The Trouble with Jewishprudence

I want to call attention to a problem that I think afflicts all well-developed legal systems, but Halakha more than most. I would be grateful for any thoughts on how to solve or dissolve it, or at least understand it better. It is based on three principles, each of which – by itself – is widely accepted by many who follow or study Halakha:

1. Halakhic Authority (“Not in Heaven”): the Halakha is whatever is decided, or “ruled,” by an authoritative process. More precisely: the Halakha is H iff an authoritative decision procedure (DP) yields the judgment that H.

For example, Quinoa is kosher for Passover just as long as the right decisor learns it out from the right sources in the right way, or if “the Halakhic process” produces such a ruling, or what have you.

1. Pluralism (“elu v’elu”): The authoritative Halakhic process, the decision procedure (DP), can non-defectively reach either of two incompatible judgments or rulings.[[1]](#footnote-1)

For example, DP, done right, can conclude that quinoa is kosher for Passover AND, alternatively, that it is not kosher for Passover. Each ruling could result from a legitimate, and non-defective, operation of DP, even as they contradict each other.

1. Faithfulness: The authoritative Halakhic process or procedure involves trying to get the Halakha right. Put differently: DP, except in some extraordinary cases, aims at discovering the correct answer, especially in contrast to what the decisors might mistake it to be, or wish it to be.

Whether quinoa is kosher for Passover, for example, is “learned out,” from the sources – derived from them -- not decided in advance (eg. because we’d like to permit it), or at least not deliberately chosen regardless of what the sources say.

The Problem:

Each of these principles seems plausible, even truistic, on its own. The problem arises when a Halakhic decisor tries to live by all three. In particular, it is almost impossible to search for the correct answer – as required by Faithfulness – when you also accept Pluralism and Halakhic Authority, which imply that there isn’t one. And by 1 & 2, there can’t be an antecedently correct answer, because its negation would be equally correct if decided properly, and nothing rules out such a (contradictory) decision. For these reasons, it will be very difficult to rationally perform the decision procedure, respecting 3, while consciously accepting 1&2. Put more crudely: you can’t try to get the right answer when you already know that any answer thereby reached is right.

It’d be like telling a waiter: ‘I have no preference for dinner, except that you try to give me the choice you think I genuinely prefer.’ We are like God’s (or the Torah’s) waiters, on this analogy, given just this instruction about which Halakhic ruling to make or follow. Yikes!

What to do?

1. Do we need all Three?
2. Partial Credit

The most obvious way out, it seems, is to sacrifice at least one of the principles. But that can be expensive. Consider that 1 & 2 – though not logically conjoined[[2]](#footnote-2) – often go together. Hasidim, for example, reject both 1 & 2 because for them, quinoa is either chametz or not, metaphysically, and the Halakhic process may get this wrong (in which case there’s something like partial credit).

But that would render a lot of religious practice, conceivably all of it, mistaken, which is hard to swallow.[[3]](#footnote-3) If there is some actual truth, up there, so to speak, independently of what we decide, then there’s no limit to how many of our decisions could be wrong, and our practice not actually the Halakha. Rejecting 1 and 2 also clashes with traditional lessons in rabbinic history, such as the well-worn ‘Not in Heaven’ slogan, which stands for the power of rabbinic authorities to determine Halakha (eg. does a composite oven receive impurity?), simply by deciding and voting. That’d be a lot to give up.

1. Who needs truth?

We could, instead, reject 3, Faithfulness. Some non-Orthodox (and even some Orthodox) Jewish camps go this route, arguing that Halakhic decisionmaking need not be a search for “the truth” or correctness. As Blu Greenberg famously remarked, “Where there’s a rabbinic will, there’s a halakhic way.”

1. Against Faithfulness

In support of this possibility, some Halakhic pluralists point to the way social pressures or values, or personal and political preferences, have influenced rabbinic rulings over the years. This point is undeniable, as a matter of history. But it doesn’t undermine 3, the requirement to try to get it right, because that principle is about what counts as a legitimate *reason* or *basis* for a Halakhic ruling, rather than what actually causes it. A cop may give a ticket because he is in a bad mood, but he cannot cite or use this as his reason, or the ticket will (or should) be thrown out in traffic court.

Put differently: you may be biased, in deciding Halakha, but that does not license being biased on purpose.

Of course, there have been famous cases of decisors intentionally – and legitimately -- flouting correctness, narrowly understood. I heard that the Brisker Rav once responded to an impoverished woman, who asked whether her chicken was kosher, by saying: “First, let me ask you a question: How many chickens do you have?” Farther back in history were the famous cases of the “Rebellious Son,” where rabbinic authorities grabbed any pretense on the books so as not to enforce the law. Arguably they did the same with the death penalty.

These examples are misleading, though, for two reasons. First, they’re exceptional, which is part of why they’re famous. One wonders whether a rabbi would have attained the authoritative stature of the Brisker if this were known to be his general practice, instead of a celebrated departure from it. Second, the Halakhic process – the decision procedure DP – need not be understood narrowly. There’s more to “correctness” than what a particular textual source may prescribe or imply. As Eliezer Berkovitz argued, there are also underlying principles – such as mercy, justice, “ways of peace in the world,” and so on-- that can sometimes trump positive Halakhic law in settling the final ruling.[[4]](#footnote-4) Appealing to such principles, as the Brisker Rav arguably did, is a more sophisticated way of seeking correctness, not an alternative to it.

Far more importantly, the pluralism-friendly accounts of rabbinic decisionnaking – “where there’s a rabbinic will…” – tend to look better outside the actual practice of Halakhic inquiry. Imagine things from the inside, on the other hand: closely poring over the text, struggling to determine whether, say, the Sabbath ban on lighting fires applies to electric circuits (or is that “building”?). It seems hard to understand this exegetical activity other than as investigating which answer the sources favor, and which they rule out. What else could it mean to “check the sources” to see if the answer is P or not P? The practice seems unintelligible except as a search for the correct answer.

Most important, this interpretive practice is taken very seriously, much more so than judges take their legal research (itself a more faithful exercise than legal academics cynically claim). Rabbinic decisors are exhorted to investigate thoroughly and humbly, asking God’s help in preventing a mistake: “May it be Thy will, O lord my God, that no mishap occur through me and that I not err in a matter of halakha ... that I not declare the impure pure or the pure impure.”[[5]](#footnote-5) Again, this strenuousness – like all trappings of seriousness, integrity and effort in Halakhic research – becomes absurd if there is nothing to get wrong. Why worry or work hard?

On the other hand, trying to get it right is equally unintelligible if, at the same time, one follows principles 1 and 2, above, to the realization that there’s no correct answer prior to the process. Hence, the problem.

1. Halakhic Dualism

Before throwing up my hands, I want to consider what may be the most promising way out, suggested by Aaron Segal. At the risk of distorting it, I’ll put the point this way: there may be two types of Halakhic truths, a theoretical (“Heavenly”) truth and a practical truth. The theoretical truth refers to the dictates of Halakhic sources – what do they say or imply or defeasibly entail about, eg., Sabbath times in Alaska, or gebrokst on Passover, or whatever. This truth can be read off the text (or off of Berkovitzian principles, as they apply).

In other words, we can read principles 1 and 2 as referring to practical Halakha – what we may follow – and principle 3 as referring to theoretical Halakha (what’s \*really\* kosher or treif). Synthesizing them: P-Halakha can legitimately be either of H and ~ H, iff the result is reached by a decision procedure that involves, inter alia, searching for the correct T-Halakha.

This proposal would dissolve the tension, the paradox. But we should note the costs, which seem to me substantial.

1. The revision of 1&2 is fairly heavy; we wouldn’t be able to happily have our pluralism and eat our faithfulness, too, because pluralism about Halakhic truth would, in the end, be sacrificed, on this proposal. It wouldn’t really be right to say, as the Mishneh does, “these and those are the words of the living God.” Instead, we’d have something like the Hasidic system of partial credit: “That’s the word of the living God,” one could say, “but you may follow this opposing view, too, because it was properly (if incorrectly) reasoned.” I’m not sure how big a cost this is, but it seems a bit less like pluralism.
2. The reasons to DO some Halakha would not be the reasons it IS the Halakha. The reasons something is, say, kosher or against Sabbath laws would be a theoretical matter, which we may or may not know. The reason one has to follow some practice, on the other hand, would be that it was decided well. When a rabbi sermonizes that, say, “We eat Matzoh to commemorate the plight of our fleeing forebears,” he would not be strictly correct; it’s done because certain people read things that way, and that would be reason enough even if they read it wrong. With congressional laws, this would be unremarkable, but for religious laws this disparity of reasons may be costly.
3. As before, this response to the problem might clash with the day-to-day of Halakhic interpretive practice. Consider a Halahic decisor, faced with a question, who takes a fair amount of time to check the sources and come to a good faith answer. There would be no reason, on this proposal, for him or her to revisit the question, or the reasoning that yielded it. No need to doublecheck or lose a moment’s sleep over the possibility that he erred. As long as he *intended* to get it right, and acted on that intention, then for practical purposes he DID get it right. End of story. But with actual Halakhic practice, trying hard, and worrying about erring, seem both common and appropriate. It would be hard to make sense of this on the dualistic picture of Halakha, or so it seems to me.

Still, it doesn’t seem to me that there is a cost-free solution out there. All the principles – authority, pluralism and faithfulness – seem indispensable. Yet they don’t work well-together; something has got to give. That is, unless I’ve missed something here: maybe I didn’t try hard enough, and I should rethink it… At least I tried to get it right.

Comments, feedback most welcome!

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1. This is meant to be different from the claim that (a) DP could yield H or it could yield ~H, which is trivial; and (b) DP could yield H&~H, which is too strong. Here the claim is that there are pairs of incompatible rulings, either one of which can properly become Halakha by way of DP. [↑](#footnote-ref-1)
2. For example, DP could be truth-tracking and contradiction-proof, like some kind of perfectly functioning calculator, so that, contra 2, it can’t yield either of two contradictory results. But I don’t think anyone views Halakhic reasoning or learning this way, even when done by the leading experts. [↑](#footnote-ref-2)
3. This point was first made by Rabbi Barry Freundel in “Masorah, Mahloket and Emet: Origins of Rabbinic Debate and the Search for Truth in the Halakhic Process” (circulated paper). [↑](#footnote-ref-3)
4. Rabbi Eliezer Berkovitz, *Not in Heaven* (Shalem, Jerusalem: 2010), pp. 28-29. [↑](#footnote-ref-4)
5. BT Berakhot 28b. [↑](#footnote-ref-5)