

THE RELATIONSHIP BETWEEN
 HALAKHIC DECISORS AND THEIR PEERS
 AS A DETERMINING FACTOR IN
 THE ACCEPTANCE OF THEIR DECISIONS –
 A STEP IN UNDERSTANDING
 INTERPEER EFFECTS IN
 HALAKHIC DISCOURSE

by

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To my dear mentor, Rabbi Professor Daniel Sperber

“The Torah is acquired by forty-eight qualifications...

[A person who] knows his place” (M. Ab. 6:6)

A. Introduction

Since the beginning of the *Wissenschaft des Judentums* movement in the nineteenth century, scholars have discussed the relationship between metahalakhic

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¹ Y. Sussmann, “The Scholarly Oeuvre of Professor Ephraim Elimelech Urbach” (Heb.), in D. Assaf (ed.), *Ephraim Elimelech Urbach. A Bio-Bibliography* (Heb.) (Jerusalem: The World Union of Jewish Studies, 1993), 89. Note especially Sussmann’s remarks: “Research on the history of the halakhah from the Second Temple Period until the end of the redaction of the Talmud was one of the aims of the *Wissenschaft des Judentums* from its inception... the fact is that this goal has been ignored by modern research almost entirely, and since the end of the 19th century, most scholarship has focused on the *literature of halakhah*, and not on *the halakhah itself*” (emphasis in the original). To be sure, since this was written, there has been some change, and research into the history of the halakhah itself has become more popular.

considerations, on the one hand, and formalistic arguments – which, after all, comprise a very large part of halakhic writing – on the other hand.¹

Over the years, students of the history of the halakhah have dealt with the question of the extent and exact nature of the influence of various factors on the halakhic decision-making process, greatly emphasizing the role of socioeconomic factors, especially those relevant to the communities toward whom a particular decisor's decision was directed. In this article I will try to analyze the influence of another sociological factor in halakhic decision-making: inter-decisor relationships. I will try to show that the success of a decisor in having his decision accepted depends, *inter alia*, on the legitimacy attributed to this decision by his peers.

To demonstrate this, I will compare two cases in which halakhic decisors supported their decisions with perfectly valid and acceptable substantive arguments, but they reacted differently to criticism of their peer group, and I will compare the results of these different attitudes towards the peer group.

B. The case of Rabbi Shlomo Zalman Auerbach

The first decisor I will discuss is R. Shlomo Zalman Auerbach. Rabbi Auerbach was born in 1910 to a family of distinguished *haredi* Rabbis. At first he studied with his father, and later he studied in the Ets Hayim Yeshiva in Jerusalem, under the world-renowned Rabbi Isser Zalman Meltzer. At the age of 39 he became the Rosh Yeshiva of Yeshivat Kol Torah. He never consented to take public office, and he refrained from taking part in politics. He passed away in 1995.²

The case I analyze deals with an innovative ruling of R. Auerbach about halakhic infertility. According to biblical law (Lev. 15:19), a woman is prohibited from sexual relations from the beginning of the menstrual flow for seven days. Additionally, by rabbinic law another four to five days, at least, of abstinence are required.³ As a result, sexual relations are forbidden for close to two weeks. In some cases, e.g. lengthy menstrual flow or early ovulation, the ovulation takes place during the period of abstinence, making conception very unlikely due to the rabbinic stringencies. This is called halakhic infertility.

² This survey is based upon the biography in Amir Mashiah, "The Halachic Thought of Rabbi Shlomo Zalman Auerbach" (Ph.D. thesis) (Bar Ilan University, 2008), 4-5. This work contains extensive discussion of the halakhic methods of Rabbi Auerbach.

³ For a short yet thorough description of the development of the laws of the menstruant from the Torah through talmudic literature, with references to the relevant secondary literature, see S. Emanuel, "The Seven Clean Days: A Chapter in the History of the Halakhah", *Tarbiz* 76 (2006), 233-234, and the literature cited in the notes. References to various studies dealing with the relationship between the relevant laws in the written Torah and those in the Oral Torah can be found in D. Biale, *Eros and the Jews* (Berkeley: University of California Press, 1997), 55 n. 138.

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Rabbi Auerbach devoted a lengthy treatise to the solution of this problem.⁴ This is not the place for a detailed analysis of his approach; rather, I focus here on the salient details of the proposed solution. According to the Talmud (Nidd. 41b), the prohibition of marital relations begins when menstrual blood leaves the uterus and touches the birth canal. A second most important rule for our purposes is that if the menstrual blood left the woman's body through a tube, the prohibition of relations would not apply (Nidd. 21b). This is also the authoritative ruling of the Shulhan Arukh (YD 128:3).

Rabbi Auerbach's ruling is based on two innovative assumptions. First, according to many authorities, including R. Shneur Zalman of Liadi, the solution would be valid only if the tube passes into the cavity of the uterus. Rabbi Auerbach devoted twelve whole pages to refute this possible objection. He concludes that while we would need to take this view into account when dealing with a matter of Torah law, this view need not concern us when dealing with rabbinical stringencies, such as those under consideration here.

Rabbi Auerbach's second innovative assumption is that the prohibition of relations starts not when the menstrual blood enters the cavity of the cervix, but when it touches the vagina upon exit from the cervix. Rabbi Auerbach proposed, therefore, that a flexible tube lead all the blood from her body without coming in contact with the vagina, thereby avoiding the prohibition of relations.⁵

We have seen that the arguments of Rabbi Auerbach are perfectly valid, classic substantive arguments. While these arguments are fully in accordance with normative halakhic discourse, the result is extremely innovative, solving a problem which had been troubling people for hundreds of years.

Rabbi Auerbach was, of course, fully aware of this. He writes in an unusually apologetic tone, and he repeatedly uses phrases conveying a sense of his humility.⁶ Moreover, in the publication of his proposal, Rabbi Auerbach includes the following disclaimers:

And since it is a great *mitzvah* to investigate and search for ways to find succor for

⁴ Rabbi Auerbach's proposal was published twice in the same year, first in *Noam*, a periodical dealing with halakhic issues; see R. Auerbach, "A Proposal to Give Succor to Women in Connection with the Laws of Niddah", *Noam* 7 (1964), 134-174. The proposal was republished as an appendix to a book published by R. Auerbach's brother; see R. Avraham Auerbach, *Imrei Avraham* (Jerusalem, 1964), 1-33.

Interestingly, the proposal proposed in *Imrei Avraham* was presented in greater detail than that in *Noam*. Since the differences between the two versions are not significant for our purposes, references to the proposal in this paper are taken from the article in *Noam*, which is more accessible than the discussion in *Imrei Avraham*.

⁵ Rabbi Auerbach accepts the view of Rabbi Shneur Zalman of Liadi with respect to Torah law, and hence requires the woman to perform ritual immersion before having relations.

⁶ For expressions which reflect Rabbi Auerbach's awareness of his innovations, see Mashiah (*supra* n.2), 77-78.

suffering people, I find it my duty to publish the humble considerations which I have thought of, and I hereby request from the great sages, who know well to distinguish between things which seem similar, to seriously consider and investigate the ideas presented herein (p. 158).

At the end of this paper I reiterate what I have written in the text above: that everything I have written applies only to women without children who cannot otherwise conceive, and I have written this only as a proposal for the review of the *gedolei Torah* [Great rabbis] (p. 174).⁷

In the edition of Rabbi Auerbach's proposal published in his brother's book, he is even more circumspect, adding an additional disclaimer at the beginning of the essay.⁸

Only a year after publishing the proposal, Rabbi Auerbach published a laconic retraction (again in *Noam*), as follows:

Regarding the proposal I made in the previous volume of *Noam*, and in the book *Imrei Avraham* by my honorable brother, and since *gedolei Torah* notified me that they do not agree with my proposal, I hereby announce again that which I have previously said, that everything I wrote was only written as a proposal, and not as a decision which one may rely upon in practice.⁹

This laconic notice raises several questions:

Who were the rabbinical authorities who rejected his proposal? What were their reasons? Did Rabbi Auerbach agree with their reasons, or did he merely accept their authority?

Since Rabbi Auerbach is no longer with us, I posed these questions to his closest disciple, Rabbi Avigdor Yehezkel Halevi Nebenzahl, who studied with Rabbi Auerbach for many decades, and is therefore an authoritative source of information about Rabbi Auerbach. Rabbi Nebenzahl is currently considered an outstanding authority both in ultra-Orthodox (Haredi) communities and in religious Zionist communities. Rabbi Nebenzahl answered that R. Auerbach's proposal was rejected by the Moetzes Gedolei HaTorah, which included some very important halakhic authorities and yeshiva heads. Their primary reason for rejecting this

⁷ In *Imrei Avraham* these two sections appear as a note at the end of the proposal. It is noteworthy that a similar expression of humility appears in another article by Rabbi Auerbach, "Artificial Insemination", *Noam* 1 (1958), 145, and in the introduction to Rabbi Auerbach's *Me'orei Esh* (Jerusalem, 1935), which deals with the use of electricity on Shabbat. Such self-effacing expressions are rare in the writings of Rabbi Auerbach, and appear only in opinions dealing with issues of great concern, which were discussed by the most prominent halakhic authorities of the time. It is clear that Rabbi Auerbach was quite aware that his suggestion was very innovative.

⁸ "Let it be known that everything that has been written in this article is only a suggestion to the Gedolei Torah, and not to be acted upon" (Rabbi Auerbach, *supra* n.4, at 1).

⁹ Rabbi Shlomo Zalman Auerbach, "Regarding My Proposal to Give Succor to Women With Regard to the Laws of Niddah", *Noam* 8 (1965), 275.

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decision was that they thought that their generation lacked the authority to reach adopt such a far-reaching leniency. The rabbis went so far as to clarify to Rabbi Auerbach that the adoption of such leniency would result in ostracism. Rabbi Auerbach was not convinced that his proposal was invalid, but he deferred to the consensus.

C. The case of Rabbi Shlomo Goren

We now come to the case of the second halakhic authority, Rabbi Shlomo Goren. Rabbi Goren was born in 1918, in Poland. He came with his family to Israel as a young child. They initially settled in Kfar Hassidim, but later relocated to Jerusalem. There he started to study in the Etz Hayim yeshiva, but at the very young age of twelve, he was accepted as a student in the Hevron Yeshiva, the leading Yeshiva in Eretz Israel at the time. He quickly became known as an *ilui*, an unusually brilliant student. At the age of seventeen he was ordained as a rabbi, and by the age of twenty-one he had already published two serious halakhic works, which received encomia from the leading rabbis in Jerusalem: R. Isser Zalman Meltzer, R. Avraham Yitzhak Kook and R. Yitzhak Isaac Herzog.¹⁰

In 1948, at the age of thirty, Rabbi Goren established the Rabbinat of the Israeli Defense Forces, which he subsequently headed. His brilliance was recognized when Rabbi Goren was granted the rank of *aluf* – Major General – only one rank lower than that of the Chief of Staff.

At the young age of fifty one, Rabbi Goren was elected Chief Rabbi of Tel Aviv, but he actually assumed the position only two years later, in 1970, after being finally released from the Army. In 1972 he was elected to the position of Ashkenazi Chief rabbi of the State of Israel, as the candidate of the Religious Zionists. Rabbi Goren passed away in 1994.

The dramatic case I discuss here relates to the personal status of Hanoach and Miriam Langer. Their mother, Hava, married a Polish man named Bolak Borkovski, who had supposedly converted to Judaism in order to marry Hava. Some years later Hava and her husband left Poland for Israel. After some time, Hava and Bolak Borkovski separated. Several years later, Hava married Yehoshua Langer, despite not having been divorced from Borkovski, and she gave birth to Hanoach and Miriam. Since Hava had had children from Langer without having been first divorced from Borkovski, the children were ostensibly *mamzerim*, who were forbidden to marry other Jews.

In the period between 1955 and 1970, this problem came before five different

¹⁰ The biographical background of Rabbi Goren is based upon S. Freedman, *Rabbi Shlomo Goren, Torah Sage and General* (Jerusalem & New York: Urim Publications, 2006).

rabbinical courts.¹¹ The Supreme Rabbinical Court in Jerusalem, on appeal, also agreed that the children were *mamzerim*.

In 1971 Rabbi Goren, well aware of his lack of authority, published his halakhic analysis of the case in a limited edition of one hundred copies indicating that the Langer children were not *mamzerim* and hence could marry other Jews.¹²

What were the halakhic justifications of this decision? First, Rabbi Goren explained that the situation of the brother and sister was intolerable, and that one must try to help them. This is not an Halakhic argument which would permit their marriage; it is, however, sufficient to motivate one to try to find a way to permit the marriages.

Rabbi Goren ruled that Borkovski was not Jewish, as his conversion was invalid; hence his marriage to Hava was null and void *ab initio*. Accordingly, the only real marriage Hava had contracted was the marriage to Langer. And since this was a nonadulterous union, the Langer children were halakhically legitimate.

Rabbi Goren's ruling that Borkovski was not Jewish was based on three factors. First, and most important, Rabbi Goren maintained that there was no valid evidence that Borkovski had undergone conversion at all.¹³ There were no witnesses to any of the elements of conversion: neither to the circumcision nor to immersion in the Mikveh, or even to the decision of the rabbinic court to convert Borkovski! The only evidence brought before the Israeli rabbinical courts was hearsay testimony given by people who were halakhically unfit to testify. Borkovski's testimony itself was entirely unreliable and full of contradictions, and there was no document attesting to the conversion (pp. 114-117). Since there was no evidence of conversion, according to Rabbi Goren, Borkovski could not have contracted a halakhically valid marriage with Hava, so the Langer children were not *mamzerim*.

Secondly, if indeed Borkovski had undergone some form of conversion, this

¹¹ Rabbis Goldschmidt, Babliki and Karelitz (Tel Aviv, 13 November 1955); Rabbis Schlezinger, Wilenski and Sorotskin (Tel Aviv, 17 May 1966); Rabbis Karelitz, Zolti and Rubenstein (Petah Tikvah, 8 October 1967); Rabbis Karelitz, Zolti, and Kreisman (Petah Tikva, 4 June 1969); Rabbis Eliashiv, Israeli and Yosef (Supreme Rabbinical Court of Israel, 20 January 1970).

¹² Rabbi Shlomo Goren, *A Halakhic Opinion Regarding Personal Status* (Heb.) (Israel: The General Staff, 1971). Two years later, after Rabbi Goren had already permitted the marriages of the Langer children and performed the marriages, he republished the decision in book form: *The Decision Regarding the Brother and the Sister* (Heb.; Jerusalem: Chief Rabbinate of Israel, 1973). Since the second publication is more accessible, references here are based on that publication.

¹³ Commenting on this case in 1988, Rabbi Goren emphasized that the main basis of his ruling was the absence of evidence that Borkovski had undergone conversion, see Rabbi Shlomo Goren, *Mishnat HaMedinah* (Jerusalem: Ha'idrah Rabah & Mesorah La'am, 1999), 184. A detailed analysis of various aspects of this decision can be found in M. Finkelstein, *Proselytism* (Heb.) (Ramat-Gan: Bar-Ilan University Press, 1994), 350-53. Here too, Finkelstein emphasizes that the main reason behind Rabbi Goren's lenient ruling was not the annulment of Borkovski's conversion, but rather the assumption that the existence of such a conversion had never been properly established.

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was not of his own free will, but at the insistence of Hava's parents. Rabbi Goren argued that this would invalidate the conversion (p. 143), based upon a ruling of R. Chaim Ozer Grodzensky (*Ahiezer*, 3:26).

Third, Borkovski continued going to church even after he had allegedly converted. Rabbi Goren maintained that by so doing, Mr. Borkovski invalidated any conversion if indeed a conversion had taken place (pp. 119-120).

The first factor alone would have been enough to permit the children to marry. The other points are valuable adjuncts. The halakhic considerations adduced by Rabbi Goren are perfectly valid substantive arguments, which could have easily been accepted as part of normal rabbinic discourse.

In the first publication of his ruling, Rabbi Goren stated that he did not have the power to permit the Langer children to marry. He wrote that his only purpose in publishing this halakhic analysis was to bring about a reconsideration of the issues, with an eye toward permitting the children of Mrs. Langer to marry.¹⁴ Indeed, Chief Rabbi Nissim, in parallel with this publication, attempted to form a special court to reconsider matters. Opposition from all Rabbinic circles, both Haredi and Zionist, defeated his efforts, and such a tribunal was not formed.

Thus, despite Rabbi Goren's well-argued ruling, the judges of the Supreme Rabbinical Court refused to re-open the case and thereby remove the stigma of illegitimacy from the Langer children.

At this stage the problem became a public affair, since there was a direct connection between the forthcoming election of Rabbi Goren to the position of Chief Rabbi and the enabling of the Langer children to marry: if Rabbi Goren were elected, he would set up a special rabbinical court to reconsider the case and thus permit the children to marry.¹⁵

Indeed, on November 19th, 1972, one month after he took office, Rabbi Goren

¹⁴ This remark appears only in the first publication, which appeared before the Langer siblings were permitted to get married and the public furor which followed the stringent rulings.

¹⁵ See the article published in the leftist newspaper of the Israeli Labor Federation, *Davar*, shortly before the elections of the Chief Rabbis (Tovia Mendelssohn, "What is Expected of The Chief Rabbinate", *Davar*, 12 October 1972, # 14501, 3): "The problems [of relations between state and religion – AYH] which lay at the center of public discussion some months ago were silenced, at least partially, by the intervention of the Prime Minister, who concluded that the election of Rabbi Goren will resolve these problems. Since then, all efforts were devoted to getting Rabbi Goren elected, and Rabbi Goren himself, well aware of the power of the media, took active part in this effort". For the other side of the political spectrum, see the article in the Agudah newspaper (*Hamodia*) by S. Friedmann, "In the Crooked Paths of Leniencies", *Hamodia*, 13 October 1972, #8328, 3.

In fact, the public campaign started well before the elections; see for example the call for action published by Rabbi Bezalel Zolti, who was then a member of the Supreme Rabbinical Court in Jerusalem, "The Battle for the Integrity of the Rabbinate", *HaPardes* 46 (1971), 19-21. Rabbi Zolti concluded his article with these words: "A call issues to the elders of the *gedolei hador* and to all *Gedolei Torah*, Heads of yeshivot, rabbis and yeshiva students of all circles: *let us unite in the battle for the integrity of the Torah!*" (emphasis added, AYH).

published a statement that another nine rabbinical judges had agreed with his opinion, and that the Langer children were therefore free to marry. However, the names of the rabbinical judges who agreed with Rabbi Goren were not released, for fear that they might be harmed.¹⁶

At this stage, since a rabbinical court had permitted the marriages, the Langer children were married that very evening!

The opposition to Rabbi Goren was twofold:

On the one hand, his opponents presented him as a person who was willing to subjugate himself to the demands of the secular politicians. His opponents claimed that his Religious Zionist outlook caused him to bend religious principles in servitude to the secular state.¹⁷

The political-ideological nature of the debate was accentuated by the publication by the National Religious Party of a pamphlet supporting Rabbi Goren, and this party represents the Religious Zionist position.¹⁸

The very publication by a political party testifies to the political interest in the public debate. Moreover, two of the articles in the pamphlet – the interview with Rabbi Tzvi Yehuda Kook (pp. 7-15) and the article of Rabbi Katriel Tchursh (pp. 17-21), a senior rabbi of Tel Aviv and the head of the National Religious Party's rabbinical organization, both analyze the debate as an ideological one, whose basic issue is the attitude of the halakhah to non-observant Jews. As expressed by Rabbi Kook in the pamphlet: "The Chief Rabbi proved that in this case there was no conversion, and the attackers do not refute this with any reasonable argument!... It is well known that the Moetzet Gedolei Hatorah of Agudath Israel object to the Chief Rabbinate [of Israel]. It is consistently their ideology and this is the determinant [of their behavior]" (p. 10). Likewise: "Here [in the view of Rabbi Goren and his supporters, the NRP and similar-minded rabbis] the unity of the Jewish people is treated as the foundation of everything, whereas there [with regard to the attackers of Rabbi Goren] we find deepening the rift between Jews"

¹⁶ The *Ma'ariv* newspaper (20 November 1972, no. 8623), 2 reported that a police watch had been put Rabbi Goren's house for fear of attack.

¹⁷ Articles and manifestos against Rabbi Goren and against the Rabbinate in general were collected in *Otzerot Yerushalayim* 118 (1973), 274-288, and *ibid.* 119 (1973), 293-298.

Significantly, on the morning following the announcement that the marriages had been performed, the Israeli press reported that Prime Minister Golda Meir congratulated Rabbi Goren for putting an end to this affair. See e.g. *Ma'ariv*, 20 November 1972, #8623, 1. Similarly, Moshe Dayan, the Defense Minister, is quoted (*ibid.*, 2) as saying that he was happy that Rabbi Goren replaced Rabbi Unterman as Chief Rabbi, and added: "It is a pity that this replacement was not effected years ago. If that had happened, many of the disputes between the religious and the nonreligious parties would have been discussed in a more appropriate and positive atmosphere."

¹⁸ P. Farber (ed.), *The Chief Rabbinate – A Rabbinate for the Whole Nation* (Tel Aviv: Hapo'el Hamizrachi Publications, 1973).

(p. 11).¹⁹

Aside from this sort of argument, there were also arguments relating to the halakhic validity of the actions taken by Rabbi Goren. The main claim was that Rabbi Goren lacked the authority to overrule the decisions taken by the five courts who had dealt with this issue previously.

Significantly, the main argument of Rabbi Goren's opponents did not relate to his substantive analysis: There was no attempt to show that the testimony taken by Rabbi Goren was not reliable. Similarly, there was no dispute regarding his claim that the fact that Mr. Borkovski continued to attend church invalidated his alleged conversion retroactively.²⁰

Interestingly, the pamphlet mentioned above includes an article by Minister Zerah Warhaftig (pp. 24-32), who was aware of the problematic nature of Rabbi Goren's conduct in contravening decisions of previous courts; however, he held that a decisor of the stature of Rabbi Goren has such a privilege.

Throughout the whole period – from the first publication of his initial opinion until the marriages of the Langer children and even afterwards – Rabbi Goren never recanted, and he never accepted any criticism of his decision or his actions.

D. Comparison of the results of the behavior of Rabbis Auerbach and Goren

Before summarizing the similarities and the differences between the two cases, I will describe the results of the actions of the two rabbis.

We begin with Rabbi Auerbach, who, as indicated earlier, abandoned his proposal. As a result Rabbi Auerbach did not lose his status. On the contrary, Rabbi Auerbach was considered one of the most important and influential halakhic

¹⁹ See also "Goren's Coup on Mamzerim", *The Jewish Chronicle* (London), 24.11.1972, #5405, 1-3: "Rabbi Goren's coup, which by-passed normal Bet Din (rabbinical court) procedure and avoided involving Rabbi Ovadia Yosef, the Sephardi Chief Rabbi of Israel, caused a sensation all over the country. His action pushed almost every other topic out of the newspaper head-lines for 24 hours... The middle-of-the-road religious section of the population represented by the National Religious Party and most non-observant Israelis, who form the majority, now regard Rabbi Goren as a folk hero".

²⁰ There were some exceptions to this assertion which, however, played a minimal role in the public debate; see Rabbi Shmuel Tovia Stern, "The 'Pesak' of Rabbi Goren", *HaPardes* 47:8 (1973), 9-11. Rabbi Zolti initially published his opinion simultaneously in two different newspapers, under the title "A Public Statement Regarding the Cause Celebré"; see *Hamodia* (Agudath Israel), 26.1.73, #8419, 3-4, and *She'arim* (Po'alei Agudath Israel), 26.1.73, #6562, 4. Rabbi Zolti's response appeared shortly afterwards, in *She'arim*, 7 Adar I 5773, 9.2.73, # 6574 p.6 and in *HaPardes* 47: 7 (1973), 7-12, under the title "A Halakhic Answer". A response to this was published by an anonymous dayan as "An Open Letter to the Author of the Public statement", *Hatzofeh*, 2.2.73, #11313, p. 5.

According to Rabbi J. D. Bleich, "Survey of Recent Halakhic Periodical Literature", *Tradition* 13:4 (1973), 192-200, the real reason for the dispute was not the halakhic arguments, but rather the political issues: "Of course, the pros and cons of the halakhic arguments, however important they may be, are not the crucial issues... The real issues are the relationship between Synagogue and State, concern for the integrity of the judicial process and the abyss between observant and non-observant in Israel".

authorities throughout his life, and he was accepted and beloved by all circles: Haredi and Religious Zionist.

The behavior of Rabbi Goren, on the other hand, was diametrically opposite.

Rabbi Goren disputed the decisions taken by previous courts. When he was criticized, he rejected the criticism out of hand. He pursued his ideas and implemented them.

This behavior had immediate consequences: the Haredi rabbinic establishment throughout the world, including rabbis from the U.S.A and Europe, published statements declaring all of Rabbi Goren's decisions null and void.²¹

One of the notable announcements was made by the Vaad HaRabbonim in the U.S. and signed by Rabbi Moshe Feinstein:

Regarding a terrible thing that happened in Eretz Israel ... this made a great din among the Gedolei Torah ... in the offices of the Agudath HaRabbonim, the leaders of the rabbis and the Roshei Yeshivot met and decided that ... all Rabbis and Torah supporters should protest against the desecrators of the Torah ... we concur with the call of Rabbi Abramski ... and all the Gedolei Eretz Israel that *all of [Rabbi Goren's] decisions and instructions are null and void.*²²

Rabbi Goren's behavior impacted not only on his personal status, but on the relations between the Haredi rabbinical establishment and the Zionist rabbinical establishment, and also – inevitably – on the status of the Chief Rabbinate.²³

E. Summary

It seems to me that it is not possible to attribute the different results to the superiority of the substantive arguments advanced by Rabbi Auerbach over those

²¹ For example, see the public notice in the name of Rabbi Eliyahu Munk of the Eidah Ha-Haredith of Paris, Rabbi Shaul Breisch of Zurich, and Rabbi Chaim Kreiswirth, Av Beit Din of Antwerp, in *HaPardes* 47:4 (1973), 26-28.

²² This statement was published on the inside cover of *HaPardes* 47:4 (January 1973); the emphasis is mine. In this issue, on pp. 24-26, additional calls were published to refrain from using the title of rabbi with respect to Rabbi Goren. Among the signatories of these calls were the following very noted sages: Rabbis Yehezkel Abramski, Haim Shmuelevitch, Eleazar Menahem Man Shach, Yisrael Kaniewski, Yosef Shalom Eliashiv, Shmuel Halevi Wosner, Nathan Gestettner, and Moshe Sternbuch. It is noteworthy that R. Shlomo Zalman Auerbach was one of the signatories to this!

²³ This understanding is reflected in a remark by Rabbi Yehoshua Shapira, Head of the Yeshivat Hesder in Ramat Gan, made in a joint interview with Rabbi Ya'akov Ariel, Chief Rabbi of Ramat Gan, to a Haredi journal. Rabbi Shapira claimed that the rift between the Haredi establishment and the Zionist establishment was severely deepened as a result of the affair of "the Brother and Sister"; see Rabbi Ya'akov Friedman, "Thy Servant's Shed Blood - An Interview with Rabbi Yaakov Ariel and Rabbi Yehoshua Shapira", *Sha'ah Tovah, Parashat Vayikra* (2008), 20-27. It should be stressed that I do not take a position here about this statement; I merely indicate that this is how a Zionist Rosh Yeshiva views the results of Rabbi Goren's persistence in disregarding the majority opinion about this issue.

of Rabbi Goren. For as we have seen, in both cases the opposition hardly addressed these substantive arguments at all.²⁴

Theoretically, it could be argued that the different results are due to the different social backgrounds of the two rabbis, for Rabbi Auerbach was from a well-established rabbinic family. However, this seems unlikely, as this social gap already had been bridged by Rabbi Goren as a young man. Perhaps more relevant is the fact that Rabbi Auerbach was always part of the Jerusalem ultra-Orthodox society, in contrast to Rabbi Goren, who was an outsider, and rubbed shoulders with the secular, and often anti-religious, political and military leaders.

There is also a political difference between the two rabbis: Rabbi Auerbach was a non-political person, whereas Rabbi Goren had a definite political orientation, as a Religious Zionist.²⁵

However, I believe, that these attempts to explain these developments are of limited value in understanding the differences between the two cases considered here. After all, Rabbi Auerbach was also threatened with ostracism. The main difference between the cases lies in the different ways the two rabbis responded to the rabbinic objections. Rabbi Goren refused to accept the authority of his peers, whereas Rabbi Auerbach submitted to their authority.

According to this suggestion, the basis of the difference lies in the fact that Rabbi Auerbach saw himself as member of the collective of halakhic authorities, and submitted to the majority, even though he did not agree with their objections. This behavior demonstrated his membership in his peer group, the authorities of his time, and hence there was no reason for them to oppose him. Rabbi Goren, on the other hand, positioned himself outside of the authority of contemporary halakhic authorities, so they naturally fought him. In my view, Rabbi Goren's political identity and public involvement brought upon him a certain amount of suspicion from his peers, but his open disregard of them turned suspicion into antagonism. Hence the reaction to his disregarding their decisions was to reject

²⁴ There is one noteworthy exception. The volume of *Noam* in which Rabbi Auerbach retracted his suggestion contains an article by Rabbi Menahem Mendel Kasher which presents serious arguments against Rabbi Auerbach's substantive claims. See R. Menahem Kasher, "Regarding the Proposal to Give Succor to Women In Connection with the Laws of Niddah", *Noam* 8 (1965), 293-349. Nevertheless, it is clear that Rabbi Auerbach's retraction was not motivated by Rabbi Kasher's article, as evidenced by the fact that Rabbi Kasher's article appeared in the same issue as Rabbi Auerbach's retraction; note also Rabbi Nebenzahl's remarks about this (cited above), and Rabbi Auerbach's lack of response to Rabbi Kasher's article. Furthermore, the Moetzes Gedolei HaTorah did not address the arguments of Rabbi Kasher. Rather, as Rabbi Nebenzahl pointed out, they merely asserted that their generation lacks the authority to adopt the leniency proposed by Rabbi Auerbach. Thus, had they agreed with Rabbi Kasher's ideas, they could have based their objections on Rabbi Kasher's criticism!

²⁵ Rabbi Auerbach refrained from expressing a clear position about the State of Israel; see Mashiah, *supra* n.2, at 206-208. As for Rabbi Goren, the fact that he was the Chief Rabbi of the Israeli Army, and later was elected as Chief Rabbi of the State of Israel with the support of the National Religious Party, clearly reflected his political orientation.

him and his opinions entirely.

F. Conclusions

The conclusions emerging from this analysis may be summarized as follows.

The basic difference between the two authorities is that Rabbi Auerbach saw a halakhic authority as a member of a group, perhaps a group spanning generations. Therefore he believed that the actions of an individual authority must be acceptable to the mainstream of his time.

In contrast, Rabbi Goren seems to have held that a halakhic authority aims to discover the halakhic truth, and hence he must maintain his view even if all his peers disagree with him.²⁶ A dispute between one halakhist and his peers thus stems from the fact that he has not yet succeeded in convincing them, or that they are not open to the truth.

A second conclusion pertains to understanding the development of the halakhah. Halakhic authorities clearly have the ability, the right, and on occasion the duty to

²⁶ When issuing decisions, judges are known to take into consideration how these decisions will be accepted by other courts or by the legislatures of their countries. See for example Omri Yadlin, "Judicial Activism and Judicial Discretion as a Strategic Game," *Bar Ilan University Law Review* 19 (2003), 665-720 (especially 685-87). For this phenomenon in international courts, see Shai Dotan, "The Reputation and Strategy of International Courts" (Ph.D. thesis in progress, Tel-Aviv University). Thanks to my friend, Amos Israel, for drawing this material to my attention.

Rabbi Goren may have been motivated by the desire to prevent the acceptance of a proposal to legalize civil marriages in Israel. If so, his decision was influenced by strategic considerations. A basis for this interpretation of Rabbi Goren's motivation can be found in a remark made by Rabbi Goren himself. Immediately after he was elected Chief Rabbi, he remarked that he would request that the proposal to institute civil marriage in Israel be removed from the government's agenda. See the interview with Rabbi Goren in *Davar*, 16 October 1972, #14504, 1: "Goren and Yosef Elected Chief Rabbis; Rabbi Goren asks MK Hausner to Delay the Proposal for One Year". Similarly, after the Langer brother and sister were married, *Ma'ariv* reported (20 November 1972, #8623, 1): "This morning, the heads of the Labor party, Mapam, and the Independent Liberal Party expressed the opinion that the act of Chief Rabbi Goren will prevent a government crisis regarding the proposal by MK Hausner to institute civil marriages. Mr. Hausner said last night that the solution of the problem of the Langer brother and sister will undoubtedly influence the decision of the Independent Liberal Party congress as to whether to accede to the request of Rabbi Goren to postpone submitting the proposal". See also the remarks of Rabbi Bleich, *supra* n.20.

That said, it is my understanding that the actions of Rabbi Goren in this case reflect his general philosophy of halakhah: in novel cases there are often many legitimate halakhic options. It is the halakhic authority's responsibility to choose the option which best fits the particular case, in light of the relevant aspects of the situation, such as economic, social and historic factors (this point is developed in the Ph.D. thesis upon which I am working). Thus it seems to me that as far as Rabbi Goren was concerned, the strategic considerations which motivated him to choose this particular option, which he considered the call of the hour, did not cause him to overstep the legitimate bounds of normative halakhah.

Another element which may have been influenced by Rabbi Goren's strategic considerations was his decision to act in haste, without seeking support for his decision from important halakhic authorities, in Israel and abroad, before publishing his opinion.

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“rock the boat” and to be daring in arguing for innovation.²⁷ Rabbi Goren conducted himself accordingly! However, he aroused opposition in his strong criticism and rejection of previous decisions, criticism which was exacerbated because of the political context.

Halakhic authorities generally seem to agree that such extraordinary behavior on the part of one of their peers threatens orthodoxy. In such cases, therefore, it could only be expected that they react accordingly.

Thus it can be seen that the ability of an individual halakhist to bring about a change depends, to a certain extent, on his ability to foresee the opposition of his peers to his innovation.

From these conclusions it is possible to derive further practical conclusions. First, an authority who seeks to participate in halakhic discourse must be aware that by publishing a decision which contradicts conventional wisdom, he may be suspected of challenging rabbinic authority, and such a situation is likely to end with a sharp break and even ostracism.

Second, to bring about change it is not sufficient to have excellent proofs based on traditional sources and substantive arguments. One must take into account the limits of the tolerance of one’s peers to the proposed innovation. One of the elements of the limits of tolerance is the stature of a halakhic authority among his peers.

It goes without saying that the results of the comparison presented here are incomplete, and it is necessary to analyze additional cases where halakhic authorities have voiced positions radically diverging from the accepted rabbinic view and the struggles which ensue therefrom. Hopefully, such analysis will shed additional light on the sociology of rabbinic decisors and decisionmaking.

²⁷ “R. Joshua b. Korhah said, Whence do we know that a disciple, who is present when his master judges a case and sees a point that would support a poor man or a rich man, should not keep silent? As it is written, ‘You shall not be afraid of any man’. R. Hanin explains this, ‘You shall not hold back your words because of anyone’” (*Sanh.* 6b). This principle was codified by Maimonides, *Hilkhot Sanhedrin* 22:2.