Halakha in Crisis Mode: Four Models of Adaptation

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Introduction

The ongoing pandemic has put enormous stress on ordinary halakhic life. Many women cannot get to the *mikvah*, making abstinence and the "distancing" required of couples during *niddah* last indefinitely; mourners are deprived of *shiva* visits and *kaddish*; and the absence of thrice-daily, daily, or even weekly *tefillah beTzibbur* (communal prayer) sucks the oxygen out of many people's religious lives.

These reactions are normal. In a crisis, restrictions that are ordinarily difficult become massive obstacles requiring Herculean strength to overcome. Ritual actions turn out to be needs as well as obligations, so that being deprived of them feels unjust and unbearable. Moral principles that feel satisfyingly altruistic in times of plenty now seem like playing a sucker's game.

These reactions are justified. Maimonides teaches that the laws of Torah, like the laws of nature, are Divinely constructed to provide the best outcomes for most people in most societies in most places most of the time. They are not universal panaceas.

To account for the minority of situations where halakha is counterproductive, the Torah gives prophets, the Sanhedrin, and perhaps other rabbinic bodies the authority to suspend specific laws when necessary. Maimonides writes regarding this authority that "sometimes one has to amputate a leg to save the patient," the same metaphor used centuries later by Abraham Lincoln to defend his suspension of habeas corpus in the run-up to the Civil War.

Amputation is a desperate last resort (and suspension of the laws of nature is not an option for physicians). The Torah commands us to heal — in other words, to understand, interpret, and utilize the laws of nature in the ways that maximize their human benefits and minimize their human costs. Competent posekim (halakhic decisors) relate to the laws of Torah in the same way. Nature and Torah are immutable, but human beings have the ability and obligation to adjust their *effects*, whether physical, psychological, or spiritual.

Every crisis generates calls for radical responses. Some of these recommendations may rise to the level of amputation. But the organizing metaphor of this article is medicine, not surgery. What are the tools we have *within* halakha to respond to crises? How far can we adapt our community's praxis while maintaining the law rather than suspending it?

The halakhic term for "ordinary crises" is *sh'at haDehak*. (Extraordinary crises that justify suspending the law are something along the lines of *migdar milta vehasha'ah tzerikah lekakh.*) We can therefore frame our investigation as a study of how halakha adapts in response to which kinds of *sh'at haDehak*.

My thesis is that there are four distinct modes of adaptation. Those four modes are the following:

1. Ruling in accordance with a less authoritative opinion over a more authoritative opinion.
2. Stripping observance of the law down to essentials, rather than seeking the ideal.
3. Satisfying only the most authoritative opinion, rather than seeking to satisfy all authoritative opinions.
4. Lowering a legal standard beyond what was previously seen as an absolute minimum.

Calls for halakhic responses to the crisis can generally be understood and evaluated in terms of these categories.

1.

To understand how halakha adapts, we need first to explain what halakha is. For our purposes, I suggest the following definition: "Halakha is what a posek without opinions would say it is under ordinary circumstances."

You are presumably asking yourself: What is a posek without opinions? Isn't the whole role of posekim to input questions and output opinions? Let me illustrate what I mean by quoting Rabbi Moshe Isserles (Rama, *Shulhan Arukh Hoshen Mishpat* 25):

If the issue is one of "prohibition or permission," then if the relevant prohibition is *deOraita* (Torah law)—follow the strict opinion; if (the relevant prohibition) is *deRabanan* (Rabbinic law)—follow the lenient opinion. This is only if the two disputants are of equal stature; one must not rely on the words of a lesser against those of one greater in wisdom and number,[1] even in a *sh'at haDehak*, unless there would also be great loss.

Rabbi Isserles sets out an algorithm for deciding prior halakhic disputes. One needs to answer four questions.

1. Is the level of personal authority behind each opinion equal, or is one side greater?
2. Is the relevant issue Torah or Rabbinic law?
3. Will following the opinion with greater authority cause someone a great loss?
4. Is this a *sh'at haDehak*?

If the levels of authority are equal, and there is no *sh'at haDehak* and possibility of great loss, then in *deOraita* cases one adopts the strict position, and in *deRabanan* cases one adopts the lenient position. However, if there is a *sh'at haDehak* and possibility of great loss, then one follows whichever opinion prevents the loss.

Rabbi Yoel Sirkes (Bah, *Issur vaHeter*) clarifies that "great loss" can be defined either objectively or subjectively. For example, having an intended main course declared non-kosher may be considered a great loss for a poor person on Monday, and a minor loss for a rich person that same day. But the intended main course for a Shabbat table is a major loss for rich and poor alike on Friday afternoon, when it cannot be replaced in time for Shabbat. This demonstrates that the category "great loss" applies to emotional or spiritual as well as financial loss.

What emerges is that in an ordinary crisis, the default rules of halakhic decision-making shift, and posekim should adopt whichever positions prevent people from suffering great financial, emotional, or spiritual losses.

This seems like a caricature of pesak halakha. And it is a caricature, until we realize that Rama is describing the process *as engaged in by posekim with no opinions of their own***.** Where *no other basis* exists for decision, perhaps because one simply doesn't know the material well enough for one's own opinion to have weight, these rules apply. One is entitled to follow these rules only *so long as one can adopt the resulting positions with integrity*, meaning that one believes them as likely to be true as the alternatives.

Talmidei Hakhamim will generally have independent ideas as to what the texts mean, or what the intent of the law requires, and will therefore make halakhic decisions on those grounds. They will not be able to follow these rules. Ironically, in these cases they may have fewer options than a hypothetical *pesak* algorithm.

I think it is nonetheless clear that competent posekim should be heavily *influenced* by these rules. That is to say, an important factor in their interpretations and evaluations should be that texts and positions that cause fewer great losses are more likely to represent the true intent of the law.

Talmud *Niddah* 9b provides another limit on the posek's discretion to rule in accordance with less authoritative positions. A Beraita records that Rabbi Yehudah HaNasi issued a ruling that followed the position of Rabbi Eliezer against that of the Sages. "When he remembered, he said: Rabbi Eliezer is worthy of being relied on in a *sh'at haDehak*." The Talmud comments: "If you say that he remembered that the halakha does not follow Rabbi Eliezer but rather the Sages, how would that justify following Rabbi Eliezer in a *sh'at haDehak*?! Rather, it must be that the halakha was not formally determined either way, and it means "*when he remembered*" that Rabbi Eliezer was disagreed with by a group, not an individual." In other words, an opinionless posek can adopt the less authoritative position only on open questions, but cannot relitigate settled issues even in cases of *sh'at haDehak.*

The boundaries of "open" and "settled" are themselves not always clear. As with everything else, integrity and humility are necessary, and not always sufficient.

An interesting test case is the "Zoom Seder" controversy this year. A group of Israeli rabbis, mostly of Moroccan origin, issued a ruling before Pesah that permitted families to have interactive seders over the Zoom conferencing platform. They offered various policy grounds for regarding this as a sufficient *sh'at haDehak* to waive rabbinic violations of Yom Tov, but their backstop argument was the minority position that simply permits use of electricity on Yom Tov. A wide swath of Ashkenazic and Sephardic rabbis ruled the Zoom-seder position out of bounds precisely because of the reliance on that position. A plausible explanation of the disagreement is that one side saw the issue of electricity on Yom Tov as formally settled, while the other saw it as open, which allowed them to rely on the lenient position in a *sh'at haDehak*.

2.–3.

Talmudic halakha often distinguishes explicitly between what should be done *leHatkhilah*, *ab initio*, and what need not be redone *beDiavad*, *post facto*.

A universally accepted principle is *kol sh'at haDehak kedieved damya*, meaning that in pressing circumstances the *beDiavad* becomes acceptable *leHatkhilah* .[2]

There are at least two kinds of *leHatkhilah / beDiavad* divisions.

The first division is when the *beDiavad* meets an essential legal standard, while the *leHatkhilah* adds a requirement that is indirectly related to that standard. For example, aesthetic experience is basic to very few mitzvoth, but regardless, many mitzvoth are *leHatkhilah* only when done with aesthetically pleasing accoutrements. For negative commandments, the *leHatkhilah* often involves taking added precautions against violating the prohibition. This means that the *leHatkhilah* can be intimately bound up with rabbinic decrees intended to safeguard biblical prohibitions.

Rabbi Chaim Amsellem argues in *U'Baharta BaHayyim* that *sh'at haDehak kedieved damya* gives posekim the right to waive *deRabanan* decrees. On that basis he suggests, for example, that during the pandemic women can immerse in any *mikvah* large enough to contain them fully, and in water considered "drawn," since in his opinion the requirement for 40 *se'ah* (the talmudic measurement of volume) and the requirement that the water not be "drawn" are *deRabanan*. Rabbi Daniel Sperber was reported on Facebook to have made a similar argument regarding "distancing" for women who will be unable to immerse during the pandemic.

One can counter that the Sages chose to make some of their decrees binding only *leHatkhilah*, but made others obligatory even *beDiavad*. S*h'at haDehak kedieved damya* permits waiving only the first category, and the burden of proof may be on the posek to prove that a decree can be waived. One can also counter that preventive decrees may be waived only when there is little likelihood that the *deOraita* violation they were instituted to prevent will happen as a result. My sense is that both these counters are correct.

However, a different principle may allow waiving *deRabanans* of both types in emergencies. Mishnah *Shabbat* 24:1 teaches that a person trapped outside of town before Shabbat may ask a Gentile to carry his or her wallet in, even though asking a Gentile to perform work forbidden to Jews is generally forbidden. The reason given is that asking a Gentile is generally a preventive decree, lest one come to do the action oneself, but in this case such a decree makes it *more* likely that one will violate the prohibition oneself. Ravvyah (1:391) sees this as an example of a general principle that rabbinic decrees can be waived in cases where they are counterproductive. According to this, if one could demonstrate compellingly that a specific "distancing" is counterproductive during the pandemic, meaning that observing the prohibition makes it more rather than less likely that the couple will violate the prohibition against intercourse, the prohibition against that "distancing" could be waived. However, such demonstrations are hard to come by.

The second kind of division is when the *beDiavad* satisfies only the most authoritative position in a halakhic dispute, whereas the *leHatkhilah* also satisfies less authoritative positions.

This *leHatkhilah* can metastasize into the idea that one must *always* be *yotzei leKhol haDeiot* (fulfill one's obligation according to *all* possible positions). The excesses of that approach, which can literally threaten lives (as when the largest position about the size of an olive is combined with the position that one must eat an olive-size of matzah in one swallow), can make accounting for multiple reasonable positions seem unreasonable. However, an issue may not be ripe for conclusive decision, and sometimes accounting for multiple positions can increase the likelihood of approximating the Divine Will, at minimal cost.

Some of the recent discussions about Zoom seders, *mikvaot*, *kitniyot* and the like have revolved around these issues, both broadly and specifically. One might think, for example, that the time has come to adopt a coherent halakhic approach to electricity. But one might counter that technology continues to develop so rapidly that we are best off continuing to muddle through.

4.

The last, most controversial, and perhaps most radical way that halakha can change during a *sh'at haDehak* is by lowering a legal standard beyond what was previously seen as the absolute minimum.

A Beraita cited on Talmud *Sukkah* 31a states regarding the Four Species:

If they are withered—they are valid; If they are dried-out—they are invalid. Rabbi Yehudah said: Even if they are dried out (they are valid). Said Rabbi Yehudah: It happened that the people of Karkom would bequeath their *lulavim* to their grandchildren. They replied: What proof is that!? A *sh'at haDehak* is no proof.

Rosh and Raavad, cited by Tur (OC 649), derive from the response to Rabbi Yehudah that that the city of Karkom lived in a permanent *sh'at haDehak* regarding *lulavim*, and as a result, its residents could fulfill their obligations with *lulavim* that anywhere else would have been invalid even *beDiavad*.

However, Bet Yosef notes that Raavad eventually came to consider this result absurd:

"How could this be, that in a situation of *dehak*, one fulfills obligations with it and make blessings over it *leHatkhilah*, if in a situation of not-*dehak*, one does not fulfill one's obligation with it even *diavad*?!" Raavad concludes that the people of Karkom waved their ancestral *lulavim* so as not to forget the mitzvah rather than to fulfill the mitzvah.

Bet Yosef himself responds that authority to determine the halakhically necessary standard of *lulav*-freshness was given over by Scripture to the Sages, and they said that in a situation of not-*dehak*, one's obligation is not satisfied even *beDiavad* (with a desiccated *lulav*), so that Israel would be scrupulous about mitzvoth, but in a situation of *dehak*, they validated such lulavim, since the mitzvah could not be fulfilled any other way, and even permitted blessing over them.

Bet Yosef concludes by splitting the difference; one can wave such *lulavim* in a *sh'at haDehak*, but not make the blessing over them.

This seems to me the best framework for analyzing the Zoom *minyan* issue. I think halakhic precedents make clear that a *minyan* ordinarily requires physical community. However, the question was whether the halakhic standard of community ought to be redefined in this *sh'at haDehak*. The general answer of the community was to do so only where there was no risk of making a *berakhah leVatalah*, or blessing made in vain.

Rabbi Eliezer Melamed's astonishing assertion that saying *kaddish* without a minyan is not a violation of any sort therefore opened up the possibility of *kaddish* via Zoom. In my humble opinion, his position should at most be used to allow a mourner to say *kaddish deRabanan (kaddish* said after

learning together) in a Zoom *minyan* that has learned together, rather than *kaddish yatom* (mourner's *kaddish*), because one can argue that the *minyan* for learning is constituted by a shared experience rather than shared presence.

Conclusion

Halakha has ample mechanisms for adapting in times of crisis. Competent posekim can utilize these mechanisms to develop creative strategies to reduce communal and individual burdens and allow better access to the consolations and joys of ritual.

These mechanisms are governed within halakha by formal rules. Deviating from those rules moves a posek from the realm of adaptation to that of "amputation," from maintaining the law to suspending it.

Ultimately, though, the metarules of halakhic adaptation, like those of ordinary halakha, are subject to interpretation. The integrity of halakha always depends on the integrity of those who decide it, and on the integrity of the community that empowers them to decide it.

[1] "Number" may refer either to age or to number of students.
[2] S*h'at haDehak k'dieved damya,* often attributed to Rabbi Mosheh Isserles, *Torat HaHatat* 17, although he may not have intended to articulate a general principle.