Minhag Ha-Sochrim: Jewish Law’s Incorporation of Mercantile Custom and Marketplace Norms

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INTRODUCTION

Many litigants and students of Jewish law find it puzzling that commercial norms (minhag ha-sochrim)–customs and practices of the marketplace–may determine the outcome of a din Torah. After all, if the purpose of a din Torah is to adjudicate a dispute according to Torah law, why give any weight to practices that originate outside of Judaism, especially when they differ from the internal provisions of choshen mishpat (Jewish monetary law)?

This article offers an answer to that question by explaining Jewish law’s incorporation of commercial norms and the mechanism through which it does so. The goal of this article is to provide an exposition of minhag ha-sochrim as a halakhic doctrine and to explain its normative power within Jewish law.

This article unfolds as follows. Section I introduces minhag ha-sochrim as a halakhic principle of incorporation that validates external commercial norms, distinct from dina de-malkhuta dina. Section II demonstrates that minhag ha-sochrim is firmly anchored in the Talmud and its case law, establishing that it constitutes a well-founded principle of Jewish law. Section III surveys post-talmudic case law where poskim apply minhag ha-sochrim to regulate commercial relationships–such as rent control, bankruptcy, and equitable distribution of marital property–between Jewish parties. Section IV considers what counts as a “valid” commercial practice as well as several restrictions that may limit the application of minhag ha-sochrim. Section V examines minhag ha-sochrim’s conceptual basis: What is the mechanism through which halakhah incorporates these external norms? The section develops two theories. One is grounded in the power of individuals to attach conditions to their private agreements (tenai shel mamon). The other is rooted in the authority of the townspeople to enact legislation (takanot ha-kahal) to regulate commerce (rasha’im benei ba’ir le-basi’a al kitzatan). Section VI discusses whether

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*minhag ha-sochrim* is limited to contractual relationships that arise by agreement or whether it extends to non-contractual disputes, such as tort actions and claims of unjust enrichment. **Section VII** concludes with reflections on *minhag ha-sochrim* as an internal principle of Jewish law and how it facilitates the interface of halakhah and modern commerce.

I. **PRINCIPLES OF INCORPORATION: DINA DE-MALKHUTA DINA AND MINHAG HA-SOCHRIM**

Jewish law provides a comprehensive system of internal rules and principles that govern virtually all types of market interactions. But in addition to its internal provisions, Jewish law also contains principles of incorporation which *incorporate* and *validate* certain external commercial laws and practices that originate outside of Judaism. A principle of incorporation has the effect of making the external norm valid and binding as a matter of Jewish law.

*Dina de-malkhuta dina* is perhaps the best-known halakhic principle of incorporation. Through *dina de-malkhuta*, Jewish law incorporates some of the laws of the jurisdiction as halakhically binding. For example, under *dina de-malkhuta*, a tax imposed by congress becomes halakhically obligatory.\(^2\) Similarly, if congress lawfully expropriates someone’s property and converts it into public land, the transfer of ownership is recognized by Jewish law through *dina de-malkhuta dina*.\(^3\)

*Minbag ba-sochrim* is also a principle of incorporation, but it differs from *dina de-malkhuta*. Whereas *dina de-malkhuta* incorporates *laws* enacted by governments and sovereigns, *minbag ba-sochrim* incorporates *customs* and *practices* of the marketplace. Through *minbag ba-sochrim*, external marketplace norms become valid and binding as a matter of Jewish law.

To appreciate the difference between *minbag ba-sochrim* and *dina de-malkhuta*, notice that a commercial practice can be widespread without being enshrined into law. Contrariwise, a law may be formally proclaimed by a legislature but fail to gain support in real-world commercial practice. *Minbag ba-sochrim* grants halakhic recognition to commercial practices even when they are not formally enshrined in law. *Dina de-malkhuta* recognizes laws even when they have not achieved widespread practice.

\(^2\) Nedarim 28a, Rambam Gezelah 5:11.

\(^3\) Bava Kamma 113b, Rambam Gezelah 5:17.
Practically, *minhag ha-sochrim* may have a wider scope of application than *dina de-malkhuta dina*. This is because many *poskim* limit *dina de-malkhuta* does not govern a private law dispute between two Jewish parties. Others hold that *dina de-malkhuta* is limited to cases where the law directly benefits the government or society (*tikkun ha-medina*). Still others write that *dina de-malkhuta* does not apply wherever the secular law conflicts with an internal halakhic provision. And some hold that *dina de-malkhuta* does not apply in Israel. Yet *poskim* apply no such limitations to *minhag ha-sochrim*. Thus, *minhag ha-sochrim* enjoys a wider scope of application, and for that reason, it can serve as a more fruitful principle of incorporation than *dina de-malkhuta dina*.

**II. MINHAG HA-SOCHRIM: THE TALMUDIC CASE LAW**

Having introduced the concept of *minhag ha-sochrim* above, this section proceeds to establish its talmudic basis. This section and the next seek to demonstrate that *minhag ha-sochrim* is a well-founded principle of Jewish law. I wish to emphasize at the outset that *minhag ha-sochrim* is itself a provision of *choshen mishpat* (Jewish monetary law). When a *beit din* applies *minhag ha-sochrim* to decide a case, it may appear as if the *dayanim* are failing to apply Jewish law, that they are choosing secular commercial norms over the provisions of *choshen mishpat*. But this perception is inaccurate, since Jewish law itself provides, under the right conditions, for the incorporation of marketplace norms and for those norms to be halakhically binding. Thus, a *pesak din* that decides a case based on *minhag ha-sochrim* is no different from a *pesak din* that decides a case based on *chazakah, migo,* or *shevu’a*. They differ only in the halakhic principle or *siman* that controls the *pesak*: In one case, it is the halakhic principle of *chazakah* (or *migo, shevu’a*, etc.) that controls. In the other

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4 Piskei Ri”az Bava Batra 3:36, Responsa Maharik 187.
5 Sefer Ha-Terumot 46:8, Shulchan Arukh Choshen Mishpat 369.
6 Shakh Choshen Mishpat 73:39.
7 Or Zarua’ Bava Kamma no. 447, Nemukei Yosef Nedarim 10a.
8 For statements emphasizing the wider scope of *minhag ha-sochrim* over *dina de-malkhuta*, see Iggerot Moshe, Choshen Mishpat I, 72, regarding rent control; Rabbi Y. L. Graubart, Chavalim Bene’imah Vol. 5, Even ha-Ezer 34, regarding the division of marital property.
case, it is the halakhic principle of *minhag ba-sochrim*. The examples discussed in this section demonstrate that *minhag ba-sochrim* is a fundamental halakhic principle within *dinei mamnot*, firmly entrenched in the talmudic case law.

1. **Ha-Kol Ke-Minhag Ha-Medinah**

The Mishnah in Bava Metzia (83a), discussing employment agreements, establishes that ambiguous terms in a contract should be determined by regional custom (*ha-kol ke-minhag ha-medinah*). When an employment contract fails to specify some aspect of the agreement, such as the expected work hours or whether the employer will provide meals, the Mishnah rules that the ambiguous provisions should be filled out according to local custom: *ha-kol ke-minhag ha-medinah.*

Crucially, the Talmud defers to *minhag ha-medinah* even when it diverges from the halakhah’s normal set of rules. For instance, according to Jewish law, the workday begins at sunrise and concludes at nightfall: If you hired a worker and specified that the work hours are defined by *din Torah* (lit. “Torah law”), the workday would commence at sunrise and conclude at nightfall. Similarly, if you were to hire a worker in a city with no prevailing custom, and you didn’t specify the work hours, the agreement is filled in by *din Torah*, and the worker is obligated to work from sunrise to nightfall.

Yet the presence of workplace norms overrides the default *din Torah*. According to the Mishnah, if you hire a worker in a town with established workplace norms (e.g., a nine to five workday), the unspecified content of the employment agreement is determined by local custom.

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And Pitchei Choshen Sekhirut 7 n. 17:

ובזמננו נהגו הבתי דינים לדון בקצת דיני ממונות עפ”י חוקי המדינה, ולכאורה יש לדון כן מצד דינא דמלכותא, אף在当地 דלא שייך דינא דמלכותא... יש מקום לדון עפ”י החוק משום מנהג, ושלוה בתי דינים בא”י לדון בהרבה דיני שכירות עפ”י המנהג המבוסס על החוק, וכל אחד סבור וקיבל עליו מנהג הסוחרים.

See also Pitchei Choshen Halva’ah 2:29 n. 72:

אף在当地 שאין כח מדינא דמלכותא, כיון שנהגו כך, יש לשון עפ”י מנהג הסוחרים, וכל אחד סבור וקיבל עליו מנהג הסוחרים.

9 Bava Metzia 83a:

.Place שאמינן שלא لوוסיפו שלח תורני אונר ישך לקופך, מוקד שאמינן לאו, לקופך בחרוה תקופך, לכל מכלן.

10 Shulchan Arukh Chosen Mishpat 331:1

.ושכר את הפיקול אויר הלילה... כיון שכר את המיל וורו, יספר יוצאת מפריך בהוריהشم וילשך מילאמה תعالم, זאות המכלים.

11 Ibid:

.לא וודא מהגייס... וייבא לממחיה בחירה שמית וילשך מילאמה דע זאות המכלים.

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agreement is filled out by workplace norms, not by the workday defined by din Torah. In other words, the commercial minhag overrides the internal provisions of choshen mishpat.

2. Minhag Mevatel Halakhah: Custom Prevails Over Halakhah

The Talmud Yerushalmi’s (Bava Metzia 7:1) commentary on the above case illuminates the power of custom in two significant ways. Commenting on the fact

12 Bava Metzia 83a-b; Shulchan Arukh Choshen Mishpat 331:1-2. It’s striking that the Talmud takes it as obvious that custom would override the “din Torah” workday. Immediately following its presentation of the “din Torah” workday, the Talmud wonders if it is ever relevant given that communities typically have customary work hours. The Talmud responds that the din Torah workday is relevant either in a new settlement lacking commercial norms or in a case where the employer and employee agree to define the workday by “din Torah”. See Bava Metzia 83b:

And note Mordekhai’s comment (Bava Batra no. 477):

Furthermore, according to some commentators, the din Torah work hours are structured to allow the worker to daven before work. See, e.g., Torat Chayim, Bava Metzia 83a. On this view, the din Torah workday is not defined arbitrarily. And nevertheless, custom prevails.

13 Minhag ha-medinah features prominently in other talmudic cases as well. In the same Mishnah (Bava Metzia 83a), R. Shimon ben Gamliel holds that custom can limit the amount of food an employer is obligated to provide his Jewish workers—even if halakhah would otherwise require that he provide them with significantly more:

In Bava Metzia 93a, the Mishnah rules that custom would permit a produce watchman to eat from the produce he guards, even though there is no right within Jewish law to do so. See Rashi s.v. me-hilkhot medinah and Shulchan Arukh Choshen Mishpat 337:6.

In Bava Batra 2a, the Mishnah holds that a privacy wall between abutting lots should be constructed to the specifications of local custom. According to some authorities, this example provides us with another striking illustration of minhag overriding the internal provisions of choshen mishpat. The Talmud provides a homeowner with the right to compel his neighbor to pay for half the costs of the privacy wall. Yet some commentators hold that a regional custom to forego privacy walls could defeat the halakhic right to one. See Rabbenu Yonah, Bava Batra 2a:

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The Mishnah in Bava Metzia 103a rules that regional custom governs the allocation of agricultural responsibilities between a landlord and a tenant-sharecropper.

See also Or Zarua’ Bava Batra no. 2. For views that conceptualize bezek re’iyah as either a matter of ritual law or public policy, and therefore not waivable by minhag, see Yad Ramah Bava Batra 4a; Yad Ramah Bava Batra 60a; and Shut Rashba 2:268. See also Shulchan Arukh Choshen Mishpat 157:1. Here are some further examples where minhag is decisive in monetary law: The Mishnah in Bava Metzia 103a rules that regional custom governs the allocation of agricultural responsibilities between a landlord and a tenant-sharecropper.
that local custom fills in the terms of the agreement rather than *din Torah*, the Yerushalmi concludes: “*minhag mevatel halakhab*”—literally, “custom overrides halakhab”. Here the Yerushalmi explicitly formulates the position that *minhag* overrides (*mevatel*) the internal rules of Jewish monetary law that would otherwise govern.

Some commentators go further and explain that the Yerushalmi’s conclusion “custom overrides halakhab” extends to the procedural rules for adjudicating disputes. Specifically, while Jewish law normally assigns the burden of proof to the claimant, *minhag* will shift that burden onto the party whose claim runs contrary to local custom. For example, suppose an employer and worker were in a dispute over the amount of compensation or benefits that was initially agreed upon. Under

In Bava Metzia 110a, the Talmud considers a case of a sharecropper and a landlord who dispute the terms of their profit sharing agreement. Rav Nachman rules that a court should decide such a case by distributing the crop yield in accordance with the prevailing regional custom.

Mordekhai also rules that regional custom overrides the *din Torah* rule for determining which residents are obligated to shoulder the costs of public goods. According to the Talmud (Bava Batra 8a) a resident becomes liable to participate in the communal security tax only after residing in the town for twelve months. But Mordekhai holds that local custom can obligate the resident even sooner:

For Minhaig’s role in governing the monetary obligations of the Ketubah, see e.g., Mishnah Ketubot 6:4, and Shulchan Arukh Even Ha-Ezer 8:1.

The language of the Yerushalmi–*minhag mevatel halakhab*—might lead some readers to conclude that halakhab’s incorporation of minhaig is somehow contrary to halakhab. But this is erroneous since the Yerushalmi is clearly stating a halakhabic position requiring the incorporation of minhaig. It is paradoxical to say that “halakhab requires that we follow minhaig rather than halakhab”. For that statement itself appears to be a statement of halakhab. It is better, therefore, to translate *minhag mevatel halakhab* as “custom overrides what would otherwise be the halakhab.” Put differently, custom displaces the internal provisions of Jewish law that would normally apply.
the internal procedural rules of *choschen mishpat*, the worker, as claimant, bears the burden of proof, since he is attempting to procure benefits or compensation from the employer. However, if the worker’s position is consistent with the customary compensation or benefits for workers in the area, then the worker prevails.16

Under this interpretation, *minbag* modifies the procedural rules for adjudicating disputes, shifting the burden of proof from the claimant (*motzi*) to the party whose position runs contrary to local *minbag*.

Having surveyed two of the Talmud’s explicit statements about the power of *minbag* to override the internal rules of Jewish monetary law (*ba-kol ke-minbag ba-medinah* and *minbag mevatel halakah*), let us turn to talmudic rulings that reflect and presuppose the validity *minbag ba-sochrim*.

3.  *Situmta*: Mercantile Custom as a Means of Conveyance

In Jewish law, the conveyance of property requires a *kinyan*. The Talmud details strict rules for how *kinyanim* are to be executed, and it specifies which *kinyanim* are valid for different types of property (e.g. real property can be conveyed through a symbolic payment (*kesef*) or by transferring a deed (*shetar*); small personal property is conveyed by lifting (*bagbahah*); domesticated animals can be conveyed by transferring the reins (*mesirah*)).17 Yet, notwithstanding the detailed rules and provisions for *kinyanim* indigenous to halakhah, the Talmud introduces the principle of *situmta*, which recognizes the prevailing commercial methods of conveyance as a valid halakhic *kinyan*.

*Situmta* is introduced in Bava Metzia 74a, where the Talmud refers to a commercial practice of marking wine barrels (*situmta*) to signify the conveyance of title to the purchaser. Marking barrels is not a *kinyan* specified by Jewish law. But the Talmud rules that it constitutes a halakhically valid *kinyan* wherever commercial

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16 Tamud Yerushalmi Bava Metzia 7:1: אמרים רב ומשייע א bais אפרים המנה נמכל א bais הלכה אי רמי כל המוצאים מחבריו עלי תלכוב ראנייה וך. See the first interpretation R. Yehonatan cited in the Shita Mekubetzet Bava Metzia 87a:

17 See, for example, Kiddushin 26a and 25b.
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norms treat it as such. Many authorities explain that *situmta* instantiates the general principle that Jewish law incorporates and recognizes prevailing commercial practices as halakhically valid.

A dispute recorded in the responsa of Ra’avan captures the novelty of *situmta*. The plaintiff claimed that he had purchased merchandise from the defendant “in accordance with the customs of merchants,” by locking the door to the room where the merchandise was stored. The defendant countered that the sale was not valid because the plaintiff did not perform a halakhically recognized *kinyan* (the plaintiff never took possession of the merchandise through *mesbikah*).

Ra’avan holds for the plaintiff, based on the principle of *situmta*. A commercially recognized form of acquisition is valid, even if it is not one of the *kinyanim* indigenous to Jewish law.

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18 See Bava Metzia 74a:

אמר בר פפי משמיה דרava: אי סיטומתא קני... באתרא דנהיגו למקני פלך חבירו והו נגר המקח.

For the interpretation of *situmta* as marking wine barrels, see Rashi Bava Metzia 74a s.v. *situmta*. Other commentators offer different interpretations of the actual commercial practice described by *situmta*. Rosh cites an opinion that *situmta* is a handshake performed between the buyer and seller. See Rosh Bava Metzia 5:72:

והז פיר פדרוה ธוחך ממחזוריה בכרה המקח חוקק صف פלך חבירי והו נגר המקח.

The underlying point remains the same: Jewish law incorporates the recognized commercial method of conveyance.

For a narrower interpretation of *situmta*, see Ritva Bava Metzia 74a, citing R. Pinchas.

19 See, e.g., Rashba Bava Metzia 74a s.v. u-veduchta, concluding from the Talmud’s discussion of *situmta* that:

ושמעינין מינה שהמנהג מבטל ההלכה וכל כיוצא בזה, שכל דבר שבממון על פי המנהג קונין ומקנין הלכה בכל דבר שמעינו.

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.*" See also R. Akiva Eger Choshen Mishpat 3:1.

20 Ra’avan Bava Metzia:

ראובן שטען שלישים מענייה להמריה פלטוני noticias לא פסקה מהחורה ממקחי ובמיותי החורה אמר Lópezים דמי לקת.

The principle is based in the Talmud’s ruling regarding *situmta.*

See the general statement in Shulchan Arukh Choshen Mishpat 201:2:

דרינו החורה בכותב לקת מתורה פלטוני הדיצה חורה המקח...

21 See the general statement in Shulchan Arukh Choshen Mishpat 201:2:

אם המורידה או שמרתה ורגשית קני מפורז, נ곤 המקה את אחד מהדיליוхот נור, והו把持 הזה להיליוхот... נ곤

כל דבר שמעינו הקוקב קלי קלי, ובכן על ידי שמעינו הקוקב מפורז להיליוхотuters ואורים ודעתי על הפועלים, ואילו

מותרי שרופים לכול המפקח, וכנל כלTHING בוח.
4. Can Established Commercial Norms Invalidate a Kinyan?

Situmta establishes that commercial norms can validate transfers that would otherwise not be recognized by Jewish law. Does minhag ba-sochrim also cut the other way? Suppose the halakhic mode of conveyance (kinyan) is contrary to the prevailing commercial norms. Does minhag ba-sochrim invalidate a transfer that is otherwise halakhically valid? For example, it is settled Jewish law that one can acquire real property by means of a down payment (kesef). But suppose commercial norms require transfers of real property to be in writing. If you attempted to purchase property exclusively through a down payment (kesef), would the commercial norms halakhically invalidate the kesef transfer?

The Talmud (Kiddushin 26a) discusses exactly this case and rules that custom overrides the halakhically prescribed kinyan. Rashi (s.v. lo kanah) explains that parties doing business in a commercial environment rely on the commercial norms to effectuate the transfer, not on the kinyan native to halakhah. Thus, the transfer is only effective when it complies with accepted commercial practices. The Shulchan Arukh codifies the Talmud’s ruling, and it is applied even more broadly by later poskim.

III. Applications of Minhag Ha-Sochrim in the Poskim

Having surveyed the Talmud’s statements on the power of minbag to override the internal provisions of Jewish monetary law, the present section examines how

23 E.g., the statute of frauds.
24 Kiddushin 26a:
25 Rashi s.v. lo kanah:
26 See Shulchan Arukh Choshen Mishpat 190:7:
27 See Iggerot Moshe Choshen Mishpat II:62:

Contemporary halakhic authorities discuss jurisdictions that require a formal registry of land ownership. In such places, some authorities hold that one cannot acquire land by performing a kinyan without registering ownership. See Pirchei Choshen Kinyanim 2:8:11.

See also note 14 therein; and see Responsa Divrei Malkiel 4:143 and Responsa Maharsham 2:31.
Poskim apply minhag ha-sochrim to contemporary commercial practices. The goal of this section is to provide examples that illuminate both the scope of minhag ha-sochrim as a halakhic principle as well as its powerful effect on Jewish commerce through incorporating sweeping market regulations such as bankruptcy and rent control as binding under Jewish law.

1. What’s Included in a Sale?

The fourth and fifth chapters of Bava Batra contain extensive discussions of what items are included in a sale. The fourth chapter delineates rulings on whether doors and appliances are included in the sale of a house, whether air rights are included in the sale of land, and whether clothing racks and benches are included in the sale of a bathhouse. Similarly, the fifth chapter includes detailed provisions whether a mast and sail are included when you buy a boat, whether the sale of a wagon includes the horses that pull it, whether the sale of a donkey includes its saddle and reins, and whether the sale of a tree includes the land that houses it.

Yet, despite these internal provisions of Jewish law, poskim hold that they are only applicable in the absence of marketplace norms. Wherever there are recognized norms, the content of a sale between two Jewish parties is determined by the marketplace norms, not by the provisions of the fourth and fifth chapters of Bava Batra. Put differently, these chapters establish default rules for cases where there is no prevailing commercial norm. But in a jurisdiction governed by clearcut commercial rules, halakhah yields to the norms of the marketplace over its own

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27  Mishnah Bava Batra 4:1, 4:3.
31  Ibid 5:1.
32  Ibid 5:2.
33  Ibid 5:4.
34  See the sweeping statement of Rambam, Mekhirah 26:7. After codifying many of the rules of the fourth chapter of Bava Batra, Ramabm writes:

בכומר הלוקח אין כל אלו הדברים וכיוצא בהן מענינים אמורים אלא במקום שאין שם מנהג… אבל במקום שנהגו שהמוכר כך מכר כך הרי זה מכור וסומכין על המנהג.

Similarly, in Mekhirah 26:8:

וזה עיקר גדול בכל דברי משא ומתן הולכין אחר לשון בני אדם тому מקום ואחר המנהג, אבל מקוםאין ידוע בו מנהג ולא יש שמות מיוחדין אלא יש קורין כך ויש שקורין כך עושים כפירשו חכמים בפרקים אלו.

See also Mekhirah 17:6 and 18:12. A similar statement appears in Rif, Bava Batra 47a (Alfasi), regarding the specifications in the Talmud for regulating the quality of merchandise:

 venez יטגי דלית מבאירה ודליין ננתנה ואל באתאתא דאלא מנתנה טבدين מבנתה דקרימה anomalies לעכל דקרא גואיה כל בכמהกวיה המיתנה.
delineated set of internal rules. If you sold your home in Teaneck and are unsure whether the chandelier goes with the house, the answer will generally turn on New Jersey law, not the fourth chapter of Bava Batra.  

2. Situmta: Contracting in Futures, Intangibles, and Speculation

In Section II:3, we saw that situmta expands the set of halakhically valid kinyanim to include commercially recognized means of conveyance. Many authorities develop situmta further. They argue that situmta can validate types of commercial transactions that would ordinarily be impossible under Jewish law. According to these authorities, minhag ha-sochrim doesn’t simply bear on how a conveyance is performed. It expands the types of economic relationships recognized by halakhah.

Compared to western legal systems, halakhah significantly limits the types of binding agreements that can be entered into. For example, an individual cannot contract to sell an item that does not yet exist (davar shelo ba le-’olam) or that is not yet in his possession (davar she-eno be-reshuto).  

Thus, I cannot sell you the penthouse in the apartment building that is not yet built. Nor can I sell you next year’s etrogim crop. Similarly, I cannot sell you merchandise that I do not yet have in inventory, even if I’ve placed the order from my supplier. Jewish law also invalidates: contracting mere intangibles (davar she-ein bo mamash), such as licenses, copyrights, use-rights, and air rights; contracting by verbal promise to execute a kinyan at a later date (kinyan devarim); and contracts conditioned upon contingencies that undermine the parties’ intent to categorically execute the agreement (asmakhta).  

In other words, most of the routine contracts that power modern commerce would be invalidated and unenforceable under the internal provisions of Jewish contract law.

However, many authorities argue that situmta and minhag ha-sochrim will make these contracts valid and enforceable wherever they conform with standard

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35 See Iggerot Moshe Choshen Mishpat I.72:

 incone בעניני מכירה מה הוא בכלל המכר שאף שאיכא דינים קבועים בפרקי המכירה בב”ב מה הוא בכלל המכירה מפורש ברמב”ם ס”פ כ”ו ממכירה ובש”ע חו”מ סי’ רי”ח סעי’ י”ט דהוא רק במקום שאין מנהג אבל במקום שיש מנהג.  

See also Tosefta Bava Batra 4:8:

 camer את הראשה ואשתו início זכר ויאמר את הלהי ויאמר את והיה שעה זכר ויאמר זכר ויאמר את שמה שמי זכר ויאמר זכר ויאמר את המפורש כיוий קימר.  

See also Rashbam Bava Batra 83b s.v. lo makbar.

36 See Shulchan Arukh Choshen Mishpat 209:4-5.

37 See, respectively, Shulchan Arukh Choshen Mishpat 212:1-2, Shulchan Arukh Choshen Mishpat 157:2, and Shulchan Arukh Choshen Mishpat 207. For a general overview, see Pitchei Choshen Kinyanim, chapters 19 and 21.
commercial practice. Tosafot, for example, discuss the problem of *asmakhta* in prenuptial agreements (*shiddukhin*). It was common practice in Ashkenaz for the bride and groom to enter into a prenuptial agreement (*tena'im*) imposing a monetary fine upon the side that breaks the engagement. Tosafot observe that such a provision is an *asmakhta* because the parties lack the requisite intent (*gemirat da'at*) to obligate themselves in the fine. Neither party, at the engagement, believes they will break it off. But Tosafot argue that the penalty provision is nevertheless halakhically binding under the principle of *situmta* because agreements containing that provision have become standard practice.³⁸

Other rishonim invoke *situmta* to recognize the sale of future interests that have not yet vested in the seller (*davar shelo ba-le'olam, davar she'enu be-reshuto*). For example, on the basis of custom, Rosh validates tax farming contracts, even though they involve the transfer of future interests (i.e., the transfer of tax obligations not yet assessed or collected).³⁹ Similarly, Maharam holds that a promise to hire someone as a *mohel* for an unborn child or to honor him as a *sandek*, which would ordinarily be invalid under the principle of *davar shelo ba-le'olam*, becomes halakhically binding if such a practice is customary.⁴⁰

³⁸ See Tosafot Bava Metzia 66a:

> וכתב רבנו משה סܫון בר אברהם זצ"ל בהם ר' יש"ע(...), אסמכתות אפי' מעכשיו לא קני... ויהיו קנס שעושין בשעת שידוכין... דלಎ,... ומניומי אמר אסמכתא לא קני... אסמכתות אפי' מעכשיו לא קני... ומיהו קנס שעושין בשעת שידוכין מהני אף...โลיך דכל העולם מידי דהוי אסיטומתא דלקמן (דף עד.) דקניא.

See also Or Zarua' Bava Metzia no. 188:

> ובפרק זה בורר פירשתי עוד ענין אסמכתא. כתב רבינו שמשון בר אברהם זצ"ל אותם ריישמיינש שנותנין בשעת שידוכין קניא שתקנום העולם. כדאמ' בסוף פרקין שקונין במנהג. וגם כן יש להועיל דיישמינש בשידוכין כיון שכל העולם נוהגין ליתן אותם בשידוכין.

³⁹ Responsa Rosh 13:21:

> וממה שטענו המורשין לבטל החכירות משום דהוי דבר שלא בא לעולם ומשום דאין אדם מקנה לחברו דבר שאינו ברשותו זה אני מודה לדבריהם. דמדין תורה אין קנין נתפס בחכירות, דאפי' חוב גמור אין אדם יכול להקנות חובו לחברו אפי' בקנין דמלוה להוצאה ניתנה ובל דבר שנאומת דשנה הוי דבר שלא בא לעולם ובל דבר שאינו ברשותו.

> אלא שאני רואה מנהג הארץ כל היום שחכורין זה מזה ואין בו חזרה. וכן הודו המורשין דבחתימת ההורדה ובמסירתה למכור מתקיימת החכירות, וכיון שנהגו כן הוי קנין דאין בו חזרה. כדאמרינן בפרק איזהו נשך (ע"ד) אמר רב פפי האי סיטומתא קניא, ופירש רש"י ז"ל רושם שרושמין החנונים על החביות שלוקחין מבעלי בתים. ורבינו חננאל ז"ל פירש כדרך שנהגו הסוחרים בגמר המקח תוקע כפו לכף חברו ובזה נגמר המקח. ופסק ר"י ז"ל כיוצא באיזה דבר שנהגו לגמור המקחfluence באתרא דנהיגי למקני ממש קנין...

⁴⁰ Tashbetz Katan no. 398:

> המר"ם אמר ואדם מודר החבר לא בבל ומכל אלו חידוד בברית לחבר ומכ PropertyValue. גם באיזאו איסטרカー בחבר דהוי בברית לחבר ומכ PropertyValue...

> מניימי אמר אסמכתא לא קני... אסמכתות אפי' מעכשיו לא קני... ומיהו קנס שעושין בשעת שידוכין מהני אף...โลיך דכל העולם מידי דהוי אסיטומתא דלקמן (דף עד.) דקניא.

For an objection to Tashbetz’s extension, see R. Yechiel of Paris’s gloss on the spot. But see Responsa Chatam Sofer 5:66, who sees no fundamental disagreement between the two authorities.
 Authorities also appeal to *situmta* to recognize transactions in intangibles (*davar she-ein bo mamash*). Maharshel discusses the case of a merchant who had purchased an exclusive license from the municipality to sell brandy. Maharshel acknowledges that the license is an intangible asset (*davar she-ein bo mamash*) which cannot be purchased. According to the internal provisions of *esben misbpat*, then, the merchant could not exclude others from selling brandy in the municipality. However, Maharshel notes that wherever it is customary to recognize such a license, halakhah will validate and enforce it under the principle of *situmta*. On that basis, Maharshel rules that the merchant’s exclusive license is enforceable as a matter of Jewish law.

In summary, many halakhic authorities interpret *situmta* as a sweeping halakhic validation of commercial relationships that would otherwise be impossible under Jewish law. Transactions in futures and intangibles and speculative agreements become halakhically binding when they conform with commercial practice.

3. Rashba’s Ruling on Spousal Inheritance

Rashba’s ruling on spousal inheritance illustrates the power of *minhag* to displace the internal provisions of halakhah. Rashba was asked to decide the following case. A couple had married in Perpignan, and the wife brought certain assets into the marriage. The wife died shortly thereafter, and a dispute broke out between her father and husband over who would inherit her property. Under Jewish law, a husband inherits the property of his deceased wife. But the father argued that the established custom and practice amongst the Jews of Perpignan was to follow

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41 Shut Maharshel 36:

42 Ibid:

43 See Bava Batra 111b, Shelchan Arukh Even Ha-Ezer 90:1.
the non-Jewish law, which did not recognize the right of a husband to inherit his wife.44

Rashba rules in favor of the father, contrary to the general rule of spousal inheritance in Jewish law. He cites the 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. Rashba explains that the couple, therefore, at their marriage, implicitly agreed that the wife’s assets would revert to her father upon her death.45

In this remarkable ruling, Rashba allows minhag to displace halakham’s internal rules of spousal inheritance.46 As we shall see in the next example, some poskim see Rashba’s ruling as a precedent for allowing minhag to determine how marital property should be divided upon divorce.

4. Equitable Distribution of Marital Property

Married couples accumulate property over the course of their marriage. How should that property be divided upon divorce? Under Jewish law, the wife generally

44 Responsa Rashba 6:254:
شرح מתעשה היה בבפרדיניאן ברוחב Sharks מאוה בהלא לשמעון והכניס לו עמה סך ממון בנידוניה וילדה לו בת ואחר מותה וחל ההנה שאול קל פירפינייאן בהא ותבוא דיניה הגויים שה 정치 פירפינייאן בהא ותבוא דיניה הגויים והרי כל הנושא אשה שם כאילו התנה כן.

45 Ibid:
תשובה כל דבר שבממון תנאו קיים ובאמת אמרו שקנתין בכענין זה וכדאמרו בהירושלמי הני דכתבין אין מיתת בלא בנים התניא מוחרי לבי נשא תנאי ממון וקיים. ומוסיף אני על זה שבכ”מ שנהגו להתנות ולעשות כזה תנאי אפי’ הנושאים שם סתם גובין מהם אם מתה בלא בנים שכל הנושא סתם ע”ד הנוהג שם בישראל נושא וזהו שקראוה בפ’ המקבל דרישת השדי.

Rashba raises the further question of whether it is wrongful for a community to adopt a custom that runs contrary to the internal provisions of Jewish law. Here Rashba replies that it is wrongful only if the reason for the community adopting the practice is to imitate gentile practices:

If the custom was adopted for other reasons, say economic efficiency or considerations of equity, the practice would not be wrongful. In any event, Rashba appears to hold that the minhag would be binding even in the cases where it was wrongful for the community to adopt it. See note 10 in the Machon Yerushalayim edition of the responsa.

46 In another responsum (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 internal rules of Jewish commercial law on the matter, the aide is entitled to be fully compensated, since the minhag ha-sochrim was to pay full compensation in such cases:
receives a payment for the value of the ketubah, and she recovers certain forms of property that she brought into the marriage or that she acquired during the marriage. All other marital assets go to the husband. By contrast, most jurisdictions in the United States provide for equitable distribution. Under this rule, the couple’s property will be divided “fairly” (equitably) between the husband and wife. The two systems of law sharply diverge when, for example, the husband was the primary earner during the marriage. Equitable distribution will typically distribute a significant portion of the husband’s earnings to the wife, whereas Jewish marital law (even ha-ezer) would not.

How, then, should a contemporary beit din divide marital assets upon divorce? Based on the principle of minhag ba-sochrim, some authorities maintain that if the majority of divorced couples in a given community divide their assets upon divorce according to equitable distribution, then equitable distribution constitutes a binding minhag—even if it is at odds with how Jewish law would normally distribute marital property. According to this approach, wherever equitable distribution rises to the level of a minhag, a beit din should divide marital property according to the principles of equitable distribution and not according to the internal provisions of Jewish marital law (even ha-ezer).  

47 For an overview, see Pitchei Choshen Yerusah ve-Ishut, chapter 8.
48 See Rabbi Mordechai Willig, “Equitable Distribution and the Enforceability of Choice of Law Clauses in Beit Din”, Journal of the Beth Din of America 3: “the common custom is… binding on parties who implicitly adopt it, and a beit din must honor the common custom by dividing the couple’s marital property in accordance with the principles of equitable distribution.” See also Rabbi Y.L. Graubart, Chavalim Bene’imah Vol. 5, Even ha-Ezer 34. R. Graubart argues that within jurisdictions that treat marital property as joint property, Jewish law should recognize that property as jointly owned by the couple, based on minhag:
49 For further examples of custom modifying the halakhic rules of marital property, see Rif Yevamot 22a (Alfasi), who rules that the husband’s responsibility for the wife’s nichsei tzon barzel (i.e., the documented assets brought into the marriage) is determined by minhag, not by the talmudic rule:
5. Maharshakh and R. Akiva Eger on Adjudicating in Accordance with the Customs of Merchants

An additional dimension of minhag ha-sochrim emerges from a decision of Maharshakh (d. 1601) regarding a dispute in the sixteenth century between two Venetian Jewish merchants. The core of the dispute was whether litigation over a business deal between the two parties was to be adjudicated according to the internal provisions of choshen mishpat or according to the commercial practices of Venetian merchants.

The plaintiff wanted to compel the defendant to adjudication that would be governed by the practices and norms of Venetian merchants. The plaintiff argued that adjudicating in this manner was itself the minhag ha-sochrim of the Jewish merchants in Venice. The defendant countered that the adjudication should be governed by the internal provisions of din Torah.

The dispute was sent to Maharshakh who ruled (Teshuvot 2:229) in favor of the plaintiff. Maharshakh reasons, based on the principle of situmta, that the parties are bound by the customs of the place where they did business, and he argues that minhag ha-sochrim includes the entire set of substantive principles and rules of decision that will determine the outcome of the adjudication.

Maharshakh further observes that the business deal in question would have been incoherent if interpreted according to Jewish law. Had the parties intended to be bound by the internal provisions of choshen mishpat, their actions were irrational and irresponsible—their actions, under Jewish law, offered them no means to protect their investment—“as if they were putting their money on the antlers of a deer and sending it off.” Thus, Maharshakh concludes that it would be wrong to allow the defendant to compel adjudication according to din Torah when the

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50 Responsa Maharshakh 2:229:
נפל הפרש בין יורשי ראובן לשמעון, והדרשו הפרש בין שניים ביהדות ויניציאה, ומענה היה השם, אני לא לי אלאصدرו לחייבו על פי לכל השם ידעין כי אם כי
לסה אנשייהنشמה שנהנה מפרשת משושים על פי התורה כדי לה Deus ממקומם.

51 Ibid:
כדי מעניין לפני ראובן וראובן להחרים דמלתא היא שיכולים יורשי ראובן לכוף לשמעון לדון בדין הסוחרים על פי מנהג ויניציאה
ונצרך עוד טעם לשבח, ונאמר שהדבר ידוע דבענייני הקניות והסוחרים וכל ענייני משא ומתן

52 Ibid:
הדבר היה ידוע שאם אותו העסק והמאורעות שאיפשר שיארעו באותו העסק היו נידונים בדין תורה, הניח מעותיו על קרן הצבי ויאכל הלה וחדי, ובלי ספק לא היה ראובןעשה עסק עמהם.
parties entered the deal—and the deal only made sense—assuming they would be bound by the customs of Venetian merchants. Maharshakh’s ruling is cited approvingly by R. Akiva Eger in his glosses to Choshen Mishpat.

Maharshakh’s ruling is important because it extends the principle of minbag basochrim to include the whole body of procedural and substantive rules that will govern adjudication. Indeed, R. Akiva Eger’s formulation of Maharshakh’s ruling suggests that a minbag basochrim to adjudicate in front of a panel of (non-Jewish) merchants with commercial expertise who will resolve the dispute according to commercial norms, rather than adjudicating in front of a beit din applying Jewish law, is binding.

Whereas our previous examples focused on narrow applications, such as validating the transfer of property or the implied terms of an employment contract, Maharshakh’s responsa provides for the entire adjudication to be conducted according to mercantile custom.

53 Maharshakh’s language implies that the rationale for relying on minbag basochrim, at least in the case before him, is one of fairness: It would be unfair to allow the defendant to wiggle out of a partnership agreement that all parties assumed would be governed by minhag through asserting, ex post facto, that it must be governed by din Torah. If this is correct, then at least one underlying theme of minbag basochrim is the halakhah’s desire to not frustrate the commercial expectations of the parties when their expectations are consistent with universal practice.

54 R. Akiva Eger Choshen Mishpat 3:1:

55 This is implied by Maharshakh’s order to conduct the adjudication according to dinei ha-sochrim. See also the formulation in the Pitchei Teshuvah (Choshen Mishpat 3:2):

56 R. Akiva Eger Choshen Mishpat 3:1:

See also Responsa Tzitz Eliezer 11:93. For further discussion about Jewish law’s position on arbitration before non-Jewish arbitrators, see Rabbi Yaakov Feit, “The Prohibition Against Going to Secular Courts,” Journal of the Beth Din of America 1, p. 41.
Our final two examples will illustrate how minhag ha-sochrim can give halakhic force to major commercial regulations like rent control and bankruptcy.

6. R. Moshe Feinstein on Rent Control

Jewish law has few restrictions on a landlord’s power to evict a tenant at the end of a lease term or to increase the rent at the end of the term.\(^{57}\) By contrast, many cities impose strict regulations on landlords, limiting their ability to raise rent and evict tenants. 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 (Iggerot Moshe Choshen Mishpat I, 72) rules that the parties are bound by the city’s rent control regulations. R. Moshe declines to analyze the issue through the lens of dina de-malkhuta dina, noting that the scope of dina de-malkhuta—where and when it applies—is hotly contested.\(^{58}\) Instead, R. Moshe bases his decision on the halakhic power of minhag ha-sochrim, citing the precedents discussed above of the power of minhag to determine the terms of an employment agreement and the content of a sale.

R. Moshe explains that when a landlord and tenant enter into a lease agreement, they implicitly accept the background commercial rules and customs, even if the custom originated outside of the Jewish community. Unless the parties had agreed to be bound exclusively by Jewish law’s internal set of rules for landlord-tenant relationships, they have implicitly accepted the rules and practices of the jurisdiction and are bound by them.\(^{59}\)

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57 See Pitchei Choshen Sekhirut Chapter 5:5 and note 10 therein, and Shulchan Arukh Choshen Mishpat 312:8.
58 Iggerot Moshe Choshen Mishpat I, 72: בענין דין דמלכתי קשה לכתב ידו י’א... מטעות סופות בקיי ה’ לפי דוקא, ישנה ברכה רבה בפ’.
59 Ibid: והגע עצמך דהא ברור ופשוטãng כל אלו הדינים תלויים במנהג המדינה... א”צ שיעשה המנהג ע”פ חכמי תורה også אני...
7. Bankruptcy

Putting aside the special case of *shemitah*, the internal provisions of Jewish law do not allow for a debtor to declare bankruptcy to clear himself from financial liability. Under Jewish law, an insolvent debtor—even if he has no assets to his name—always remains liable to repay his debts. In contrast, most western economies provide bankruptcy protections for insolvent debtors, allowing them to declare bankruptcy and become free from their past debt. Does Jewish law incorporate these external bankruptcy provisions?

Some poskim write that even if *dina de-malkhuta* cannot recognize bankruptcy laws, *minhag ha-sochrim* can incorporate them wherever bankruptcy has.

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60 Under the rule of shemitat kesafim, the seventh year cancels debts. But note that shemitah only cancels loans, not other forms of liabilities, and that shemitah can be avoided by pruzbul, and that it depends on the biblical force of shemitah. See generally, Shulchan Arukh, Choshen Mishpat 67.

61 See, e.g., Pitchei Choshen Halva’ah 2:26:

62 For the view that dina de-malkhuta cannot recognize bankruptcy laws, see Rabbi Breisch, Responsa Chelkat Yaakov, Choshen Mishpat, no. 32:

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One of the more surprising claims in this responsum is the assertion that bankruptcy laws provide no benefit to society and therefore do not qualify for *dina de-malkhuta*:

Economists and legislators generally agree that bankruptcy laws benefit society. These benefits include: incentivizing risk-taking that powers the economy, providing bankrupt individuals a fresh start free from crushing debt, and coordinating collection rights amongst competing creditors seeking to collect from an insolvent debtor.
become standard commercial practice. A responsum of Maharshakh offers us a precedent from the 16th century for recognizing bankruptcy through minhag ha-sochrim. In Maharshakh’s case, an insolvent debtor owed money to several creditors. In the interest of securing at least partial payment, most of the creditors collectively agreed to compromise and to accept only partial payment for the money they were owed. But one creditor held out, insisting that the debtor repay him the entire amount he owed. In effect, most of the creditors agreed on a bankruptcy rule: the debtor would use his remaining assets to pay back a portion of the amount he owed to each creditor and he would be released from the remaining liability—but the arrangement was being held up by one creditor who insisted on receiving full payment.

Maharshakh ruled that the majority of creditors can compel the individual hold-out-creditor to abide by the bankruptcy agreement reached by the majority. Maharshakh reasons that because it is customary for creditors to reach such bankruptcy settlements with insolvent debtors, the recalcitrant creditor is bound by the minhag ha-sochrim. It follows that in a society where bankruptcy practices

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63 Pitchei Choshen Halva’ah, Chapter 2 note 63:

64 Responsa Maharshakh 2:113; R. Akiva Eger Choshen Mishpat 12:13:
are widespread, Jewish law would incorporate such provisions under the doctrine of minbag ha-sochrim.\(^{65}\)

**IV. What Counts as a Valid Minhag?**

The previous section surveyed several applications of minbag ha-sochrim where halakhah incorporates commercial norms. As we shall see in this section, not every commercial practice constitutes a valid minbag. This section considers several criteria raised by poskim that bear on whether a commercial practice constitutes a binding minbag. The first consideration pertains to how prevalent and widespread the practice is within a community. A second consideration raised by poskim is whether the parties need to have knowledge of the custom when they do business before they can be bound by it. Third, poskim consider whether a “foolish” or “silly” commercial practice can be rejected as illegitimate. Fourth, does a practice need to gain support from communal leaders for it to count as valid?

**A. The “Common and Frequent” Standard**

In section I, we noted that minbag ha-sochrim differs from dina de-malkhuta dina. Whereas dina de-malkhuta is binding in virtue of it being the law, minbag ha-sochrim is binding in virtue of it being a practice adopted and taken up by a community. Thus, for minbag ha-sochrim to bind in any given case, the parties must be part of a group (industry, community, etc.) that has taken up the relevant custom. How widespread must the practice be for it to be considered taken up by a community? The Shulchan Arukh adopts the standard that to rise to the level of minbag, a practice must be common (שכיח) and frequent (נעשה הרבה פעמים). It is not sufficient that the practice was performed on a couple of occasions.\(^{66}\)

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\(^{65}\) Would minbag ha-sochrim incorporate statutes of limitations? Jewish law does not impose time limits after which a litigant is barred from bringing their claim. But most secular-law jurisdictions do. Pitchei Choshen (Halva’ah Chapter 2 note 72) suggests that even if dina de-malkhuta dina cannot incorporate such laws, minhag ha-sochrim would:

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\(^{66}\) Shulchan Arukh Choshen Mishpat 331:1:

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See also Terumat Ha-Deshen no. 342, who requires the custom to be “regular and widespread”:
B. Must the Parties Have Knowledge of the Custom?

Some authorities hold that, in addition to being widespread, the custom must be known to the parties when they enter into their business agreement. Other authorities disagree. They counter that even when the parties are unaware of the custom, they nevertheless do business assuming that the ordinary norms of commerce will apply—whatever those norms may be.

C. “Improper” and “Foolish” Practices

Some poskim argue that even when a practice is widespread and frequent, it will not gain halakhic validity if it is “improper” or “foolish”. For example, the Talmud recognizes a concept of bezek re’iyah, which requires the construction of a privacy wall between neighbors. Under this rule, a property owner can compel his neighbor to bear half the costs of the wall. But what happens if the communal practice is to not abide by halakah’s privacy rules (bezek re’iyah)—i.e., if the practice is to not build a privacy wall? Can the property owner still compel his neighbor to pay for half of the wall? Or does custom prevail?

Some authorities rule that such a practice is invalid because it is foolish or improper. Rashba, for example, explains that privacy regulations enshrine values of modesty (tzeni’ut) that affect the spiritual status of the entire Jewish people. Therefore, no community is authorized to waive bezek re’iyah regulations. Such a communal practice is invalid ab initio.

See also Responsa Hacham Tzvi (no. 61) who suggests that the minhag needs to be practiced regularly and daily. See Pitchei Choshen Sekhirut 7, n. 17:


See also Rabbi Ya’akov Eli’ezerev, “Abrogation of Contract between Contractor and Tenant,” Tébúmin 4 (1983), 369 (Heb.).
Other poskim disagree and maintain that any custom within the realm of monetary law (dinei mamonot) is valid, even if the custom is “improper” or “foolish.” They even hold that a communal custom to flout the Talmud’s privacy rules of bezek re’iyah is valid. In such a community, a neighbor will not be obligated to share the costs of a privacy wall.

D. An Established Practice Recognized by Scholars

Some poskim impose a further limitation on the set of halakhically valid commercial norms. Or Zarua’ suggests that a commercial custom is valid only if it was accepted by the community’s scholars. According to Or Zarua’, a commercial custom that never received the endorsement of the community’s scholars is not binding under Jewish law.

In theory, Or Zarua’s position might significantly limit minbag ha-sochrim. For it is rare for a commercial practice to gain official approval or recognition by Jewish law authorities. But Or Zarua’s position may be less limiting if it is satisfied by the practice having gained the tacit or implicit approval of communal scholars. For example, if rabbinic authorities have allowed their communities to adopt certain commercial practices, such as entering into contracts about futures and intangibles, declaring bankruptcy, or dividing their marital assets according to equitable distribution, these practices have, in effect, gained tacit approval of communal leaders.

Furthermore, later authorities seem to reject Or Zarua’s position.

72 See, e.g., Or Zarua’ Bava Batra no. 2:

ולא דיעשנאؤ איה חכמים שאא מוסכין עליי… דהכולל במהן אור אחת

73 See Rabbenu Yonah Bava Batra 2a:

במקומיות כליה שלא לכות, שאא מקפידין עה קד וראיא, אינא מאיתיב איזא לכות.

74 Or Zarua’ Bava Metzia 280:

אתייבורא על ודוכריין איה חכמים לעניין ודיני ממון… והיה נרער בו כינו שאא מוכת ב HOWEVER, לעניין דיני ממון… והיה

שאמר או מנהג מ𝐕אלא הלכה membruhז ותרוק. אינו מנהג שאא ולראיא מיתוח, אינא אלא מנהגBushukית הדעת. או ל닷.

75 It is also not clear whether this approval needs to come from rabbinic scholars or whether it is sufficient to secure the approval of legal and political experts (e.g., lawyers, judges, politicians, economists). If the purpose of securing such approval is to ensure that a practice is fair and to the benefit of society, it may be sufficient to have the approval of legal and political experts. See, for example, the requirement of securing the approval of an adam chashuv for communal ordinances enacted by the townspeople (Bava Batra 9a). Ritva there (s.v. hanhu) explains that the adam chashuv is required to ensure that the enactment is “appropriate” and “not to the detriment of the town”. This explanation is consistent with Ritva’s characterization of the adam chashuv as someone who is both wise and holds public office.

76 R. Moshe Feinstein (Iggerot Moshe Choshen Mishpat I:72) appears to explicitly reject it:

איך ישמע המנהיג על-פי המפח והרוח אא אל עמי חיות ודקא שאא מנהיגה ויה הכהחים מנכין שלם רוח וחתני ער

NEU, איכא אדם חשוב ביהו, לא אא מחית איזא ביהו ליגו בתו אא מחית את הכהחים מנכיני ער.
To briefly summarize this section, not every commercial practice constitutes a binding *minhag ba-sochrim*. The halakhic validity of a given commercial practice may depend on a) whether it has achieved widespread support, b) the parties’ knowledge of the custom and their intent to be bound by it, c) the appropriateness of the practice, and d) whether it has achieved the support of the community’s scholars.

V. THE NORMATIVE BASIS OF MINHAG HA-SOCHRIM

This section examines the legal and conceptual basis for halakhah’s incorporation of *minhag ba-sochrim*. Sections A and B below develop and analyze two competing grounds for *minhag ba-sochrim*. Section A examines the theory that *minhag ba-sochrim* is grounded in the parties’ halakhic power to attach conditions and terms (*tena’im*) to their private agreements. Section B develops an alternative theory that grounds *minhag ba-sochrim* in the political power of a community to self-govern through binding legislation (*rasha’in benei ha-’ir le-hasi’a al kitzatan)*.

A. Stipulations in Monetary-Civil Law (Tenai Shel Mammon)

Some *poskim* write that *minhag ba-sochrim* is based in the halakhic principle of kol *tenai shel mammon kayam*. Under this principle, stipulations attached to a private...
agreement within monetary-civil law are generally binding, even if the stipulation runs contrary to the internal provisions of halakhah. For example, the liability rules of a bailee (shomer) are specified with great precision in Jewish law. Yet a bailor and bailee are free to stipulate and agree upon liability rules that run counter to the internal ones specified by Jewish law.\(^{78}\)

According to this view, the halakhic basis for *minbag ba-sochrim* is that parties to a financial agreement can explicitly stipulate a wide array of provisions (*tena'im*) that would override the default rules of *choshen mishpat* and mimic commercial practices like rent control, bankruptcy, equitable distribution, etc. This is the idea of *kol tenai shel mamon kayam*.

*Minbag ba-sochrim* simply extends this power to the realm of the implicit. Wherever there are prevailing commercial norms, the parties need not stipulate and agree to these provisions explicitly because they have *implicitly* adopted them by doing business within this commercial context. By entering into an agreement under these background conditions, it is *as if* the parties had explicitly adopted those provisions.\(^{79}\)

Grounding *minbag ba-sochrim* in the principle of *tenai shel mammon* explains how some commercial practices can become incorporated as implied terms in private agreements. It can explain, for instance, how the creditor is deemed to have agreed not to pursue the debt if the borrower has become bankrupt and why the landlord is deemed to have agreed to not raise the rent over a certain amount after the lease term.

But *tenai shel mammon* may fall short as an explanation for *minbag ba-sochrim*. Consider the fact that *minbag ba-sochrim* can generate novel forms of conveyance: It can generate new forms of *kinyanim* (i.e., *situmta*), and according to many authorities, it can validate transactions in futures and intangibles that would otherwise not be valid in Jewish law.\(^{80}\) Now it’s doubtful that two parties can originate

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\(^{78}\) See Bava Metzia 94a and Shulchan Arukh Choshen Mishpat 296. For the example of a stipulation to restructure a husband’s financial obligations to his wife, see Ketubot 56a and Even Ha-Ezer 38:5.

\(^{79}\) See the formulation in Responsa Rashba 6:254: 

*תשבח על כל דבר שב 若要 קיים...ותCGPoint על זה שב מברך את שותה הלשון hole the חוה חוה...ומוסיף אני על זה שבכ"מ שנהגו להתנות ולעשותパソコン חוה חוה; אפיי, המשים שטב*

See also Iggerot Moshe Choshen Mishpat I:72:

*דרעתא דumbotron עזי תשיב מענה פחתנא...במוקים שטיו ג엔ו לכל משכרת איז חוה חוה נתינה נתינה*

\(^{80}\) See the discussions in Sections II and III above.
a new form of *kinyan* by *private agreement*. Nor can a private agreement between themselves make binding a contract in futures or intangibles. Thus, *minhag ba-sochrim* appears to be different from the concept of an implied stipulation (*tenai*) in a private agreement. The latter is not strong enough to explain the former.

There is another reason to disentangle *minhag ba-sochrim* from the concept of implied conditions to private agreements. If *minhag ba-sochrim* works because it is an implied stipulation within a private agreement, it stands to reason that *minhag ba-sochrim* is limited to business relationships that arise by agreement—by contract. For where there is no agreement, there cannot be implied terms of the agreement. Thus, without an agreement or a contractual relationship, there is no basis to apply *minhag ba-sochrim* as an implied term. Yet, as we shall see below, some *poskim* apply *minhag ba-sochrim* to cases where no antecedent agreement exists between the parties.

These two considerations suggest that the conceptual and legal basis for *minhag ba-sochrim* may lie elsewhere.

**B. Practices of the Townspeople as Equivalent to Takanah Legislation**

A different basis for *minhag ba-sochrim* is suggested by commentators who ground *minhag ba-sochrim* in the halakhic power of townspeople to legislate and enact binding *takanot* for monetary matters. The core idea of this approach is that a widespread practice of the townspeople can achieve halakhic status equivalent to a *takanah* (legally binding rabbinic enactment). This interpretation of *minhag ba-sochrim* emerges from combining two well-established halakhic principles: (a) most fundamentally, the principle (Bava Batra 8b) that the townspeople are halakhically empowered to legislate binding *takanot* in the realm of monetary matters (*rasha’in benei ba’ir le-basia al kitzatan*), and (b) the principle (Bava Metzia 104a-b) that a widespread commercial practice amongst the townspeople should be treated as if it was enacted through formal legislation (*darshinan lashon hedyot*). Combining these two principles, we can conclude that a widespread commercial practice amongst the townspeople should be treated as if it was enacted through formal legislation (*darshinan lasbon bedyot*).

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81 See, e.g., Ramban Kiddushin 25b:

אמר, פרש על אבאר שהוא מטמרך דבר חנקנה בשמהו ולא מסרוה שם מטמרך קנה מב, גדו קנה, שא מטמרך המקים

82 Another reason to disentangle *minhag ha-sochrim* from *tenai shel mammon* is that the latter principle is introduced in the Mishnah as a dispute between the Tana’im. See Ketubot 56a and Bava Metzia 94a. Yet there is no indication that anyone disputes the normative force of *minhag ha-sochrim*. This suggests that two concepts may be distinct from each other.
within a community can achieve the halakhic force of a *takanah*. Let us examine these two principles, in turn.

1. **The Power of the Townspeople to Legislate (Bava Batra 8b)**

The Talmud in Bava Batra (8b) and the Tosefta in Bava Metzia (Ch. 11) establish the halakhic power of the townspeople to enact binding legislation for monetary matters within their jurisdiction—even where the substance of their legislation diverges from the internal provisions of Jewish monetary law. Further, the townspeople are authorized to impose sanctions and penalties on members of the community who violate their enactments.

The Talmud and Tosefta offer several examples of binding communal legislation. The townspeople can enact legislation regulating the price of commodities and wages. They can declare social ownership over goods that enter the city. They can mandate insurance policies whereby each member of the town would be obligated to pay a premium to insure mercantile vessels and other means of private transportation. They can impose fines and penalties on the owners of animals that trespass through fields and vineyards. And they can regulate business and store hours to ensure fair competition and to distribute consumers between the different establishments.

What is the basis for the townspeople’s legislative power? Commentators explain that the townspeople themselves constitute a type of *beit din* with original legislative authority over the monetary affairs of their jurisdiction. Accordingly,

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83  Bava Batra 8b:  
84  Tosefta Bava Metzia 11:24:  
85  Tosefta Bava Metzia 11:25-26:  
86  Tosefta Bava Metzia 11:23:  
87  Tosefta Bava Metzia 11:25:  
88  See the next note. Ritva (Bava Batra 8a) explicitly connects the power of the townspeople to enact such legislation with the power of a *beit din* to reassign and redefine property rights:

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the majority of the townspeople are halakhically authorized to enact monetary law *takanot* over their town. It follows, then, that if a community were to enact legislation about bankruptcy, rent control, equitable distribution of marital property, what counts as a means of conveyance, etc., those laws would become binding as valid communal *takanot*. But because these commercial practices are usually not legislated formally by the Jewish townspeople of a given community, the crucial question is whether these practices can rise to the level of a *takanah* without

89 See Responsa Rashba 1:729:

ככל דברشبג våנין יובליי הוקל על כתמים והחומריהו...ר"ש קול להשלכת טשש

Responsa Rashba 5:126:

 shear זית את הבכשח הב ימינו חפצו ממיכיןummyיחו עיניהם של לעי

Responsa Rashba 4:11:

אנו של יתיהתחז החבר בידם יכול חל במקום ואכן י pożycz חמעך המש על יתי

Responsa Rivash 399:

ככל יתור סצהל חנום וודר' התככות שכרות א antibiot לודו מודר(...ב"כ(...)

Responsa Maharashdam Choshen Mishpat 447:

זכים וט דינא דרב אמי ורב אסי, עדיפי מינייהו.

Responsa Ravshbash 566:

ואלי כח ימואי כח ב"כ לכל העולמ...

Resposa Yachin u-Bo’az 2:20:

having been formally enacted by the legislative assembly of Jewish townspeople.\textsuperscript{90} This depends on the principle of \textit{darshinan lasbon bedyot}, which is the topic of the next section.

2. Granting Statutory Effect to Common Practice: \textit{Darshinan Lashon Hedyot} (Bava Metzia 104)

The Talmud in Bava Metzia (104a) introduces the principle of \textit{darshinan lasbon bedyot} (which roughly translates to: “interpreting the language of commoners”). This principle requires \textit{batei din} to give legal force to the prevalent business practices of the common people. To get better traction on the principle, let’s consider the Talmud’s examples of \textit{darshinan lasbon bedyot}.

In one example, the Talmud discusses sharecropping arrangements wherein the landlord grants a tenant the right to use and cultivate his land in exchange for a percentage of the crop yield. In such a relationship, the landlord incurs the risk of the tenant leaving the land fallow (resulting in no compensation for the landlord). To protect against this risk, it was common practice to include a provision requiring the tenant, should he leave the field fallow, to compensate the landlord “as if the field produced a full yield”.\textsuperscript{91} The Talmud proceeds to explain that even if the landlord forgot to include such a provision, the principle of \textit{darshinan lasbon bedyot} entitles the landlord to receive such compensation as if the provision was explicitly incorporated into the agreement.\textsuperscript{92} \textit{Darshinan lasbon bedyot} gives legal recognition to prevalent communal practices.

A second talmudic example of \textit{darshinan lasbon bedyot} relates to marriage agreements. A Jewish marriage consists of two stages: legal acquisition (\textit{kiddushin}) and chuppah (\textit{nisu'in}). In talmudic times the two stages occurred twelve months apart. The \textit{kiddushin}, which is performed first, prohibits the wife to other men. The

\textsuperscript{90} It’s an interesting question whether participation in general elections (not exclusive to the Jewish community) to appoint representatives, who then enact legislation, would count as a type of communal self-legislation under the halakhic principle of rasha’ain benei ha-’ir le-hasi’a al kitzatan (Bava Batra 8b). If yes, it might be argued that as long as sufficient members of the Jewish community participate in elections, then ordinary legislation (e.g., Congress, state legislatures, city councils) may carry with it the halakhic force of Bava Batra 8b.

\textsuperscript{91} Bava Metzia 104a:

רב מאיר היה דורש לשון הדיוט; דתניא, רבי מאיר אומר: אם אוביר ולא אעביד אשלם במיטבא

\textsuperscript{92} See Tosafot Bava Metzia 104a:

יהי מורה לשון המורה לשונת שלא חויינ מקימם טможו אלא הדורות המתוך ותרבון הורין פחדו сетא מיהודים לא חשק כמאלי.
Talmud relates that it was common practice in Alexandria to condition the legal effect of *kiddushin* on the later occurrence of chuppah. This way, the *kiddushin* (and therefore the prohibition to other men) did not go into effect until *chuppah* occurred twelve months later. Thus, if the wife were to start a relationship with another man before the *chuppah*, she would not be considered adulterous.

Based on *darshinan lashon bedyot*, Hillel Ha-Zaken ruled that if an Alexandrian woman were to get married without explicitly stipulating such a condition, the *kiddushin* is nevertheless contingent on the *chuppah*, consistent with communal practice. The Talmud relates that Hillel actually exonerated, based on *darshinan lashon bedyot*, Alexandrian women who had started relationships with other men prior to their chuppah. Hillel also ruled that the children born from these unions were not *mamzerim*. He reasoned that their *kiddushin* were contingent on the occurrence of *chuppah*, even though the *kiddushin* of the women in question did not contain such a stipulation.93 *Darshinan lashon bedyot* gives legal effect to communal practices, even when the individual parties did not explicitly opt into it.

What legal or philosophical principle underlies *darshinan lashon bedyot*: Why are the parties bound by a common practice if they did not opt into it? Commentators explain that *darshinan lashon bedyot* enshrines the idea that a widespread communal practice (*minhag*) can be halakhically equivalent to a binding rabbinic enactment (*takanah/tenai beit din*).94 The logic of this idea is straightforward. As we saw in the last section, the townspeople are authorized to formally enact communal *takanot* to regulate commerce (*rasha’in benei ha-‘ir le-has’ia al kitzatan*). The principle

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93  Bava Metzia 104a:
הלל הזקן היה דורש לשון הדיוט; דתניא: אנשי אלכסנדריא היו מקדשין את נשותיהם, ובשעתgowתifes אינן הלכו אלא יחידים והטורף המשיכו לשאתם בобще מוסריים. אם הלל הזקן: הביאו בין חنتهاء אמם. הבאא לו ח느냐 לא יטבלו. וLOCKSינא לשון הדיוט המופיע_CHAR שבל אינן הלכו ולא עשו בניהם ממזרים.

See also Ramban Bava Metzia 104a:
ונראא מפי אומר ודלינו, וдолינו לשבות ישים מהנדיהו היך שיחה灰尘 ממספר הן יognito יים זע עות פיקוח... ושאינים ישים טיבב

כמי שבתוים כי היליאו ווה מ𐰇ות מיסות כל הלמבילעם פין ממקבלות יעש עות מי ישים קלא היו ישים

94  Responsa Rashba 3:433:
וה𬮱 שכריא ב OMITים לשו הייה דלילה עדין והנה מהנהי מטעני כי בעית ב OMITים משא לא OMITים

ב⊇หมายות... ב⊇⫏פה מהנהי ב OMITים

Ramban Bava Metzia 104a:
והו אומרים, ודלינו לשבות ישים קלא-Smith מי הנידיהו היך שיחה灰尘 ממספר הן יumbnail יים זע עות פיקוח... ושאינים ישים טיבב.

וארגא חシンプルות פעולות בן אלה על פיקוח, והו י démarch הינה חнима ד", שאריא"ו שאריא ישים טיבב עם שבערה דמי

והיעיאו והו מ_OPCODEים משא עות מי ישים קלא ים מהנباقي יעש עות... י网约 ד לזרחי לשבות ישים ממקבלות יעש עך מי ישים קלא ישים

ב"ד ישים.

See also Chokhmat Sholomo Bava Metzia 104a:
нести לשבות... באחרא DEME.ids יומכת אומרי והו מחנאת אידך.
of darshinan lashon bedyot extends this idea ever so slightly. It states that when a practice has taken hold in a community and has gained widespread support, it is as if the community has formally enacted it. After all, the significance of a formal enactment (takanah/ rasha’in benei ha’ir) is just that it reflects the community’s collective preference to adopt a certain ordinance or rule of conduct. Therefore, if the community has adopted a practice through its actual conduct—if that practice has gained widespread support—the practice has effectively been legislated by the community. So there is no fundamental difference between a takanah formally enacted by a community and a minbag that a community has adopted through its ongoing practice.95

This provides us with our second basis for minbag ha-sochrim: Minbag ha-sochrim is binding because a widespread commercial practice has the force of a communally legislated ordinance (takanah).96 Locating minbag ha-sochrim in the power of the townspeople to legislate takanot for monetary matters explains some of the features of minbag ha-sochrim that could not be explained by the view that located it in tena’im (i.e., tenai shel mammon: attaching conditions to private agreements). A communally legislated takanah can validate novel methods of conveyance (kinyanim) as well as transfers in intangibles and futures. Moreover, a communally enacted takanah can impose commercial norms on the parties even when they lack a contractual relationship. This explains the position of Rashba and other authorities who apply minbag ha-sochrim to cases where no antecedent agreement exists between the parties. The view that locates minbag ha-sochrim in the power of parties to attach terms to their private agreements (tenai shel mammon) cannot explain this phenomenon. The next section discusses Rashba’s ruling and its consequences for determining the scope of minbag ha-sochrim.

95 By analogy, compare Bruce Akerman’s two tracks of constitutional lawmaking. One through formal, legislative procedures for amendment, which is carried out by elected officials. The other through “higher lawmaking” through the popular actions of the sovereign citizens. See Bruce Ackerman, We The People. Alternatively, consider the nature of the common law itself as law based on customary practice.
96 See also Chazon Ish Bava Batra 5:4 s.v. Tosafot:

לֹא חוֹלְלים אַחַר הַפְּטֵל… מִפְּטֵי שֶׁהֵם שְׁמֵמוּתֵי יְצוּרָו וּרְחֵם בֵּית דִּינָם

See also Pitchei Choshen Shutfin 1:14 n. 31, citing Chatam Sofer (Responsa Choshen Mishpat 91) that minbag ha-sochrim has the legal effect of a community that stipulated an ordinance.
VI. Disputes Arising from Non-Contractual Relationships

The previous section outlined two different bases for minhag ha-sochrim. The first conceptualizes minhag ha-sochrim as tenai shel mammon, an implied condition or term attached to a private agreement between two parties. The second conceptualizes minhag ha-sochrim as a type of communal takanah.

The clearest practical difference between the two theories is whether minhag ba-sochrim extends beyond contractual relationships. If minhag ba-sochrim is a term/condition in a private agreement, then it is limited to relationships governed by an agreement between the parties. For example, minhag ba-sochrim would apply to a partnership, an employment relationship, the sale of goods and services, and similar relationships governed by an initial agreement or meeting of minds between the parties. But it would not extend to claims that arise outside of contractual relationships.

If, however, minhag ba-sochrim is grounded in darshinan lashon hedyot and conceptualized as equivalent to a communal takanah, then minhag ba-sochrim should apply outside the domain of contracts as well. It should affect, for example, torts cases and claims of unjust enrichment, wherever those norms have achieved widespread support within the Jewish community.

Indeed, Rashba applies minhag ba-sochrim to resolve a dispute that involved no prior agreement or contract between the parties. In Rashba’s case, the plaintiff referred his friends to the defendant’s store, where they then purchased goods. The plaintiff claimed that he was entitled to a referral fee from the store owner, on the theory that it was “the custom and practice of shopkeepers to pay a referral fee to anyone who brought customers to their shop.” The defendant countered that he was not obligated to pay because he never agreed to pay it and never hired the plaintiff.97

Rashba rules in favor of the plaintiff. He cites the custom and practice of shopkeepers and explains that under the principle of darshinan lashon hedyot, a widespread minhag is binding regardless of whether the person opted into it.98 Crucially,
Rashba’s case involves no prior agreement between the plaintiff and defendant. There was no antecedent agreement between the parties through which they implicitly incorporated the custom and practice of shopkeepers as a term. The fact that Rashba rules on the basis of minhag ha-sochrim suggests that he conceptualizes minhag ha-sochrim as a communal ordinance—takanah or tenai beit din—and not as a term or condition embedded within a private agreement between two parties.

This suggests that minhag ha-sochrim may apply to tort cases as well. Consider an automobile accident between two Jewish parties. Should that dispute be governed by the internal tort principles of choshen mishpat or by the tort principles of the jurisdiction? According to Rashba’s ruling, and the theory that conceptualizes minhag ha-sochrim as equivalent to a communal takanah, it seems that if the tort principles of the jurisdiction have gained widespread support within the relevant Jewish community, then those principles may be relevant to deciding the dispute. To be sure, the Tosefta’s discussion of the townspeople’s power to enact communal ordinances (rasha’in benei ha-ir le-hasi’a al kitzatan) includes examples of tort legislation.99

99 See, for example, the Tosefta’s case of the townspeople holding a cattle owner liable if his cow trespasses across vineyards (Bava Metzia 11:23):

Maharik (Responsa no. 8) was asked whether a communal minhag to disregard the first born’s halakhic right to a double inheritance can be enforced:

Maharik attacks the minhag on the ground that such a custom is improper and foolish and that it never gained the support of communal leaders (see the discussion above in section iv). If minhag ha-sochrim is grounded in an implicit condition attached to a private agreement, there would be no basis to even entertain modifications to the laws of inheritance, since inheritance does not depend on any agreement. The rules of inheritance govern automatically. Thus, to the extent that customs governing inheritance can even be a candidate for minhag ha-sochrim, minhag ha-sochrim must be grounded in the political powers of a community to legislate rather than in the power of individuals to attach conditions to their private agreements.

Another important difference between the theory that grounds minhag ha-sochrim in tenai shel mammon and the one that grounds it in rasha’in benei ha-ir is whether we would require the parties to know the custom before they can be bound by it (see the discussion above in section iv). If minhag ha-sochrim is grounded in communal legislation, then there is no reason to require the parties to have knowledge of the practice, since ordinances are binding whether or not a particular constituent is aware of it (see, e.g., Ramban’s Mishpat Ha-Cherem). But if minhag ha-sochrim is grounded in conditions attached to private agreements, it seems at least reasonable that the parties would have to know what conditions are implicitly attached to the agreement.
VII. MINHAG HA-SOCHRIM AS A PRINCIPLE OF JEWISH LAW

By this point, it should be clear that minhag ha-sochrim is a firmly entrenched principle of Jewish law. It appears explicitly in the Mishnah and Talmud, and it implicitly underlies several rulings throughout the Talmud. Furthermore, minhag ha-sochrim is consistently embraced by poskim throughout the ages who apply it to a wide range of cases. Thus, when a beit din decides a case based on minhag ha-sochrim, that decision is just as much a decision grounded in Torah law as one that appeals to other choshen mishpat principles such as chazakah, migo, and shevu’a. Put differently, minhag ha-sochrim is itself a provision of choshen mishpat, since it is Jewish law that provides for the incorporation of commercial customs, in the same way that it provides for chazakah, migo, and shevu’a. Thus, a beit din that fails to apply minhag ha-sochrim where it properly governs acts contrary to Jewish law. Such a beit din has erred by failing to apply the proper provision of choshen mishpat (i.e., minhag ha-sochrim) to the case.

Some readers might find it strange that Jewish law should be so amenable to incorporating commercial norms that displace the internal provisions of Jewish law. Bear in mind, however, that this concern is not unique to minhag ha-sochrim. As we saw, it is accepted halakhic doctrine that the townspeople are empowered to enact legislation in monetary matters that run contrary to the internal provisions of Jewish law. This parallels the rabbinic authority to enact takanot through hefker beit din that displace other internal provisions of Jewish law. It is also well-established that private parties can stipulate contrary to the internal provisions of Jewish law in their monetary agreements.

100 See section II and section V, above.
101 See section III, above.
102 Bava Batra 8b. See the discussion above, section v(b).
103 See, e.g., Yevamot 89b, Gittin 36b. For some examples where hefker beit din modifies the internal rules of Jewish monetary law, see Encyclopedia Talmudit, “hefker beit din”.
104 See section v(a), above.
105 This is one of the important differences between dina de-malkhuta and minhag ha-sochrim. Dina de-malkhuta is binding because it’s the law, regardless of whether the particular law has been taken up by the Jewish community. This may explain why halakhah is far more reluctant to incorporate dina de-malkhuta than minhag ha-sochrim. See above Section I. If dina de-malkhuta were always binding as a matter of Jewish law, it might threaten the integrity of the internal principles of choshen mishpat, since they would always be displaced by the law of the jurisdiction. By contrast, minhag ha-sochrim is only binding when the Jewish community has actively embraced a given practice.
Some might object that if external commercial norms can displace the internal provisions of *chosben mishpat*, then there is hardly any room left for the “normal” halakhic provisions of *chosben mishpat* to apply. One response to this objection is that commercial norms do not automatically displace the provisions of Jewish law. Commercial norms are binding through *minhag ha-sochrim* only where the Jewish community has already adopted those practices. So the set of norms that could displace the internal provisions of *chosben mishpat* is always limited to those that have been taken up by the Jewish community. Moreover, as we saw earlier, *minhag ha-sochrim* may be limited in scope, based on several considerations, including: the propriety of the practice, whether the practice has gained the approval of communal scholars, and the parties’ knowledge of the practice.

It is sometimes objected that it is difficult to make sense of the prohibition against litigating in non-Jewish courts if a *beit din* would anyway decide the case according to commercial norms. There are two responses to this objection. First, whether and to what extent *minhag ha-sochrim* should govern a given case is itself a determination of Jewish law that can only be decided by a Jewish court. Sometimes *minhag ha-sochrim* is not at all relevant to a case, and sometimes it is relevant to only part of the case. But even where the entire case may turn on *minhag ha-sochrim*, that conclusion can only be reached by a *beit din* applying Jewish law to determine that in fact *minhag ha-sochrim* halakhically governs the case at bar.

This distinction is implicit in the responsum of Rashba discussed above, section III(3), regarding spousal inheritance. A careful reading of the responsum (6:254) suggests that Rashba affirms the wife’s father’s first claim based on the *practice* of the community in Perpignan (to override spousal inheritance) but rejects his second claim based on *dina de-malkhuta* (to override a father’s right to inherit his daughter). Regarding the latter claim based on *dina de-malkhuta*, Rashba writes:

רבי אליעזר הקדימה את הפרשיה של צוותא池 רבי אליעזר הקדימה את הפרשיה של צוותא池 רבי אליעזר הקדימה את הפרשיה של צוותא池 רבי אליעזר הקדימה את הפרשיה של צוותא池 רבי אליעזר הקדימה את הפרשיה של צוותא池 רבי אליעזר הקדימה את הפרשיה של צוותא

This factual distinction between the two claims in the responsum is supported by the language of the inquiry. The father’s first claim is based on the community’s *practice* to adopt the non-Jewish law:

ןויא שמהלך ירוש, שמה שחלימה בדיני הלכות, והיה כל הנושא אשה שם, יהוי כל הנושא אשה שם...

The second claim is based on *dina de-malkhuta dina*, even though the community never adopted it:

זלי ליבוד Datum literal שמה שחלימה בדיני הלכות, והיה כל הנושא אשה שם, יהוי כל הנושא אשה שם...

106 And, of course, even where minhag ha-sochrim governs the substantive matter of the case, it may not govern the procedural issues of the case.
Second, the prohibition against litigating in non-Jewish courts appears to be less about the outcome of a case and more about the impropriety of Jewish parties subjecting themselves to the legal authority of non-Jewish courts—that is, to a legal authority distinct from the Torah. When parties litigate in beit din they are subjecting themselves to the legal authority of the Torah. The dayanim then determine, as a matter of Jewish law, the extent to which Jewish law would incorporate the relevant commercial practices in light of the facts before them. If the dayanim determine that minhag ha-sochrim is relevant, they apply it as a provision internal to Jewish law. Thus, minhag ha-sochrim does not run afoul of the prohibition against litigating in non-Jewish courts.

Halakhah’s incorporation of commercial practices through minhag ha-sochrim may point to some broader themes of Jewish commercial law. On one level, it may reflect the principle that law should generally not upend the parties’ legitimate expectations. If the parties organized their business dealings according to norms that enjoy widespread support, then, to the extent possible, the law should uphold the parties’ expectations—even when they diverge from Jewish law’s internal provisions. Here minhag ha-sochrim can be understood as an equitable principle that protects the legitimate commercial expectations of the parties.

On a second level, minhag ha-sochrim may reflect halakhah’s recognition that commerce often takes place in a marketplace that cuts across different normative communities. People from different legal jurisdictions do business with each other. Sephardim do business with Ashkenazim, Jews do business with non-Jews. If

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107 For an overview of the prohibition against litigating in secular court, see Rabbi Yaacov Feit, “The Prohibition Against Going to Secular Court”, Journal of the Beth Din of America 1, pp. 30 - 47. For the idea that the prohibition is more about submission to foreign legal authority rather than the substantive outcome of the case, consider the fact that the prohibition applies even when the outcome will be the same. See Rambam Sanhedrin 26:7, Shulchan Arukh Choshen Mishpat 26:1. There are several other indications that support this thesis, which I will develop in a forthcoming article.

See also Responsa Ba’i Chai, Choshen Mishpat 1, no. 158:

108 See Responsa Maharshakh (2:229), discussed above, section III. Maharshakh emphasizes that it would be unfair to allow one party to sue under din Torah when the entire business deal was conducted according to local custom which both parties relied upon:

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Jewish law did not incorporate marketplace norms, every transaction would be simultaneously subject to multiple systems of law. This would make ordinary marketplace transactions more cumbersome and generate considerable uncertainty about which system of law controlled the deal. Minhag ha-sochrim streamlines commerce by allowing the prevailing norms of the marketplace to govern.\(^{109}\)

On a third level, minhag ha-sochrim may reflect Jewish law’s acknowledgement that commerce is dynamic and ever-changing, and that it would be exceedingly difficult to legislate iron-clad rules to govern all commercial transactions for all time and eternity.\(^{110}\) The marketplace is always in flux: with novel investment vehicles, new types of financial relationships, innovative methods of trading, emerging markets, and novel commodities. Now, Jewish law could engage with the dynamic marketplace by means of rabbinic takanot. The Talmud is full of such examples.\(^{111}\) But takanot require centralized rabbinic institutions and councils, which for chunks of Jewish history are either non-existent altogether or unavailable at the local level at which commercial practices vary. One way of thinking about minhag ha-sochrim is that it serves as an automatic mechanism, built into Jewish law, through which halakhah engages with a dynamic marketplace.\(^{112}\)

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\(^{109}\) For the idea that minhag ha-sochrim serves to facilitate efficient commerce, see Responsa Ba'i Chai, Choshen Mishpat I, no. 158:

משא וтомת שיאי דיש เมךinesis שאם יותנה על פניהם החוור הנותן לאו איה לה דלי וሌנה ובעלה והרבנות ממהו וтомת וכל
כל י недоープ ולפי הר possono אלא להנה יותנהatat זה בנסעבים בתכונת זה מניי חקיקות משה אמר מהן התנה הסנאך מוכנה

\(^{110}\) For the idea that it would be difficult for the Torah to legislate commercial and social rules for all societies across time, see Ramban Devarim 6:18:

אי אפשר להזכיר בתורה כל הנהגות האדם עם שכניו ורעיו וכל משא ומטננו ותקוני הישוב והמדינות כלם, אבל אחרי
שהזכיר מהם הרבה… חזר לומר בדרך כלל שיעשה הטוב והישר בכל דבר.

Maggid Mishneh Shekheinim 14:

תורתנו התמימה נתנה בתקון מדות האדם ובהנהוגה בעולם כללים אמר קדושים תהיו... והמענה ועשית הישר והטוב
והכוונה שיתנהו בהנהוגה טובה וישירה עם בני אדם ולא היה מן הראוי בכל זה לפי שבבות פיסים ולא ש个百分 צוות התנהו

\(^{111}\) Consider, for example, the rabbinic enactment of ma'amad shelashtan (Gittin 13b), which provided a mechanism for selling and transferring debts. Rashbam explains (Bava Batra 144a s.v. kanah) that the rabbinic enactment formally recognized the common practice so that debts could be transferred without witnesses or kinyanim:

\(^{112}\) Minhag ha-sochrim can also be thought of as a mechanism through which halakhah can apply norms to cases that lack clear-cut halakhic rules. Suppose that it’s desirable for there to be decisive rules governing all types of commercial relationships. Suppose further that certain commercial relationships are under-determined by the halakhic rules—that is, suppose that there is no clear halakhic rule that would govern some cases. Minhag ha-sochrim could serve as a gap-filling principle that extends some set of norms to cases that would otherwise lie in the
Summary

This Article has argued that *minhag ba-sochrim* is a fundamental principle of Jewish commercial law. Under the right conditions, *minhag ba-sochrim* recognizes the prevalent commercial practices of the marketplace as binding in Jewish law. Section I introduced *minhag ba-sochrim* as a principle of incorporation and showed how it differs from *dina de-malkhuta dina*. Section II established the talmudic basis for *minhag ba-sochrim*, demonstrating that it is firmly rooted in the talmudic case law. Section III surveyed applications of *minhag ba-sochrim* in the poskim. Section IV offered several criteria that may limit the scope of *minhag ba-sochrim*, including the prevalence of the practice, the propriety of the practice, the parties’ knowledge of the practice, and its endorsement by communal scholars. Section V explored two different conceptual bases for the normativity of *minhag ba-sochrim*: the power to attach conditions to private commercial agreements and the power of the townspeople to enact commercial legislation. Section VI discussed an important practical difference between these two bases: whether *minhag ba-sochrim* can be applied to disputes that arise outside of contracts, such as torts and claims of unjust enrichment. Section VII argued that *minhag ba-sochrim* is itself an internal provision of Jewish law. The section also responded to several concerns that arise in light of Jewish law incorporating commercial norms. Finally, the section pointed to several themes that may underlie *minhag ba-sochrim*. These include: giving legal recognition to the parties’ commercial expectations, facilitating commerce between parties subject to different or multiple legal jurisdictions, and allowing Jewish law to engage with the realities of modern commerce.

interstices of halakhic-legal space. On this view, minhag ha-sochrim can be viewed as one method for filling in legal gaps. See the formulation in Responsa Rabad no. 131:

וכן אני אומר בכל דבר אין דינו מפורש אצלנו ואין לנו בו מנהג ידוע שהולכים בו אחר מנהגות שלהם

See also Rabad’s gloss to Hilkhot Malveh ve-Loveh 25:10, where he suggests that the case discussed by Rambam should be decided by local custom, rather than by Rambam’s suggestion. I am indebted to Jesse Lempel for fruitful discussion about the significance of Rabad’s position.