions of *minhag ha-sochrim*.[19]

Reliance on *minhag ha-sochrim* is not always an all-or-nothing question. Sometimes parties rely on a small subset of commercial rules without capitulating entirely to that system of law. A parent who pays yeshiva tuition with a check is clearly relying on the civil law that governs checks as a legal instrument, not on the choshen mishpat principles of *shetar chov*. Therefore, a dispute pertaining to the payment instrument might be resolved according to the Universal Commercial Code. But it does not follow that every aspect of the tuition contract should now be governed by the UCC. Paying with a check is a pro-tanto reliance on commercial custom. It incorporates marketplace norms only to the extent that the parties implicitly relied upon them.

9. Commercial Custom and Dina De-Malkhuta Dina

What is the relationship between *minhag ha-sochrim* and *dina de-malkhuta dina*?[20] Some commentators draw a clear distinction between the two principles,[21] and poskim tend to rely more on *minhag ha-sochrim* to incorporate marketplace norms than *dina de-malkhuta*. This is because *dina de-mlakhuta* comes with a host of limitations. For example, some poskim hold that *dina de-malkhuta* is inapplicable when it conflicts with a substantive provision of halakhah.[22] Others hold that *dina de-malkhuta* is limited to laws that directly benefit the government or bear on public policy.[23] Still others argue that *dina de-malkhuta* doesn't govern a dispute between two Jews.[24] These limitations generally do not apply to *minhag ha-sochrim*.

Other poskim see *minhag ha-sochrim* and *dina de-malkhuta* as more closely related.[25] On this view, the law of the jurisdiction has normative halakhic weight for the same reason that *minhag ha-sochrim* does: The parties have implicitly incorporated the local laws as implied terms in their private agreements.[26]

10. Contracts Frustrated by Covid-19

How would *minhag ha-sochrim* bear on *dinei Torah* relating to contracts frustrated by the Covid-19 pandemic? Our last post outlined a range of halakhic principles that govern rental contracts affected by a pandemic. To what extent would a *din Torah* turn on these internal halakhic principles or on the relevant common law doctrines such as impossibility and frustration of purpose?

The first item in any *din Torah* would be to look at the language of the agreement. As we saw above, Jewish law grants parties broad discretion to formulate their own terms and conditions in their contracts (*kol tenai she-be-mammon kayam*). If the language of the agreement provided for the eventuality of an *ones*, such as a *force majeure* clause or a "hell or high water" clause, that provision would be controlling.

If the agreement contained no such provision, the dayanim would have to make a factual determination about what set of rules the parties were implicitly relying on when they entered into the agreement. A choice of law clause would probably settle this question. Absent a choice of law clause, the dayanim could look to the manner in which the agreement was entered into. What other provisions are contained in the agreement? Were attorneys involved in negotiating and closing the agreement? How do the parties generally do business? These and other questions might determine whether and to what extent a dispute over a contract frustrated by Covid-19 would be governed by the internal principles of choshen mishpat or by common law principles as incorporated into Jewish law through *minhag ha-sochrim*.

1. Thanks to Tzirel Klein, Dani Ritholtz, and Rabbi Shlomo Weissmann for their comments on this article.
2. See for example Kiddushin 26a and 25b.

3. Some poskim go further and argue that situmta can allow for the transfer of future assets and interests that are otherwise untransferable under Jewish law. This is because the framework of doing business according to commercial norms makes the intent of the parties more conclusive (samkha da'atei) in effecting a transfer that would otherwise have no legal force under Jewish law. See Chatam Sofer, Teshuvot Choshen Mishpat 66:2, and Pitchei Teshuva Choshen Mishpat 201:2.
4. Rashba Bava Metzia 74a s.v. u-veduchta ("ve-sham'inan minah she-ha-minhag mevatel ha-halakhah vekhol ka-yotze ba-zeh, she-kol davar she-be-mammon al pi ha-minhag konin u-maknin, hilkakh be-khol davar she-nahagu ha-tagarim liknot konin"). See also Maharshakh, Teshuvot 2:229, ("it is clear that in matters pertaining to acquisitions, commerce and business deals for which there are norms of commerce, we follow those norms, even if [the norm] is just a default one. This principle is based in the Talmud's ruling regarding situmta.") and R. Akiva Eger Choshen Mishpat 3:1, both discussed below in Section 5.
5. Rashi s.v. lo kanah ("kiven de-regilin be-hachi lo samcha da'atei"). See also Ran Kiddushin 10a s.v. iy ba'ina and Shulchan Arukh Choshen Mishpat 190:7.
6. Shulchan Arukh Choshen MIshpat 331:1-2.
7. Since traveling to the workplace is "for the purpose of working," the worker can include his commute to work in his work hours. But his commute home is not for the purpose of work and therefore comes off the worker's own time. See Sema Choshen Mishpat 331:2.
8. Shulchan Arukh Choshen MIshpat 331:1-2 based on BM 83a.
9. For other examples of minhag ha-medinah relating to the employer's duty to provide his workers with meals and the worker's right to eat from the produce he labors on, see Bava Metzia 83a, Shulchan Arukh Choshen MIshpat 331:2, and Bava Metzia 93a and Shulchan Arukh Choshen Mishpat 337:6. For examples relating to a sharecropper's duties and liabilities, see Bava Metzia 103b and 110a. See also Bava Batra 2a and 4a.
10. Bava Batra 111b, Shulchan Arukh Even Ha-Ezer 90:1.

11. In another Teshuva (6:224), Rashba was asked about an aide who had set sail with an emissary of the king. The king's emissary had died mid-journey, causing the mission to be prematurely terminated. The aide sued to be compensated in full, arguing that it was no fault of his own that the mission was terminated and that, as far as he was concerned, he was willing to see the mission through to completion. Rashba ruled that regardless of the specific provisions of choshen mishpat on the matter, the aide is entitled to be fully compensated, since the minhag ha-sochrim was to pay full compensation in such cases ("afilu lo yihyeh ha-din noten ken, keyvan she-minhag meforshei yamim ken"). In the inheritance teshuva (6:254) discussed in the text above, Rashba criticises the leaders of Perpignan for allowing the community to adopt the secular law of marital inheritance as its default custom. Rashba argues that abandoning a whole section of Jewish inheritance law would be a violation of the issur arka'ot if their reason for doing so is a desire to adopt the secular law. Despite his criticism, Rashba never calls into question the enforceability of the practice ex post facto, only whether it is proper to adopt secular law ex ante. (On this distinction see footnote 10 in the Machon Yerushalayim edition of the Teshuvot ha-Rashba.) Rashba's criticism of the Perpignan practice has generated much discussion on the permissibility of "choice of law" clauses, where the parties elect to be bound by non-Jewish law. R. Zalman Nechemiah Goldberg has argued that choice of law clauses are only problematic when the result is that they "go against the Torah" (neged din Torah) by undercutting areas of Jewish law like inheritance. But they are acceptable for most contractual arrangements where the Torah is indifferent to the specific provisions that will bind the parties. See Yeshurun 11 (5762), pp. 698-704. Others have distinguished, based on the Rashba's formulation, that a choice of law clause is problematic only if the reason for embracing the practice is that it is the non-Jewish law. If, however, the reason for accepting the practice is that it constitutes an accepted or efficient way of doing business, then the choice of law clause is acceptable. See Rabbi Yona Reiss, Kanfei Yonah (2018), Chapter 1. For further discussion of the Rashba's ruling, see Rema Choshen Mishpat 369:11 and Sema 369:20.
12. Maharshakh reasons that if the agreement were to be governed by Jewish law, it would be as though one party was giving away his money for free–an implausible interpretation of a business deal. "ha-davar yadu'a she-im oto ha-'esek ve-hame'ora'ot… hayu nidonim be-din torah, hiniach ma'otav al keren ha-tzvi."
13. "Kevan de-be-makom she-na'aseh ha'esek yesh minhag le-hitdayein kefiy derekh ha-sochrim velo kefi din torah, minhag mevatel halakhah."
14. See Pitchei Choshen Sekhirut Chapter 5:5 and Shulchan Arukh Choshen Mishpat 312:8.
15. On dina de-malkhuta dina and its relationship to minhag ha-sochrim see below, section 9.

16. Rav Moshe holds that these norms are binding even when they weren't established by the Jewish population of the city. If the majority of the city's population is non-Jewish, the norms are determined by the practice of the non-Jewish population.
17. For the principle of kol tenai she-be-mammon kayam, see Bava Metzia 94a, Shulchan Arukh Choshen Mishpat 296 and Even Ha-Ezer 38:5. For an explicit statement of the idea that minhag ha-sochrim is grounded in tenai she-be-mammon, see Rashba, Teshuvot 6:254. See also Iggerot Moshe Choshen Mishpat I:72.
18. See for example the Beth Din's Rules and Procedures, Section 3(d) and 3(e), which are based on minhag ha-sochrim.
19. Poskim also discuss whether it is sufficient for the parties to intend to be bound by the provisions of civil law, whatever those provisions contain, or whether the parties need to have specific knowledge of the substantive content of the laws in order for them to be binding. See the discussion between Rabbi Daichovsky and Rabbi Eliezorov in Techumin 4, "Abrogation of a Contract between Contractor and Tenant."
20. Dina de-malkhuta dina is a principle of Jewish law recognizing the law of the jurisdiction. For an overview of dina de-malkhuta, see Rabbi Herschel Schachter, "Dina De'malchusa Dina: Secular Law as a Religious Obligation," Journal of Halacha.
21. See for example the Iggerot Moshe (Choshen Mishpat I:72) discussed above. See also Mishneh Halakhot 6:279 (explaining why a corporation shields the shareholders from personal liability based on tenai she-be-mammon and not based on dina de-malkhuta), and Pitchei Choshen Halva'ah 2 notes 63 and 72 (distinguishing between dina de-malkhuta and minhag ha-sochrim with respect to bankruptcy and statute of limitations).
22. Shakh Choshen Mishpat 73:39.
23. See Sefer Ha-Terumot 46:8, and Shulchan Arukh Choshen Mishpat 369:11.
24. Riaz Bava Batra 3:36, Teshuvot Maharik 187.
25. Rashba Gittin 10b, reducing dina de-malkhuta to an application of situmta and minhag ha-sochrim (ve-dina de-malkhuta nami ke-minhaga haveh.)
26. See also the formulations in Rashbam Bava Batra 54b s.v. ve-ha'amar, Or Zaru'a 1:745, and Terumat Ha-Deshen 341.