

Maimonides' *Epistle on Martyrdom* in the Light of Legal Philosophy

Yair Lorberbaum and Haim Shapira

1. Introduction

The *Epistle on Martyrdom* (known in Hebrew as *Iggeret ha-Shemad* or *Ma'amar Kiddush ha-Shem*), conveys Maimonides' reaction to the harsh religious persecutions undergone by the Jews of Morocco and North Africa during the twelfth century. Perusal of the *Epistle* immediately makes the reader aware of its uniqueness. The *Epistle* contains a halakhic discussion, similar to that which we would find in ordinary halakhic responsa, together with words of admonition and polemics characteristic of non-halakhic epistles. Indeed, one could focus the discussion of the *Epistle* around the question of its classification: is it a halakhic responsum or an act of religious guidance? A complete answer to this question requires a deep discussion of the interpretation of the *Epistle*, involving both its halakhic and its rhetorical components. How is one to interpret Maimonides' ruling: is it consistent with Talmudic halakhah or does it deviate therefrom? And how is one to interpret his rhetoric? Why did he express himself as he did, and what were his goals? But all this is inadequate without analyzing the issue on the theoretical plane as well. The very formulation of the question assumes a distinction between halakhic ruling and non-halakhic (religious) instruction. Is there in fact basis for such a distinction? May one distinguish, when speaking of the teaching or instruction of halakhic authority, between "halakhah" and religious or social guidance which does not have halakhic force? And if so, what are the criteria of such a distinction?

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During the early 1980s, there was a vigorous debate on this question between two Maimonidean scholars, Haym Soloveitchik and David Hartman.¹ On the basis of a detailed analysis of the *Epistle*, Haym Soloveitchik argued that the *Epistle on Martyrdom* cannot be viewed as a “halakhic responsum” in the strict sense of the word. The *Epistle*, as he understands it, is a document of a propagandist nature whose purpose was to confront the social consequences of the religious persecutions and the confused reactions of other rabbis and of the community to this harsh reality.² David Hartman, by contrast, stated that the *Epistle*, with all its varied components, is to be seen as a halakhic document in every sense of the word. “If,” he writes, “the principles and judgments discussed in this epistle do not all qualify as strictly legal considerations, it is because Halakhah is not a pure legal system. The material that influences the halakhic jurist’s decisions is not exhausted by the stock of legal rules and definitions narrowly referred to as ‘Halakhah.’ In rendering a decision, the halakhist must consider all those factors that may

- 1 H. Soloveitchik, “Maimonides’ ‘Iggeret ha-Shemad’: Law and Rhetoric,” in L. Landman (ed.), *Rabbi Joseph H. Lookstein Memorial Volume* (New York, 1980), 281-319 (below: “Law and Rhetoric”); D. Hartman, “The Epistle on Martyrdom: Discussion,” in *Crisis and Leadership: Epistles on Maimonides*, Texts translated and Notes by A. Halkin, Discussions by D. Hartman (Philadelphia- New York- Jerusalem, 1985), 46-90; a Hebrew version of this paper appeared as D. Hartman, “Maimonides’ *Iggeret ha-Shemad*: A Glimpse into the Complexity of Halakhic Rulings,” *Mehqerei Yerushalayim be-Mahshevet Yisrael* 2 (1983): 362-403; H. Soloveitchik, “Criteria for Halakhic Rulings: A Response to Dr. David Hartman,” *Mehqerei Yerushalayim be-Mahshevet Yisrael* 3 (1984): 683-87 (below: “Response”). The quotations from the *Epistle on Martyrdom* cited below are taken from Abraham Halkin’s translation from the original Arabic, *Crisis and Leadership*, 15-45; the authors of the present paper referred to the Hebrew translation by J. Kapah in his edition of *Iggerot ha-Rambam* (Jerusalem, 1978). Regarding this debate, cf. A. Strikovsky, “Maimonides’ *Iggeret ha-Shemad*: Halakhah or Rhetoric?” *Minha la-Ish: Sefer ha-Yovel la-Rav Avraham Yeshayahu Dolgin* (Simon Dolgin Festschrift; Jerusalem, 1991), 242-75.
- 2 Soloveitchik, “Law and Rhetoric,” 306.

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be relevant to the realization of the ultimate goal of Halakhah, i.e., the passionate love of God.”³

The debate between these two scholars focused primarily upon the interpretation of the *Epistle* and less on the theoretical aspect of the question. However, this latter aspect is no less interesting or challenging. The issue of the classification of the *Epistle on Martyrdom* relates to basic issues of legal theory, such as: What is the nature of a legal system? Does it include only a collection of rules, or does it also entail abstract principles? Does the legal norm derive from positive legal sources alone (such as legislation or precedents based on court rulings), or from ethical and social principles as well? Is the realm of law totally independent and separate from other social areas, or is there perhaps no true distinction between them? These questions may also be raised with regard to halakhah. Thus, contemporary discussions on legal theory may shed new light upon Maimonides' *Epistle* and its interpreters. In the present paper, we shall attempt to elucidate the debate over the *Epistle* with the help of these discussions. It must be stated at the outset that it is not our intention to decide this debate in favor of one or another position. Support may be found within legal theory for both positions. Nevertheless, modern legal theory may help to elucidate the questions under discussion here, to reformulate the different stances, to provide them with reasons, and to weigh the advantages or drawbacks of each one of them. Above all, the discussion to be presented below regarding the *Epistle* and the interpretations offered to it may serve as a model for theoretical analysis of other halakhic issues and texts, and of the benefit to be gained for the study of halakhah and history from concepts and categories that have been developed in legal philosophy over the last generation.

We shall begin with a description of the *Epistle on Martyrdom* and an analysis of the difficulties it raises; thereafter we shall present the two main possibilities for reading the *Epistle* – namely, as halakhah or as

3 Hartman, *Crisis and Leadership*, 83.

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rhetoric. In doing so, we shall make use of the arguments presented by the two main discussants of this issue, H. Soloveitchik and D. Hartman. Following this, we shall suggest the theoretical approaches underlying each approach. Finally, we shall make a number of methodological comments pertaining to the study of the halakhah and its history.

2. *The Epistle on Martyrdom – the Problem*

The fanatic Islamic group known as the Almohads presented the Jews of Morocco (and of North Africa) with a harsh choice: to utter the declaration of Muslim faith, the *Shahada* (“There is no God but Allah and Muhammad is his Prophet”) or to die.⁴ Some Jews refused and were killed, others went into exile, and many of them uttered the declaration while secretly living Jews. Troubled by their decision and by their way of life as Marranos,⁵ a number of these Jews turned to a Rabbinic sage who lived outside of the area of persecutions and asked him for his opinion. The gist of his answer, which was evidently disseminated among most of the communities of underground Jews in Morocco, was as follows: Islam is a form of idolatry, and declaring one’s belief therein (the *Shahada*) is an act of idolatry in every respect. The prohibition against declaring faith in the Prophet Mohammad falls under the category, “one should be killed and not transgress it.” Moreover, this sage evidently stated that one who violated the law and was not killed,

4 The Jews were evidently given an additional choice – to leave their homes and the place where they lived. This possibility is incorporated within the desire of the Almohads to create a unified society of believers, purified of those holding other beliefs (Christians or Jews). On the persecutions of the Almohads, see B. Z. Dinur, *Yisrael ba-Golah* (Jerusalem, 1965), Vol. 2, Book 1, 304-36; David Corcos, “The Attitude of the Almohads Towards the Jews,” *Zion* 32 (1967): 61-137; Abraham Halkin, “On the History of the Persecution During the Almohad Regime,” *Joshua Starr Memorial Volume* (New York, 1953), 101-10.

5 We use this term, despite its anachronism, following Soloveitchik’s use in the article discussed here (see “Law and Rhetoric,” p. 282 n. 2).

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is in principle subject to the punishment of execution by a Jewish Rabbinic court.⁶ He added that these underground Jews had converted to Islam and were tantamount to Gentiles: they were disqualified from giving testimony in a Jewish court, their prayer was an abomination, and there was no value to the commandments which they secretly perform. These Marranos – thus ruled this sage – are worse than the Christians, as the latter preferred martyrdom rather than confess belief in the prophecy of Mohammad. His words evidently aroused intense ferment among the Moroccan Jews, who addressed Maimonides for his response.

At the beginning of the *Epistle* and throughout, Maimonides goes out of his way to negate the words of this sage, incorporating a severe personal attack. Maimonides begins with an admonition, stating that his letter slanders Jews. He invokes various sources to indicate that such outstanding personalities as Moses, Elijah, and Isaiah were punished for precisely that sin. Marshalling an impressive collection of quotations from the Midrash and the aggadah, Maimonides demonstrates that even the great Sages of Israel (including R. Eleazar and R. Meir) themselves behaved as if they were transgressing the law during periods of persecution, while they continued to believe in God and to serve Him in their hearts or in secret. Against the claim of this rabbi that the Marranos of North Africa were not entitled to any Divine recompense for the commandments they perform secretly, Maimonides argued that God does not withhold reward for any commandment. The commandments performed (willingly) by such great Biblical sinners as Eglon, Ahab, Nebuchadnezzar, and Esau were not considered an abomination; to the contrary, according to the Midrash they on occasion received excessive rewards for their good deeds. If such is the case

6 These details follow from Maimonides' words in the *Epistle on Martyrdom*, that evidently allude to the differing view of that sage, "Therefore, anyone who claims or thinks that a person who transgressed is to be condemned to death, because the sages established the principle that one must surrender himself to death and not transgress, is absolutely wrong" (*Epistle on Martyrdom*, in *Crisis and Leadership* [below: *Epistle*], 29).

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with regard to great, willing sinners, how much more so is this the case for the Moroccan Jews, who acted out of compulsion. In the last and major part of the *Epistle*, Maimonides summarizes the laws concerned with sanctifying God's name and profaning it (*Kiddush ha-Shem* and *Hillul ha-Shem*).

Maimonides' two main arguments in the *Epistle* are as follows:

(a) The conditions that characterized the persecutions of the Moroccan Jews did not require them to die in sanctifying God's name. He writes that "there has never yet been a persecution as remarkable as this one, where the only coercion is to say something. When our rabbis ruled that a person is to surrender himself to death and not transgress, it does not seem likely that they had in mind speech that did not involve action."⁷ In order to emphasize the lack of significance of a verbal declaration imposed upon the Jews, Maimonides emphasizes that those who forced it upon them "know very well that we do not mean what we say, and that what we say is only to escape the ruler's punishment, and to satisfy him with this simple confession."⁸ He therefore rules that "if anyone comes to ask me whether to surrender his life or acknowledge, I tell him to confess and not choose death." Nevertheless, Maimonides emphasizes that "anyone who suffered martyrdom in order not to acknowledge the apostleship of 'that man,' the only thing that can be said of him is that he has done what is good and proper, and that God holds great reward in store for him; his position is very high."⁹

⁷ *Epistle*, 30-31.

⁸ *Ibid.*

⁹ *Ibid.* This decision differs from what he says in *Hilkhot Yesodei ha-Torah* 5.4, where he rules that in the case where there is no obligation to sacrifice one's life, it is forbidden to do so. Rabbi J. Kapah suggests that when Maimonides wrote the *Epistle*, he held a different view than that which he adopted subsequently in the *Code*. He notes that a ruling in a similar spirit is brought in *Tosafot* at *b. Avodah Zarah* 27b, s.v. *yakhol* (see *Iggeret ha-Shemad*, ed. Kapah [Jerusalem, 1978], 118 n. 87); and see Hartman, *Crisis and Leadership*, 86-87 n. 22, and cf. Yitzhak Shilat, ed. and trans., *Iggerot ha-Rambam* (Jerusalem, 1987), 53.

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(b) One who violated the law and was not killed, in a situation in which he was required to die in sanctifying God's name, is not subject to punishment. Not only the Jews in Morocco, who were not even obligated to be killed *ab initio*, but also one upon whom the obligation to be killed and not to violate a given law is incumbent, is not punished because, "God exempts from liability one who is coerced."¹⁰ One who violates a given law due to coercion, "he is not dubbed a transgressor, nor a wicked man, nor is he disqualified from giving testimony [...] He simply did not fulfill the commandment of sanctifying God's name."¹¹ The distinction between one who violates a commandment willingly and one who does so out of coercion runs throughout the *Epistle*; it is used by Maimonides to reject many of the arguments of the sage.¹² In principle, it is upon this idea that he bases his claim that the underground Jews of Morocco are not to be considered either as Gentiles or as sinners. They are obligated to perform the commandments (insofar as they are able to do so without endangering themselves), and their prayer is definitely accepted by God.

Maimonides concludes the *Epistle* by advising the Jews of Morocco to free themselves of the burden of apostasy by leaving those places where they are subject to persecution, and "if he [continues to reside there]," he emphasizes, "he is a transgressor, profanes God's name, and is almost a presumptuous sinner."¹³

The *Epistle on Martyrdom* is not a routine halakhic responsum, either in terms of style or in terms of content. Maimonides includes within this *Epistle* polemics, and makes extensive use of Biblical verses and

10 The main source upon which Maimonides bases this halakhah is *Sifra*: "And this principle is explicated in *Torat Kohanim*: God said regarding one who gives his seed to Molech, 'and I shall place My Face against that person' [Lev 20:5] – not one who is compelled, or acts in error, or is misled." *Sifra, Kedoshim*, §10; see *Epistle*, 28-29.

11 *Epistle*, 29.

12 See *Epistle*, *ibid.*, 16-18, 21, 22, 24.

13 *Ibid.*, 32.

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aggadic passages. In terms of its contents, there is a certain tension between the *Epistle* and the Talmudic halakhah, and even with Maimonides' own rulings in the *Code* (*Yesodei ha-Torah*, ch. 5). Talmudic halakhah, as is well-known, discusses situations in which one is compelled to violate the commandments, and in the case of one who is compelled to perform idolatry, it rules that "he should be killed and not transgress." Moreover, during times of persecution, the Talmudic halakhah demands that one refuse to do even those things which do not fall under the rubric of idolatry, even such trivial things as how one ties "the laces on one's shoes" (*b. Sanhedrin* 74a; *Yesodei ha-Torah*). Offhand, the conclusion seems to be that the Jews of Morocco were required to refuse the demand of the Islamic extremists and be killed, as in the opinion of the anonymous sage. Maimonides, who was virulently opposed to this position, does not argue in the *Epistle* that Islam is not idolatry, nor does he raise the argument that this is not a time of persecution. If he would have raised either of these arguments, one could have explained his deviation from Talmudic law. But Maimonides focused his argument on the fact that in this case the demand was one involving speech alone, that speech is not considered an act of idolatry, and that it is doubtful whether it is considered as any sort of transgression; hence he does not require that one take the severe step of "he should be killed and not transgress." But this distinction within Talmudic law is a complete innovation on the part of Maimonides, seemingly without precedent, and as such raises the question of the legitimacy of his ruling. Against this background, the question of the status of the *Epistle* emerges with greater severity. Did Maimonides consciously and knowingly deviate from the Talmudic law, which he himself had codified in his *Mishneh Torah*? What was the nature of his ruling, and what was its goal? Why did he make such extensive use of sources that were without halakhic force, such as Biblical quotations and citations from aggadic passages? Did he see these as valid halakhic sources, or were they used for purely rhetorical purposes?

3. Rhetoric

As mentioned above, the assertion that the *Epistle on Martyrdom* is a rhetorical document whose purpose is essentially social and political, is articulated by Haym Soloveitchik. Soloveitchik claims that Maimonides did not see this epistle as bearing halakhic force, but rather social and political significance:

As a legal defense the *Iggeret ha-Shemad* is inexplicable, but not as a work of rhetoric, in the classical (and medieval) sense of the term – as a pamphlet aimed not at truth but at suasion, at moving people by all means at hand toward a given course of action. The *Iggeret ha-Shemad* is not a halakic work, not a responsum, but, to use a modern term, a propagandist tract, written with a single purpose in mind – to counteract the effects of a letter of indictment that had gained great currency and threatened to wreak havoc on the Moroccan community.¹⁴

Soloveitchik attributes this motivation to the author of the letter, Maimonides, and it was, in his opinion, understood thus by halakhic authorities during subsequent generations. The structure of the argument presented by Soloveitchik is as follows: *all* of the halakhic arguments proposed by Maimonides in the *Epistle* are erroneous and do not stand up to criticism; most of the sources from halakhic literature upon which Maimonides bases his conclusions can be easily refuted. Their lack of validity is so self-evident that it is unthinkable that Maimonides – the greatest halakhist since the closing of the Talmud – could have possibly ascribed them any halakhic validity. This leads Soloveitchik to the conclusion that the *Epistle* is purely rhetorical. In order to provide a basis for this line of argument regarding the meaning of the *Epistle on Martyrdom*, Soloveitchik makes two moves: in a systematic and detailed discussion, he attempts to show that there is no

¹⁴ Soloveitchik, “Law and Rhetoric,” 306.

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substance to any of Maimonides' halakhic claims and that his words have no real basis in the Talmudic and Midrashic sources upon which he relies. Second, after noting the weakness of Maimonides' argument from the halakhic viewpoint, Soloveitchik proposes a detailed literary analysis of the *Epistle*, in which he points out the rhetorical techniques used there.

We shall not present here all of Soloveitchik's arguments "contra" Maimonides, but will suffice by summarizing those which seem to us to be his major ones. Soloveitchik attacks Maimonides' distinction between "speech" and "act." As mentioned earlier, by means of this distinction Maimonides states that the recitation of the *Shahada* is not an act of idolatry, so that one who was forced to utter these words is not obligated to sanctify God's name and sacrifice his life. First, Soloveitchik argues against this that Maimonides fails to bring any halakhic source for this thesis. Moreover, this position contradicts an explicit ruling in the *Mishnah*, *Sanhedrin* 7.6, according to which idolatry may also be committed through verbal acts.¹⁵ Soloveitchik rejects Maimonides' claim that intention is a substantive part of the sin of idolatry and that, unlike such transgressions as murder and theft, in which the consequence is the main thing, in idolatry the act itself must be directed by inner conviction. This distinction, Soloveitchik argues, is excessively strong, for on its basis it would be impossible to ever commit idolatry under compulsion; but in that case it is not clear why a person needs to sacrifice his life rather than submit to idolatry under coercion. The entire concept of sanctifying God's name would lose its meaning under this thesis. Soloveitchik holds that idolatry does not depend upon the subjective faith of the person performing it, but only upon the technical nature of the act – namely, does it meet the formal halakhic definition of an act considered to be idolatrous? Maimonides' comment that the Muslims who force a person to perform these acts are well aware of the

15 Cf. *b. Sanhedrin* 60b. This opinion, Soloveitchik argues, appears in Maimonides' own writings. See *MT, Hilkhot Avodah Zarah* 3.4; *Hilkhot Shegagot* 1.2; and cf. Soloveitchik, "Law and Rhetoric," n. 14.

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absence of faith in Islam on the part of the Jews who are forced to make the declaration is rejected by Soloveitchik out of hand, with the argument that it undercuts the entire concept of sanctifying God's name. In any act of religious persecution the persecutor is well aware of the opposition of the one being persecuted, as otherwise there would be no need to coerce him. Yet it is precisely in this state that the halakhah commands the persecuted Jew to sacrifice his life.

Soloveitchik devotes the major part of his analysis to disproving Maimonides' words defending the Marranos against the charge that they had changed their religion and were therefore sinners, disqualified for testimony, that their prayer was an abomination, and that the commandments which they performed in secret were of no religious value. To begin with, he says, Maimonides relies primarily upon agadic sources. The *aggadot* (which are "lacking in form" and "subjective") are not material upon which one can base a halakhic argument. Secondly, as against the argument that God even rewards sinners for the commandments which they fulfill, Soloveitchik argues that performing a commandment without faith and without inner conviction is lacking in value.¹⁶ Ritual without faith, he states, is like a game and not a religious act. Those Jews of Morocco who publicly declared their faith in the prophecy of Muhammad denied the eternal validity of their religion and thereby became apostates. They differ from other sinners in that their apostasy undercuts the value of the commandments they fulfill and the prayers which they conduct.

Against this central argument of Maimonides, distinguishing between willing and coerced idolatry, Soloveitchik argues that, outside of his halakhic statements (and the invoking of several erroneous and irrelevant sources), Maimonides in practice avoided discussing this issue and did not provide convincing reasons for his decision. According to

¹⁶ To be precise, Soloveitchik attributes this argument to the sage against whom Maimonides argued; however, from the general tone of his words, it is clear that he himself accepts this argument. See Soloveitchik, "Law and Rhetoric," 294-96.

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the opinion attributed to Maimonides' ideological opponent, the anonymous sage, in those situations in which a person is required to sacrifice his life for *Kiddush ha-Shem* ("he should be killed and not transgress"), the laws of saving one's life above all else are null and void. Thus, failure in such situations does not exempt one from responsibility; on the contrary, the transgressor necessarily bears "criminal responsibility," i.e., he is subject to punishment for what he did. Soloveitchik thinks that Maimonides' argument as to the sinner's exemption from all punishment in those situations where he ought to have sacrificed his life has no real basis;¹⁷ moreover, it undermines the very obligation to die in sanctifying God's name.

As we noted at the beginning of our discussion, we are interested primarily in the meta-halakhic approach upon which Soloveitchik bases his arguments. In addition, we wish to take note of several of his comments, which will be pertinent for the continuation of our discussion. The validity of his arguments depends upon him succeeding in demonstrating that all (or at least most) of Maimonides' arguments in the *Epistle* are flawed, and that these flaws are obvious. Hence, in order to confute Soloveitchik's claims, it is sufficient to show that at least part of Maimonides' arguments has a firm basis, and that where he does in fact "err," his error is a reasonable one.

As against Soloveitchik's claim, Maimonides' argument that acknowledgment of idolatry without inner conviction is not included within the prohibition against idolatry does not nullify the obligation to sanctify God's Name in times of persecution. The obligation to sanctify God's name may apply even at a time when a person is not engaged in idolatrous worship, but merely seems to be doing so. Religious persecution is a situation of struggle between two systems of faith. In such a struggle, as in a war, sacrifices are on occasion called for. Does weakness of will preventing a person from sacrificing his life at a time

17 Soloveitchik rejects Maimonides' argument from *m. Nedarim* 3.4; see *ibid.*, 299-300.

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of battle characterize him immediately as a traitor? One can understand the obligation to sanctify God's name in a situation of coercion to perform idolatry, even if this act is not considered idolatrous in the strict sense of the word. In other words, if a person fails to perform the commandment of sanctifying God's name, this does not necessarily mean that he has fallen into idolatry, and it is certainly inadequate to state that he is henceforth to be considered an apostate or one who has changed his religion. Therefore, Soloveitchik's claim that a localized and one-time failure in the difficult test of persecution immediately stigmatizes the person as an apostate, is rather surprising, if not astonishing. It seems more reasonable to accept the view implied in Maimonides' words, distinguishing between the commandment of sanctifying God's name (and the prohibition of profaning it) and actual idolatry.¹⁸

This subject relates to another claim made by Soloveitchik against Maimonides. As mentioned above, Maimonides attributed value to the Marranos' fulfillment of the commandments by drawing a distinction between willful idolatry and compelled idolatry. Soloveitchik argued that this is not a real defense, as the Marranos had failed in their obligation to sanctify God's name and had engaged in idolatry, and hence were considered as apostates, such that there was no value to the commandments which they fulfilled. The performance of commandments is of value only if it is accompanied by acknowledgment of the God who gave the commandments and the obligation to obey Him. Such recognition is lacking among these Marranos. But on what grounds does he assert that such recognition is indeed lacking among such Jews? They were compelled to engage in idolatry without believing in it and without denying the God of Israel. On the contrary, when these Jews continued to perform commandments they did so out of belief and with complete inner conviction. On this point, Soloveitchik seems to contradict himself: he initially argues against Maimonides that the definition of idolatry does not depend upon inner faith but rather upon the

18 See also *Yesodei ha-Torah* 5.4. This position is expressed also by later Sages, such as R. Isaac Bar Sheshet (*Teshuvot ha-Rivash*, §11), and see below.

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technical nature of the act, so that even one who is forced to do so is considered an idolater; further on, he argues that, in order for the commandments to be of any religious value, they must be accompanied by inner intention. Why does idolatry not require inner conviction, whereas it is a necessary precondition for the value of one's fulfillment of commandments? If Soloveitchik were to apply his argument regarding the need for inner conviction consistently, such that the fulfillment of commandments would be of value, he would find himself agreeing with Maimonides' principal conclusion: namely, that just as the fulfillment of commandments is only of value when accompanied by inner conviction, so too a person is not considered to engage in idolatry if he did so under compulsion (in which inner conviction is clearly absent). Since the secret Jews did not engage in idolatrous worship and never denied the faith of their fathers, they are not apostates; therefore their prayers are accepted and the commandments they perform are of value.

If these criticisms are of any substance, then Soloveitchik's whole line of argument is undermined, for not only are Maimonides' main arguments clearly not erroneous, but his main arguments do in fact withstand criticism. If such is in fact the case, it becomes difficult to view the *Epistle on Martyrdom* simply as rhetoric.

Soloveitchik's claim is raised primarily with respect to Maimonides, his main efforts being devoted to establishing the claim that the author of the *Epistle* did not see it as halakhah. However, the structure of his argument raises the question as to how other halakhists related to the *Epistle* and how this influenced their understanding of its nature. In principle, the intention of the author of the *Epistle* does not necessarily determine the attitude of other halakhists towards it, just as the attitude of later halakhists does not necessarily indicate the author's intention. Thus, it is important to distinguish between the different viewpoints. A text that was meant by its author as rhetoric or literature or as a political pamphlet, may at a different historical moment be understood as a document bearing halakhic validity. The opposite may also be the case: a document that was intended by its author to have halakhic

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validity may be understood by later halakhic authorities as lacking in such force.

But Soloveitchik's argument is based upon distinctions that he does not necessarily attribute to Maimonides; these distinctions are, in his opinion, characteristic of the concept of halakhah as such. This argument is based upon the fact that, by every reasonable criterion, one cannot see the *Epistle on Martyrdom* as a work of halakhah and therefore one cannot assume that Maimonides thought that it was such. His words seem to imply that these distinctions were accepted by all halakhic jurists (or by the majority). Therefore, one may anticipate that even later halakhists would not see his *Epistle* as halakhah.¹⁹ However, a preliminary examination reveals that neither earlier nor later halakhic authorities refrained from making use of the *Epistle* and that they saw it as a document of binding halakhic force. The most striking example of this appears in a responsum of R. Isaac bar Sheshet (Ribash), who was asked regarding the status of Jews who had been forced to commit apostasy as witnesses signing on a divorce writ or as witnesses to its delivery. Ribash answers, while discussing the *Epistle on Martyrdom* and relying upon it, that these Marranos are valid witnesses and that there is no reason to disqualify the *get* which they have signed. A similar attitude toward secret Jews is expressed by R. Shimon ben Zemah Duran (Rashbatz), who likewise bases his argument upon the *Epistle*. Even an Ashkenazic Sage who disagrees with Maimonides' conclusion, such as R. Ya'akov ben Moshe Molin (known as Maharil), who thought that it was forbidden for a person to acknowledge idolatry even for appearances, relates to the *Epistle* as a halakhic document in every respect.²⁰ Attribution of authority to the *Epistle* clearly characterizes

19 In this spirit, Soloveitchik notes that Maimonides' distinction between speech and act regarding idolatry is not mentioned in later halakhic literature. His comments imply that later authorities did not share the halakhic view articulated by Maimonides, and did not even grant it obligatory status. See Soloveitchik, "Law and Rhetoric," 292-93.

20 *Teshuvot ha-Rivash*, §11; *Teshuvot ha-Tashbatz*, I. §63; *Teshuvot Maharil*, §72.

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halakhic authorities in more recent times.²¹ As we said, in terms of Soloveitchik's claims, the manner in which the *Epistle* was received by the halakhic tradition throughout the generations is of significance. If later authorities relate to it as halakhah, this places a serious question upon the criterion used by Soloveitchik in order to define what is and is not halakhah.

4. Halakhah

Unlike Haym Soloveitchik, who sees the *Epistle* as a pastoral letter of a propagandistic and rhetorical character, David Hartman sees it as an exemplary halakhic responsum for Maimonides' approach as an halakhist: "In rejecting Soloveitchik's often ingenious interpretation of this epistle, it can be maintained that far from being a distortion of Maimonides' beliefs qua *halakhist*, it reveals the depth of his approach to the scope and purpose of halakhic spirituality."²² Hartman also thinks that "the *Epistle on Martyrdom* is a classic example of the complex array of considerations that the halakhic jurist must take into account."

The key to reading the *Epistle* in this spirit is anchored, according to Hartman, in Maimonides' approach towards halakhah: "For Maimonides, Judaism is not merely a compilation of legal rules and regulations; it is rather a comprehensive religious way of life in which Halakhah is an instrument that organizes and provides a framework for expressing the relationship between Israel and God."²³ According to this approach, the halakhah is not exhausted by a delimited, specific group of rules; it also includes values and principles that constitute the goal of the halakhah. These values and principles find striking expression specifically in the non-legal portions of the Jewish tradition: in the Bible, in the

21 R. A. I. Kook, *Teshuvot Mishpat Kohen*, §143; R. E. Waldenberg, *Teshuvot Tzitz Eli'ezer*, XII, §38; R. Ovadiah Yosef, *Teshuvot Yabi'a Omer*, I, *Yoreh De'ah* §11; *ibid.*, VI, *Yoreh De'ah* §13; *ibid.*, VII, *Orah Hayyim* §15.

22 *Crisis and Leadership*, 73, 82.

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Aggadah, and in Jewish thought. It follows that these are seen as halakhically valid sources which may and ought to be used in the process of halakhic decision-making. According to this approach, the process of halakhic decision-making is not one of logical deduction from legal values, but rather an expression of a human decision based upon broad judgment that takes into consideration not only the rules but also their ultimate purpose. Hartman sees the *Epistle on Martyrdom* as bearing testimony to this approach: “The rich interconnection between halakhic (legal) and aggadic (narrative-homiletic) rabbinic material ... testifies that the halakhist jurist is not confined exclusively to the explicit legal rules of the halakhic code, but may legitimately ascribe *legal* weight to the other principles, values and goals that are integral to the halakhic tradition.”²⁴

Hartman reads the *Epistle* in light of his understanding of the halakhah and indicates the function fulfilled by social and psychological values and considerations in Maimonides’ decision. His approach is based upon the attempt to explain Maimonides’ decision not on the basis of “rule theory” – that is to say, not by relying upon a general rule that supports his approach – but rather by finding a reasonable explanation for his decision from a value and political viewpoint. This approach presumes a kind of argumentation that is not accepted by a challenger of the type of Haym Soloveitchik. And indeed, in his response to Hartman, Soloveitchik complains, “[i]n Dr. Hartman’s paper there is no real halakhic argument.”²⁵ True, Hartman does not attempt to argue that Maimonides’ decision necessarily derives from the Talmudic sources. Such a claim could have served as a response to Soloveitchik, but it would have undercut Hartman’s principal purpose, which is to show that the process of halakhic decision-making incorporates considerations that go beyond narrow legal logic. Hartman’s argument is based upon two concerns: on the one hand, he wishes to demonstrate

23 *Crisis and Leadership*, 59.

24 *Ibid.*, 47.

25 “Response,” 685.

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that Maimonides' interpretation is plausible in light of Talmudic law; on the other hand, he attempts to demonstrate that Maimonides' interpretation is convincing, not only in relation to the sources, but also in its content and in the results that derive therefrom.

At the beginning of his discussion, Hartman analyzes the dilemma that confronted Maimonides, interpreting the factors and considerations that would need to guide such a decision. Hartman assumes that one is not speaking merely of a technical question – i.e., were those conditions that require an individual to sacrifice his life for sanctifying God's name fulfilled? – but also a substantive one. The laws of martyrdom were intended to achieve a certain end, and the question as to whether or not one must choose a path of self-sacrifice must be examined in light of this purpose. In Hartman's view, the central question in this discussion is that of the existence of the Jewish community as a group having a distinct identity – that is to say, the possibility for the community to exist and to live its life in accordance with its belief. The constant threat on the part of the dominant religions, Christianity and Islam, required the Jews to adopt a firm and uncompromising approach, including the willingness to sacrifice their lives if need be, in the sense of "he should be killed and not transgress." However, there are circumstances in which the achievement of the desired result requires submission and compliance with the decrees. If, for example, one is speaking of a partial and temporary edict, it may be more correct to submit to this edict for appearances only, and once the danger passes return to a full Jewish life. In order to rule on the question of sacrificing one's life as a martyr, one thus needs to evaluate the severity of the edict and its consequences, not only from a religious viewpoint, but also from a political one. The question becomes more complex when the halakhic authority also needs to take into consideration the reaction of the community: Will they respond to his call? In the wake of this the following question arises: How ought the halakhic authority to rule in a situation in which the members of the community are unwilling to sacrifice their lives? An uncompromising demand for self-sacrifice is liable to drive many people

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away from Judaism altogether. In such a case, a more lenient position may enable them to remain within the community. On the other hand, such a position might, as mentioned, harm the community's power of resistance. In order to decide on such questions, it is not enough simply to analyze the halakhic rules. One needs to apply broader considerations as well, including political, social, and psychological ones. This analysis brings Hartman to conclude that, "judging whether to regard the Almohad persecution as a crucial test of the viability of Jewish history involves considerations that transcend legality in the strict sense."²⁶

Let us now examine Hartman's explanation of two distinctions made by Maimonides: first, that between speech and act. According to Maimonides, acknowledgement of a pagan deity by means of speech alone is not considered idolatrous and does not bring in its wake the obligation to sacrifice one's life for sanctifying God's name. The focus of the Almohad edict upon making a verbal declaration therefore constitutes a mitigating factor. Soloveitchik criticized the distinction made by Maimonides, demonstrating that, according to the halakhic sources, even simple speech involving acknowledgement of a pagan deity is considered tantamount to idolatry. Hartman, by contrast, wishes to justify Maimonides' distinction by filling it with meaningful substance. In his opinion, there is need to distinguish between speech that expresses faith affirmation and mere empty speech. Speech is considered as an act of idolatry only when it expresses actual faith in idolatry. The recitation of empty phrases, which even those who force one to say it know is not an expression of faith, does not fall under the rubric of idolatry and one is not obligated to be killed for it. It is in this respect that one must distinguish between speech and action. An idolatrous act must be firmly opposed, even if performed under coercion and without any inner identification, because compulsion to perform certain acts may, over the course of time, bring about the assimilation of an entire community. By contrast, the imposition of a purely verbal declaration allows the community to continue in their Jewish life. It is

26 *Crisis and Leadership*, 50.

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therefore possible to make one's peace with a verbal confession of idolatry undertaken under coercion and without identification therewith.

In a similar manner, Hartman defends the distinction between coerced and willful action. As will be remembered, Maimonides relied upon this distinction in order to argue that one who engaged in idolatry under coercion does not fall under the rubric of an idolater and is not excluded from the community of Israel. This distinction is well rooted in Talmudic halakhah and he rules in the same spirit in his halakhic compendium, the *Code*. And indeed, Hartman, consistent with his own approach, does not suffice with noting that this ruling may be justified according to one of the formal rules of the halakhah, but attempts to explain the value and psychological dimensions of this distinction. According to his opinion, one finds here an expression of the halakhah's consideration of the psychological motivations of a person and not only of his external acts. The motivations express the total personality of the individual. Maimonides' opponent had argued that whoever recited the *Shahada*, even under compulsion, was to be considered a wicked person, thereby attaching a general label to his personality. By contrast, Maimonides considered it improper to say that a person who has been compelled to declare faith in Muhammad indeed believes in Muhammad, and hence one cannot relate to him as an idolater.

Hartman devotes a considerable portion of his discussion to clarifying the concept of sanctifying God's name and the role played by it in the *Epistle on Martyrdom*. On the face of it, Maimonides' discussion of this matter is necessary, because the obligation imposed upon one who is forced to violate one of the commandments falls under the rubric of sanctifying God's name. However, Maimonides engages in a far broader discussion than that required for purely halakhic purposes. He proposes somewhat different definitions of that commandment, presenting it as a comprehensive concept that goes beyond the matter of sacrificing one's life. Soloveitchik sees this as an attempt by Maimonides to obscure the true halakhic picture. Hartman, on the other hand,

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sees the presentation of this subject as a confrontation with the guilt feelings of the members of the community who see themselves as having failed in the test of sanctifying God's name. By presenting the varied definitions of sanctifying God's name – i.e., sacrificing one's life; fulfilling commandments out of love; supererogatory ethical behavior (“beyond the letter of the law”) – Maimonides shows that even one who has not risen to the level of sacrificing his life can sanctify the Name in everyday life through his manner of fulfilling the commandments and in his relations with others. This confrontation is, in Hartman's eyes, part of the halakhic responsum.

Both Soloveitchik and Hartman take note of the dialectical nature of the *Epistle on Martyrdom*. This character may be seen on both the halakhic and the rhetorical level. In terms of halakhah, Maimonides affirms two different responses to the edict in the *Epistle*. On the one hand, he states that, “Anyone who suffered martyrdom in order not to acknowledge the apostleship of ‘that man,’ the only thing that can be said of him is that he has done what is good and proper, and that God holds great reward in store for him. His position is very high, for he has given his life for the sanctity of God, be He exalted and blessed.” On the other hand, he rules that, *ab initio*, one should instruct a person who asks what to do that he should “confess [i.e., recite the *Shahada*] and not choose death.”²⁷ On the rhetorical level, one may observe a significant change in the tone of his words between the beginning of the *Epistle* and its end. At the beginning of the *Epistle*, Maimonides sharply rejects the approach of the sage who saw the recitation of the *Shahada* as idolatry, and one who was forced to recite it as an evildoer. However, at the end of the *Epistle* he remarks that a member of the community who had made this declaration under coercion “must look upon himself as one who profanes God's name, not exactly willingly, but almost so” (33). Soloveitchik saw these words as an expression of the rhetorical nature of the *Epistle* and its halakhic inconsistency. Hartman, by contrast, sees

27 *Ibid.*, 30. As we noted above, this ruling is opposed to his words in *Mishneh Torah*. See above, n. 9.

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this as an expression of the complex reality they confronted and of Maimonides' attempt to attain the majority of his goals, even when they are inconsistent with one another. Thus, he sees the *Epistle* as a "classic example of the complex array of considerations that the halakhic jurist must take into account in cases involving compromise."²⁸ Precisely for that reason, Hartman thinks that the *Epistle of Martyrdom* sheds valuable light upon the complexity of halakhic decision-making generally and serves as an outstanding example to halakhic authorities of future generations.

5. Formalism and Anti-Formalism, Positivism and Non-Positivism

In essence, the debate between Soloveitchik and Hartman reflects the debate between the formalistic approach to law and the anti-formalistic approach. One can also find therein elements characteristic of the debate between positivistic and non-positivistic concepts of law. In what follows we shall clarify these concept-pairs and with their help attempt to clarify the debate concerning the nature of the *Epistle on Martyrdom*.

Legal formalism is a concept that appears in a variety of contexts in legal theory and legal literature, bearing different meanings. Max Weber used it to describe the legal system in general, and particularly the characteristics of legislation.²⁹ In theoretical writing in the United States in the areas of philosophy, history, and sociology of law, the term is used to describe tendencies and developments of the law. In this context formalism also indicates a theory of adjudication, that is to say,

28 Ibid., 82.

29 M. Weber, *Economy and Society*, in G. Roth & C. Wittich, eds. (Los Angeles-London, 1978), 2.641-895. And see further, M. Mautner, *The Fall of Formalism and Rise of Values in the Israeli Legal System* (Tel Aviv, 1993; Hebrew), 16-17.

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a certain approach to the judicial process, its interpretation, and its legal reasoning.³⁰ The majority of those writing on the subject have a critical attitude towards formalism and it is used as a term of derision, making it difficult to present a fair and balanced picture. At the same time, there are theoreticians who have presented legal formalism in a more balanced way, formulating and defending its principles and values.³¹ For purposes of the following discussion, we shall utilize the characteristics of formalism as articulated by Mautner:³²

- (1) The legal rules are organized in a system with an internal order. This order has both a horizontal dimension (legal norms arranged according to distinct legal categories: criminal law, torts, contract law, property law, etc.), as well as a vertical dimension (hierarchy of constitution, statutes, ordinances, etc.).
- (2) Law is isolated from its value dimension. The judge applies the rules which he identifies in the legal system to the case in question independent of value considerations relating to issues of justification and morality. The juridical process relates only to

30 See D. Lyons, "Legal Formalism and Instrumentalism – A Pathological Study," *Cornell Law Review* 66 (1988): 949-72, where he writes as follows: "Our sketch of formalism amounts so far to this: first, the law is rooted in authoritative sources, like legislative and judicial decisions; second, it is complete and univocal. But what makes it 'formalistic'? That label turns on a third doctrine – namely, that law decides cases in a logically 'mechanical' manner. In other words, sound legal decisions can be justified as the conclusions of valid deductive syllogisms" (952). And see also F. Schauer, "Formalism," *Yale Law Journal* 97 (1988): 509-48, who states: "At the heart of the word 'Formalism,' in many of its numerous uses, lies the concept of decision-making according to *rule*" (510). Together with this, at times the term "formalism" appears in the literature in other senses. See, for example, R. M. Unger, *The Critical Legal Studies Movement* (Cambridge, Mass., 1983), 5-14; and D. Kairys, ed., *The Politics of Law: A Progressive Critique* (New York, 1982), 1-17.

31 Thus, for example, Schauer (above, n. 30) and, in a different way, E. J. Weinrib, "Legal Formalism: On the Immanent Rationality of Law," *Yale Law Journal* 97 (1988): 949-1016.

32 Above (n. 29), 13-16.

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identifying the given rule to be applied to the case at hand according to the internal logic of the legal system itself, without evaluating the consequence of the ruling in terms of values or practical utility.³³

- (3) Creativity is limited within the framework of the judicial process. The function of the judge is, as we have noted, to identify the relevant legal rules applicable to the case at hand and to apply them in a logical-mechanical way. In the absence of such an appropriate rule, the judge needs to derive it by means of deduction or induction – that is, by means of logical reasoning – from the system of rules existing within the law.³⁴

33 See, for example, J. Shklar, *Legalism* (Cambridge, Mass., 1964), 2-3, 16-17. As against her position, Weinrib (above, n. 31), holds that legal formalism is the basis for the intelligibility of law and, as such, for the morality embodied therein. He sees the formal element in law, under the inspiration of Kant (and under the inspiration of the rationalistic tradition in Western philosophy) as follows: “Legal formalism postulates that law’s content can be understood in and through itself by reference to the mode of thinking that shapes it from inside. ... Law is identical to the ideas of which it is comprised and the intellegibility of law lies in grasping the order and connection of these ideas. ... Just as one can understand geometry by working through a geometrical perplexity from the inside, so one can understand law by an effort of the mind that penetrates to and participates in the structure of thought that law embodies” (962). “Through the notion of form the formalist draws attention to the rationality inherent in legal relationships and thereby denies law’s radical contingency. ... Formalism repudiates analysis that conceives of legal justification in terms of some goal that is independent of the conceptual structure of the legal arrangement in question” (964-65).

34 See Weinrib’s remarks quoted in the previous note. Unlike Weinrib, many theoreticians see formalism – especially because of this point (as noted above) – as a pejorative term. See, e.g., Lyons (above, n. 30), 510. Hart thinks that the formalist label designates one who refuses to recognize that, in those cases which fall into the “penumbral area of rules,” there are different possible decisions deserving of consideration, and not only on the basis of a linguistic, literal analysis of the wording of the law. See Hart (below, n. 36), 121-50; idem (n. 37), 608-12.

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- (4) Certainty and predictability are central goals of the legal system. The rules included within the legal system are seen as objective facts subject to identification.³⁵ This characterization of the law creates expectations of certainty, enabling the consumers of the law to plan their acts without being surprised by unexpected results.

The term “legal positivism” is used to refer to a group of general theories of law that explain its nature and origins. The substantive core of positivism, which distinguishes it from non-positivistic approaches to law, is the claim regarding the source and manner of coming into being of legal norms. Positivism, with all its variety of schools, argues that the validity of legal norms is anchored in the fact that they were created by authoritative social institutions.³⁶ As against that, according to the non-positivistic approaches, the source of law lies in abstract principles, such as “natural law,” or moral or other principles. And indeed, in the jurisprudential literature of positivism, this serves as a label for additional arguments.³⁷ For purposes of the following discussion, we shall attribute to positivism in general the following characteristics:

- 35 According to the formalistic approach, there may be cases in which identification of the norms may be difficult and complex; nevertheless, in principle they are unequivocal and capable of being identified. See Lyon’s comments cited above, n. 30.
- 36 The most striking difference between the three principle versions of positivism is rooted in the characterization of the basic norm that serves as the criterion for identification of the law observed in a given country. Austin developed “command theory,” according to which the “positive law” includes every command issued by the sovereign issues which carries some sort of sanction. See J. Austin, *The Province of Jurisprudence Determined* (London, 1954). Kelsen coined the term “basic norm” to indicate that norm which defines the legislator and the procedure of binding legislation. See H. Kelsen, *General Theory of Law and State* (Cambridge, Mass., 1961), and cf. Y. Englard, *Introduction to Jurisprudence* (Jerusalem, 1991; Hebrew), 31-40. Hart used the term “rule of recognition” to indicate a social rule that determines the binding law of the state. See H. L. A. Hart, *The Concept of Law* (Oxford, 1961).
- 37 Hart enumerates five claims attributed to various different positivistic thinkers: “(1) The contention that law are commands of human beings. (2)

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- (1) The law of a community is fundamentally a set of rules that serve the community in order to determine what kind of behavior is punishable and what kind of behavior is to be enforced by means of public force, as well as rules that confer powers and rights.³⁸
- (2) These rules may be identified by means of tests and criteria that do not pertain to their contents but to their pedigree or the manner of their creation. These criteria serve to draw distinctions between valid legal rules and social norms that are not legal.³⁹ These social rules (generally referred to as common morality) do in fact guide the behavior of members of the society, but are not enforced by means of public force (that is: the courts, the police, and other bodies which enforce the law).
- (3) The law includes lacunae which require completion. Since, according to positivism, the set of rules is coextensive with the law, there may be cases that are not covered by the rules. In such a case, the decision will be made by an official having the authority to do so, usually a judge, who exercises “judicial discretion” while relating to the principles, policy considerations, and

The contention that there is no necessary connection between law and morals or the law as it is and ought to be. (3) The contention that analysis of legal concepts is worth pursuing and to be distinguished from historical inquiries ... sociological inquiries ... and from the criticism or appraisal of law. (4) The contention that a legal system is a ‘closed logical system’ in which correct decisions can be deduced by logical means from predetermined legal rules without reference to social aims, policies, moral standards. (5) The contention that moral judgments cannot be established or defended as statements of facts can, by rational argument, evidence, or proof (non-cognitivism in ethics).” See H. L. A. Hart, “Positivism and the Separation of Law and Morals,” *Harvard Law Review* 71 (1958): 593-629 (reprinted in: idem, *Essays in Jurisprudence and Philosophy* [New York, 1983], 66 ff.)

- 38 See Hart, *Concept of Law*, 77-90. On positivistic attitudes towards these principles, see below, n. 47.
- 39 See, e.g., *Concept of Law*, 97-120 and also J. Raz, “Legal Principles and the Limits of Law,” *Yale Law Journal* 81 (1972): 823-54, esp. at 823-24. The attempt to provide a basis for this distinction characterizes the approaches of Austin and Hart, each in his own way.

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standards that are outside or beyond the law. This judicial discretion is referred to as “strong discretion” (as opposed to “weak discretion,” in which the judge is required to apply the law through interpretation).⁴⁰

- (4) The conceptual analysis of legal concepts occupies an important place in the application of law, its interpretation, and its legal justification.⁴¹

From examination of the list of characteristics we have attributed to legal formalism and those which we have attributed to legal positivism, we find there to be a significant closeness between the two.⁴² This closeness stems from the incorporation of those characteristics mentioned in positivism, that is, from our adopting a broad definition of the term. If positivism is reduced to its core element – namely, the claim that the source of law lies in the sustaining of social facts and not due to its relation to abstract principles – we find that there is no conceptual relationship between it and formalism. One may adhere to a positivistic or non-positivistic theory regarding the source of the law, and to adhere to a formalistic or anti-formalistic approach with regard to the nature of the legal process. And indeed, there are positivists who express reservations towards formalism and even deprecate it,⁴³ and there are theoreticians who have argued for a relationship between formalism and certain non-positivistic approaches, such as that of natural law.⁴⁴ We have chosen the broad definition of positivism, both because of its extensive use in legal literature, and because it can serve us in analyzing the debate regarding the *Epistle on Martyrdom*.

40 A. Shapiro, “The Problem of Judicial Discretion in Liminal Cases,” *Mishpatim* 2 (1970): 57-66; J. Raz, “Legal Principles and Judicial Discretion,” *Mishpatim* 2 (1970): 317-28.

41 See Hart, *Concept of Law*; and see there for his references to the writings of positivistic thinkers.

42 See Mautner (above, n. 29), 22-23.

43 See, e.g., Hart, *Concept of Law*, 124-30.

44 See Weinrib (above, n. 31), 955-56 and 954 n. 14.

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Both formalism and positivism (in its broad definition) emphasize the centrality of legal rules (characteristic [1] of both). According to both approaches, there is no necessary relationship between law and morals. According to characteristic (2) of positivism, a valid legal norm is identified by means of its source and the manner in which it came into existence, and not through its compatibility with moral principles. According to characteristic (2) of formalism, the legal process is totally separated from its value dimension. Both these approaches see the main function of the judge as applying legal rules to the case at hand. The formalistic claim regarding the limited degree of creativity of the judge (characteristic [3]) follows from this. The positivistic claim as to the existence of lacunae requiring completion by the judge (characteristic [3] of positivism) relates to exceptional cases. The judge's creative role in such a case is an exception that proves the rule. This understanding of the judicial process is also connected with the argument that analysis of legal concepts plays a central role in judicial reasoning (characteristic [4] of positivism).⁴⁵ Both formalism and positivism share the assumption that certainty and predictability are salient goals and values that the legal system is supposed to realize (characteristic [4] of formalism).

Legal non-positivism is a general term for a wide range of approaches that disagree with the basic principles of positivism. Within this framework one ought to include the classical theories referred to as natural law, as well as modern theories such as that of Ronald Dworkin.⁴⁶ The

45 Against this background, one should note Hart's efforts, as a positivist, to distance himself from formalism. This finds expression in his interpretive theory, according to which the judicial process is not exhausted by the logical and mechanical application of rules, but rather in interpretation which incorporates consideration of values and social benefit (this, because of the existence of "penumbral areas" in every legal rule). Nevertheless, it is possible to identify a kernel of formalism in Hart as well, as he admits that in those situations in which the case falls within the core area of the legal rule, the activity of the judge is purely technical and does not take into consideration the results of the application of the rule.

46 Concerning natural law, see: L. L. Weinreb, *Natural Law and Justice*

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common denominator in all these approaches is the recognition that law is not exhausted by closed hierarchical systems of sharply-defined and clear rules. Dworkin develops the insight that, alongside a system of rules, the law includes principles, standards, policy considerations, and even the political theory that underlies them. These sources of the law are not necessarily found within the written law (in the constitution or the law itself) nor in the rulings of the various tribunals acting within a given system. These legal sources are derived at times from the ethical principles observed in a given society or from the basic principles of the legal system. The judge discovers these principles, not only in the recorded law, but also in the values and ideological elements that are inherent between the lines of the law or that lie in its basis. Moreover, they are also likely to draw upon the ideal ethics.⁴⁷

Non-positivism, unlike positivism, denies the existence of sharp, clear and formal criteria used to identify valid legal rules. Even if it were possible to formulate such criteria, they are not concerned with the pedigree, that is to say, the manner in which legal rules of various kinds came to be adopted or into existence. Unlike the positivistic approach to law, non-positivism follows the viewpoint according to which there is no definite separation between law and ethics (both common and

(Cambridge, Mass., 1987); H. McCoubrey, *The Development of Naturalist Legal Theory* (London, 1987); in this context see L. L. Fuller, *The Morality of Law* (New Haven, 1969; revised ed.); J. Finnis, *Natural Law and Natural Rights* (Oxford, 1980). On R. Dworkin, see his books: *Taking Rights Seriously* (Cambridge, Mass., 1977); *A Matter of Principle* (Cambridge, Mass., 1985); *Law's Empire* (Cambridge, Mass., 1986).

47 For the distinction between common ethics and ideal or critical ethics, see H. L. A. Hart, *Law, Liberty and Morality* (Palo Alto, Cal., 1962). In this context it is important to emphasize that positivists also believe that principles play an important role in the legal system. See esp. Raz (above, n. 39), 839-42. One of the differences between Dworkin and Raz in evaluating the function of principles in law is that Raz thinks that one needs to distinguish between legal principles (that is, principles which have been recognized in legislation or in rulings) and ethical principles, which are not an integral part of the law. Dworkin rejects this distinction.

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ideal). Hence, this approach understands the concept of “legal obligation” not only in a descriptive manner, as do the positivists, but as an expression that includes a moral-value component. In other words, the boundary between law and morality is blurred. According to this approach, one may conceive a situation in which it is impossible to apply any of the legal rules yet there nevertheless exists a legal obligation that derives from an ethical or political principle (which is also a legal principle). This understanding of the limits of law of course reflects a certain erosion in the weight of certain social goals, such as certainty, predictability, and coordination, that the legal system wishes to realize.⁴⁸

The type of judicial discretion attributed to judges according to non-positivism is referred to as “weak” because it does not create a new law, but only applies the existing law. The legal sources available to them – particularly due to the existence of principles, standards and “political theory” – in practice encompass all of the cases that come before them. In other words, according to this viewpoint regarding the limits of law and justice, a situation of lacunae in the law is in practice impossible. In a case in which there is no relevant rule, one applies one of the legal principles in which the answer is to be found. Hence, one should not be misled by the characterization of the judicial discretion of the judge as “weak.” According to the non-positivistic approach, far greater creativity and activism is attributed to (and even demanded of) the judge than that ascribed to him by the opposite viewpoints.

Legal positivism, particularly according to the formalistic approach, sees the judge as one who applies legal logic, a kind of scientific thinking, based primarily upon analysis of concepts and legal arguments which will lead him in a technical way – at times simple and at times convoluted – to the correct and necessary conclusion. According to the

48 One ought not exaggerate the degree of erosion that non-positivism has brought about in these goals, as even according to their approach, most rulings of the court and of other tribunals are expected. In the final analysis, most cases are not “hard cases” and those cases in which the judges are indeed active and creative are extremely limited.

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opposing viewpoint, the nature of the judge's thinking is entirely different. In a non-positivistic approach, the judge examines principles, standards, general values, and the like that are relevant to the case under consideration. After clarifying them, he is called upon to determine their weight in relation to the case at hand, to balance between them, and only then to decide.⁴⁹ According to these approaches, judicial discretion that clarifies, weighs, and balances does not supplant the quasi-logical analysis of concepts and arguments, but enjoys primacy over it. The non-positivistic approach undercuts the centrality of "legal logic" – that is to say, that which is characterized by the opposing approach as the essence of legal examination and thought, and particularly of judicial thought. According to this approach, considerations of policy, different purposes of legislation, and social, political, national, and ideological goals lie at the very heart of judicial discretion. Considerations of this type may frequently override or decide considerations of a deontological nature ("let the law pierce the mountain"), considerations based upon conceptual analysis, which are typically isolated from circumstantial contexts of time and place.

The "sources of law" upon which the judge (halakhic authority) relies in making his decision also influence the nature of his judicial discretion. According to the positivistic and formalistic approach, these sources are generally clear-cut, sharply defined legal rules that respond to a technical and/or conceptual analysis, whose applicability to the case in point as it appears to the judge is either all or nothing.⁵⁰ According to the opposite approach, those sources of law available to the judge are far broader. Conceptual analysis is appropriate to some of

49 In light of this, Dworkin crystallized an approach according to which every legal question has one correct answer. See, e.g., Dworkin, *Taking Rights Seriously* (above, n. 46), 81-130; idem, *A Matter of Principle* (op. cit.), 119-45, 167-77. See also Shapiro's paper (above, n. 40). Both positivists such as Raz (above, n. 40), and those closer to Dworkin's approach, such as A. Barak, *Shikkul Da'at Shipputi* (Tel Aviv, 1987), 52-58, dissented from this approach.

50 See Dworkin, *Taking Rights Seriously*, 22-31.

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them (i.e., of the legal rules), but for others an entirely different type of analysis – value-oriented, ethical, and cultural – is more appropriate.

Moreover, the nature of judicial discretion and the nature of the legal matter upon which it is based likewise dictates the nature of the discourse that the judge conducts in his ruling. Whereas according to the positivistic and formalistic approaches, the judge leans towards proving his case, in the other approach his goal is to convince. While the former strives to formulate his approach in a quasi-mathematical or logical manner, the other, alongside arguments based upon conceptual analysis, does not refrain from citing arguments of a persuasive nature. In other words, according to this approach rhetoric is not alien to legal reasoning nor may it be separated from legal logic.

In light of all that has been said, it seems clear that the different approaches tend to describe the social function of the judge in differing manners. Whereas the positivistic and formalistic approach sees him as a kind of a professional, whose main function is to decide disputes that come before him through use of his expertise, according to the opposed theoretical approach, the judge is first and foremost a social leader, an educator and trailblazer.⁵¹ In his rulings and decisions, he addresses not only the litigants standing before him and the legal community, but also society as a whole. This target audience dictates the nature of the texts that he creates, which cannot be excessively technical or professional.

51 Dworkin, upon whose approach the above characterization of non-positivism was largely based, does not share in this characterization. In his early writing, at least, Dworkin (*Taking Rights Seriously*, ch. 2) sees his theory of adjudication as providing a solution to the difficulty that arises from attributing discretion to judges in the strong sense. According to his view, such a situation is undemocratic (as judges do not act therein according to the law but create it) as well as unethical (as it creates situations of retroactive legislation). His theory of adjudication represents the judge as one who activates and reflects in his rulings the existing legal situation, and not as one who governs the community by means of “judicial legislation.” To us, this portrayal seems to entail an element of naiveté, as what happens in practice, according to Dworkin’s theory, is the creation of legal rules and norms by the judge, and not merely their application and implementation.

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According to this approach, unlike the formalistic-positivistic approach, the judge is not separated from the social and political realms.

6. The Polemic Over the *Epistle on Martyrdom* in Light of Legal Theory

Examination of the approaches taken by Soloveitchik and Hartman towards the analysis of the *Epistle on Martyrdom* in light of the various approaches we have seen in legal theory may shed light upon a number of aspects of this debate which have not been sufficiently clarified. Soloveitchik's approach to halakhah entails explicit elements of formalism as well as positivistic characteristics. "Without entering into the thick of defining the limits of halakhic discussion," writes Soloveitchik, "we shall note two such limits which are quite clear. One: elementary rules of deduction, two: non-contradiction to explicit Mishnaic rulings, particularly if they have been interpreted consistently by all of the commentators over the course of a millennium. These limits (among other things) were crossed by Maimonides in the *Epistle on Martyrdom*."⁵² These tests of the limits of the halakhic discussion are clearly of a formalistic nature. According to Soloveitchik, halakhic reasoning must meet certain logical criteria and may not deviate from the accepted meaning of certain sources. Departure from these sources is not only erroneous; it also transforms the discussion into one that is non-halakhic. The first test posed by Soloveitchik is based upon the approach which states that halakhic reasoning, like legal reasoning, is characterized by strict logic and argumentation. This is a quasi-scientific understanding of law – or, in this case, of halakhah. According to Soloveitchik, the function of the halakhic jurist is first and foremost to prove his stance, not to convince. Soloveitchik's understanding of halakhah is reflected in the nature of the halakhic arguments which he develops in his article. His writing is of an explicitly analytical nature;

52 See Soloveitchik, "Response," 684.

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he draws a sharp distinction between matters of halakhah, written in a scholastic manner, and rhetoric, whose purpose is to convince. For him, halakhic writing is not intended to persuade, but only to prove.

According to Soloveitchik, considerations of public policy, balance between principles, purposes and goals, be they social or religious, are not (or at least not typically) within the realm of halakhic discourse.⁵³ Within the context of halakhic writing, the halakhic authority is required to arrive at an unequivocal and proven halakhic conclusion, on the basis of authoritative sources and by means of valid arguments. Soloveitchik does not deny the importance of societal and national (and perhaps also religious) goals, such as the avoidance of conversion to Islam by a Jewish community subject to persecution. However, this purpose and the nature of leadership and the behavior derived therefrom, notwithstanding all their importance, are not, for him, a purpose which that halakhic discussion as such is required – or even permitted – to take into consideration.

The halakhist, according to Soloveitchik, differs from the communal leader. The halakhic authority is a kind of professional who applies his erudition in the realm of halakhah; his addressees are those interested in obeying the halakhah. The halakhic authority is not an educator, nor a religious guide, nor is it his function to suggest solutions to crises, serious as they may be. Soloveitchik goes so far as to hint that there may be circumstances – such as those which confronted the Moroccan Jewish community – in which an halakhic authority such as Maimonides

53 Soloveitchik, “Law and Rhetoric,” 308: “To avoid this catastrophe, Maimonides entered the fray. It mattered now little whether they were or were not technically ‘apostates,’ for if something were not done they would soon be in fact. So long as they persisted in their Judaism, even if technically their efforts were worthless, when the persecution passed they could very easily be brought back to the fold. At any rate, their children and future generations would not be lost forever to the people of Israel. *And while this last point was indeed irrelevant to the legal question of yehareg we-al ya’abor it had no small bearing on the simpler issue of Jewish survival*” [our emphasis].

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is obligated to remove the halakhist's mantle and guide the public while deviating from the halakhah.⁵⁴ However, due to his formalistic approach, Soloveitchik is unwilling to accept the view that, under such circumstances, "deviation" from the halakhah is an activity within the framework of the halakhah itself.

On this point, Soloveitchik's stance reflects a typical positivistic stance. As we noted earlier, positivism, as opposed to non-positivism, claims a clear separation between law and ethics. In terms of our subject, it is important to note the distinction between law and ideal morality.⁵⁵ The distinction between law and morality has been emphasized by Austin,⁵⁶ who is considered the father of modern legal positivism. All those thinkers who adopted legal positivism followed in Austin's wake.⁵⁷ This distinction has numerous significances and implications. According to one of them, there may be situations of a serious contradiction between a legal obligation and a moral obligation. In such cases, notwithstanding that we identify a binding law, there is no moral obligation to obey it.⁵⁸ While such a situation is not im-

54 It is thus that we may understand his comment: "It seems to me that we [i.e. Soloveitchik & Hartman] do not disagree as to Maimonides' motivations and that *it is good that he did as he did*" [our emphasis] – Soloveitchik, "Response," 639.

55 On the distinction between common ethics and ideal ethics, see above, n. 47.

56 See J. Austin, *Lectures on Jurisprudence* (New York, 1875), Lecture 1: 86-89. The approach regarding the distinction between law as it is and law as it ought to be is far more ancient. It appears, for example, in the Platonic dialogue (or that attributed to Plato), *Minos, or Concerning Law*, in the words of the friend who speaks with Socrates in this dialogue.

57 See Hart, *Concept of Law*. An unusual approach is that of Kelsen, who held a non-cognitivist approach towards ethics, such that that which he understood as obligatory was only the legal obligation. See H. Kelsen, *The Pure Theory of Law*, trans. M. Knight (Clark, NJ, 2005), 59-69.

58 One ought not confuse this situation with the question as to whether in principle there is an ethical obligation to obey the law. Even if such an obligation exists, it only establishes a *prima facie* obligation. Our concern here is with situations in which the question is decided on the basis of the injustice caused as a result of obedience to the law. In such cases preference

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possible according to non-positivism as well, since, according to this approach, ethical considerations are part of what determines law, a case in which a valid legal rule will contradict what is appropriate from an ethical viewpoint is rare.⁵⁹

Soloveitchik's theoretical approach leads him to the conclusion that Maimonides, in the *Epistle on Martyrdom*, instructed the people to behave in a manner (he considered) opposed to halakhah. Formal application of the halakhic rules regarding sanctifying God's name to the case at hand would have brought a terrible disaster upon the Moroccan Jewish community. This disaster – thus is implied by his words – was one which was worth avoiding. While Soloveitchik, it is true, does not raise this argument explicitly, he nevertheless alludes to it.⁶⁰ Moreover, this conclusion – even if he does not articulate it with the desired degree of clarity and openness (and it may be that he was not entirely aware of it) – underlies his claim that this, among other things, is the significance of the argument that Maimonides' move was a rhetorical one rather than a halakhic one. In the final analysis, in his "rhetorical" words Maimonides instructed the people how to act in practice – instructions that, according to Soloveitchik, were opposed to halakhah.

This claim with regard to the *Epistle on Martyrdom* is somewhat surprising, as it raises the question: Is an halakhic authority who acts within the halakhic tradition permitted to arrive at the conclusion according to which, under certain circumstances, the halakhic requirements are undesirable and therefore ought not be followed? Such a situation is not impossible, and one can provide a theory for it; however, we will not deal with that question here. We will only comment

is given to the ethical obligation (not to obey the particular law) over the legal obligation (to obey it), even if there exists alongside it an obligation in principle to obey the law (generally speaking).

59 An interesting question is, under what circumstances such a situation is possible according to a non-positivist like Dworkin. According to Fuller's version of non-positivism, such situations will be more common.

60 See above, n. 54.

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that positivism raises a (conceptual) problem for the halakhist, who operates in a normative religious system. At face value, the halakhah is understood by the halakhic authority and by the community which is loyal to it, not only as a valid normative system, but also as a system whose instructions are fitting and desirable. Whereas the secular positivist may see the distinction between morality and law – including its implications regarding the absence of an obligation to obey the law in certain situations – as a theoretical and moral advantage, as it facilitates criticism of the law and the possibility to amend and to improve it,⁶¹ the theoretician of the halakhah will see in the contradiction between the halakhah and what seems in the eyes of the halakhic authority to be the appropriate course of action, a problematic situation that requires explanation and clarification.⁶²

Soloveitchik likewise defines the boundaries of the halakhah rather strictly in terms of its accepted and binding sources (condition 2 above). According to him, the aggadah is not within the realm of the halakhah; one may not rely upon it when dealing with a decision on a halakhic matter. This is one of the central considerations underlying his claim that the *Epistle on Martyrdom*, in which Maimonides relies extensively upon aggadic sources, is not a halakhic responsum. Soloveitchik connects this to his previous criterion:

Our attention is immediately caught by the nature of the material Maimonides employs. His entire defense rests on Aggadic data. Homiletic disquisitions are not the stuff of which legal arguments are made. Their amorphousness and subjectivity makes them unamenable to a serious juridic system. They may be used occasionally

61 Thus, for example, Hart (above, n. 37), 620-21. Hart thinks that the distinction between ethics and law contributes, not only to clarifying the concept of law, but also assisting in developing sensitivity and an ethical position towards the law. Cf. Hart, *Concept of Law*, 176-80; and compare L. Fuller, "Positivism and Fidelity to Law – A Reply to Professor Hart," *Harvard Law Review* 71 (1958): 630.

62 Soloveitchik, as mentioned, does not raise this claim explicitly and therefore does not attempt to explain it.

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with some effectiveness in a peroration, as a *coup de grâce* of a sharp legal duel, but they lack the hard substantiveness to bear the brunt of juristic combat.⁶³

A central reason why aggadic sources are not included within the realm of the halakhah, according to Soloveitchik, is not only because of the positivistic demand for a genealogy or “pedigree” of the legal rules which, in the context of the halakhah, are a kind of “explicit rulings ... that have been interpreted consistently by all commentators over the course of a millennium” (in Soloveitchik’s language). It primarily pertains to the nature of this material which, in his view, is not suitable to a discussion of a strictly logical nature.

Soloveitchik takes a similar approach in relation to another historical issue, which likewise relates to the issue of martyrdom and sanctifying God’s name, namely, the behavior of Ashkenazic Jewry during the period of the First Crusade, the pogroms of 1096. As is well known, during the course of the First Crusade many Jews killed themselves, as well as members of their families, with their own hands – all this, in order to prevent the possibility of their being forced to change their religion in the future. In an essay dealing with processes of change in Ashkenazic halakhah, Soloveitchik argues, on the basis of a formalistic analysis of halakhic sources, that the phenomenon of suicide and killing one’s own children was without any halakhic basis. Avraham Grossman, by contrast, argues that Ashkenazic Jewry relied upon aggadic literature and various historical precedents to which they gave great halakhic weight, in fashioning their approach to the issue of sanctifying God’s name.⁶⁴

63 Soloveitchik, “Law and Rhetoric,” 294-95. This point is repeated in “Response,” 684, where he expresses himself in a similar spirit, albeit more moderately.

64 H. Soloveitchik, “Religious Law and Change: The Medieval Ashkenazic Example,” *AJS Review* 12 (1987): 201-21; A. Grossman, “The Roots of Martyrdom in Medieval Ashkenaz,” in *Kedushat ha-Hayyim ve-Heruf ha-Nefesh: Maʿamarim lezikhro shel Amir Yekutiel*, I. Gafni and A. Ravitzky, eds. (Jerusalem, 1993), 99-130.

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Soloveitchik's manner of handling this issue is similar: he adheres to criteria which allow him to determine what is and is not halakhah, his primary criteria being halakhic sources and legitimate halakhic considerations. It is on this basis that he states that the acts of those Ashkenazic Jews were opposed to halakhah.⁶⁵

David Hartman adheres to an entirely different theoretical understanding of the halakhah. His approach is anti-formalistic and non-positivistic, as he has said explicitly, even though he does not explain his theory in full. He attributes this approach to Maimonides, and hence arrives at the opposite conclusion from that of Soloveitchik – namely that the *Epistle* is, for him, a halakhic responsum in every respect. Hartman does not perceive the halakhah as a closed system of rules to be applied in a technical manner or by means of “halakhic logic” to those cases which come before the halakhic authority. It follows from his words that the boundaries of the halakhah are far broader: they include principles, standards, and policy considerations, including theological and ideological considerations that pertain to the purpose and goal of human life. This approach to halakhah is reflected, among other things, in his assertion that “the impact of the rabbi's ruling on the community ... was for him a halakhically relevant fact of major importance.”⁶⁶ These influences were, in his opinion, taken into consideration by Maimonides when it became clear to him that the Jews of Morocco were not capable of sanctifying the Name, that is, “who fails to live a heroic religious life.”⁶⁷ In Soloveitchik's formalistic eyes, “halakhic logic” does not include considerations of this type. But according to Hartman, who adopts a different image of halakhah, such a consideration is not only legitimate within the framework of halakhah;

65 But see the article by H. Soloveitchik, “Rupture and Reconstruction: The Transformation of Contemporary Orthodoxy,” *Tradition* 28:4 (Summer 1994): 64-130, in which a different approach to halakhah seems to be expressed.

66 Hartman, *Crisis and Leadership*, 51.

67 *Ibid.*

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in light of the circumstances of the Marrano Jews of Morocco it was absolutely necessary. In order to answer the question that confronts him, particularly when one is speaking about an issue so loaded from a moral and a religious viewpoint, the halakhic authority must address an entire complex of sources, including aggadic material, as it is possible to learn from them “the proper way for a Jewish leader to react to the community’s sinful behavior.”⁶⁸ The aggadah, according to Hartman, includes in various formulations, a system of values, principles, and policy considerations which are not extra-halakhic.⁶⁹

Moreover, unlike Soloveitchik, who sees the halakhic authority primarily as a Talmudic scholar (*talmid hakham*), an expert who applies his professional discretion regarding the case in hand, Hartman sees the halakhic authority first and foremost as a leader of the community.⁷⁰ This understanding of the role of the halakhic authority fits in well with his viewpoint on the nature of the considerations that ought to guide him. Unlike the expert, the communal leader needs to weigh not only rules, but also principles and policies, all against the background of the circumstances of the case that is at hand. His main interest is not with technical application or “isolated” formal analysis of fixed halakhic rules. As a leader, his first and foremost concern is to convince his addressees, not necessarily to prove his conclusion.

68 Ibid., 53.

69 Ibid., 64: “Halakhic problems involving borderline situations, such as the one dealt with in the *Epistle on Martyrdom*, demand that the halakhist listen attentively to both the Halakhah and Aggadah of his tradition in order to gain a sense of direction that reflects the spirit of Judaism. Although he listens attentively to every aspect of his tradition, his decision is not a mechanical application of rules, but rather a creative act that grows out of the interaction between the weight of the tradition and the complexity of the present.”

70 See, for example, *ibid.*, where he says “the halakhist cannot simply apply the law in a mechanical fashion, but must boldly accept responsibility for his creative role in making a decision for a community that chooses to live by the Torah in an unredeemed world.”

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In this theoretical approach to halakhah – particularly regarding the nature of the responsum or the halakhic epistle⁷¹ – it is difficult to draw a clear line between halakhah and rhetoric. If an epistle is addressed towards the broad public and not only to individual halakhic scholars, it must necessarily include rhetorical components.⁷² The existence of such elements in a responsum or epistle of a halakhic character – something that is expected in light of its addressees and its purpose – does not undercut its halakhic elements. The two can exist within the same framework. Even if the *Epistle on Martyrdom* includes rhetorical elements, these do not transform it in its entirety into a non-halakhic document.

7. Theory and Interpretation

As we have seen, Soloveitchik and Hartman adhere to two different theories of law and of halakhah, each one interpreting Maimonides in light of the theory which he advocates. Soloveitchik interprets Maimonides' epistle against the background of a formalistic and positivistic theory, while Hartman interprets it in terms of an anti-formalistic and non-positivistic theory, similar to that proposed by Dworkin. It should be made clear that neither Soloveitchik nor Hartman derived their inspiration – at least not directly – from the various schools in the philosophy of law described above. Soloveitchik was evidently influenced by a formalistic approach to be found in halakhic literature, and that is particularly characteristic of his family tradition. This approach is clearly expressed in the teaching of his father, the late

71 On the epistolary genre, *Risala* in the Judeo-Arabic tradition, see s.v. "Risala," *The Encyclopaedia of Islam, New Edition* (Leiden, 1995), 8. 538-39. The section of this entry on the *Risala* in the Judeo-Arabic tradition was written by Haggai ben Shammai.

72 The rhetorical component in legal writing has been emphasized by several schools in modern jurisprudential thinking, particularly by legal realism and critical legal studies. See, for example, H. Perelman, *ha-Logiqa ha-Mishpatit* (Jerusalem, 1983), esp. 85-115; idem, *Mamlekhet ha-Retoriqa* (Jerusalem, 1984); Unger and Kairys in their above-mentioned books, n. 30.

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Rabbi Joseph B. Soloveitchik, as expounded in his essay, *Halakhic Man*.⁷³ Hartman developed his approach independently, through his integrated engagement with both philosophical and halakhic aspects of Maimonides' thought.

The combination of theory and interpretation raises certain problems for both partners to this debate. In both, one finds transitions from statements concerning the legal theory of Maimonides to abstract theoretical statements about the halakhah in general. It would seem that on this important methodological-theoretical point, Hartman is more cautious than Soloveitchik. In his writing, he generally takes care to attribute his statements regarding the theory of halakhah to Maimonides. However, he also does not totally abstain from making general statements about the legal theory of "the halakhah" or "the Jewish tradition." At times his words are *descriptive*, and at others they are *prescriptive*, determining how it ought to be understood and fashioned.⁷⁴

Soloveitchik's approach is more consistent, but for that very reason is exposed to greater difficulties. Soloveitchik approaches the discussion with a systematic jurisprudential theory. He assumes as self evident a clear and solid approach towards law and towards halakhah, on whose basis he concludes that Maimonides' discussion deviates from the realm of halakhah. If, at the center of his discussion, he were to describe his viewpoint on the phenomenon known as "law" (and on halakhah) by which he would judge the nature of Maimonides' activity in the *Epistle*

73 Rabbi Joseph B. Soloveitchik, *Halakhic Man*, translated by L. Kaplan (Philadelphia, 1983), original Hebrew publication: *Talpiyot* 4 (1944): 651-735. Cf. A. Sagi, "Rabbi Soloveitchik and Professor Leibowitz as Theoreticians of the Halakhah," *Da'at* 28-29 (1992): 131-48.

74 See for example, his remarks on p. 64: "The halakhist cannot simply apply the law in a mechanical fashion, but must boldly accept responsibility for his creative role in making decisions for a community," and this also follows from what he writes on p. 50. See also on p. 82, "The *Epistle on Martyrdom* is a classic example of the complex array of considerations that the halakhic jurist must take into account in cases involving compromise," and cf. on p. 83.

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on *Martyrdom*, that would be reasonable. However, Soloveitchik's aim is to describe the *Epistle on Martyrdom* from the viewpoint of Maimonides himself.⁷⁵ What guides him in his reconstruction of "the author's intention" is a fixed assumption regarding Maimonides' philosophy of law and, as a result, of his theoretical understanding of the halakhah. But Soloveitchik does not bring any proof, either from the *Epistle* or from Maimonides' other writings, to indicate that Maimonides in fact adopted the formalistic-positivistic outlook described above. He sees the identity between the two as self-evident, and therefore his argument to a large extent begs the question.⁷⁶

75 See Soloveitchik, "Law and Rhetoric," 306, and see above, at the beginning of §3.

76 Thus, for example, Soloveitchik's claim that aggadah, according to Maimonides, is of no halakhic force demands thorough examination. However, the *Epistle on Martyrdom* is not the only place in which Maimonides makes use of aggadah. He makes similar use in other responsa, such as his responsum to Obadiah the Proselyte, which is a halakhic responsum. Moreover, even if the phenomenon is not widespread in Maimonides' responsa, this is no proof of Soloveitchik's claim, because most of his responsa deal with "easy cases," in which Maimonides applies halakhic rules in an almost technical way. The appeal to aggadic sources, as in cases where the judge has need for principles and standards, is by and large in liminal and difficult cases in which there is no clearcut answer in the rules or the rules provide a "harsh" answer that contradicts the standards or spirit of the law. In addition, Soloveitchik's words imply that he thinks that Maimonides inherited the Geonic approach to the aggadah, for which reason, among other things, he did not attribute any halakhic force to it. However, it is clear that Maimonides had a different attitude towards aggadah than did the Geonim. Thus, as opposed to the Geonim, who did not see any reason to engage in aggadah and to interpret it, Maimonides planned to write an extensive commentary to the aggadah. See his remarks in his *Commentary to the Mishnah*, Introduction to *Perek Heleq*, Principle 7; and his Introduction to *Guide for the Perplexed* (see Pines, ed., [Chicago, 1963], 9). And cf. Y. Lorberbaum, "As if the Sages and those who are Knowledgeable are Drawn to this Matter by the Divine Will': On the Approach to Parable in *Guide for the Perplexed*," *Tarbiz* 71 (2002): 84-132. Maimonides' attitude towards aggadah demands further clarification. In any event, it is clear that the claims implicit in Soloveitchik's words are not self-evident.

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It is possible that Soloveitchik considers this legal doctrine to be the most justified and convincing one; however, it is clear that it is not the only approach offered by philosophical and theoretical thought regarding law over the generations, and particularly not that which has developed during the past century. Even within the framework of the halakhah there have been expressed a greater variety of different approaches than that which has been assumed by Soloveitchik. Hence, this attribution of a formalistic approach to Maimonides requires further proof.

The reading of the *Epistle* proposed by Hartman suffers from similar difficulties. These are not inherent in its contents – his analysis seems to us more convincing than the reading proposed by Soloveitchik – but by the basis which he provides them. While Hartman, on the basis of the *Epistle on Martyrdom*, attempts to reconstruct an anti-formalistic and non-positivistic theory of law on the part of Maimonides, his attempt to refute Soloveitchik's claim begs the question. Soloveitchik can argue – as he in fact does in his response to Hartman's essay – that wherever Maimonides presents an argument based upon a non-positivistic view, his words are mere rhetoric. In order to bolster his own interpretation, Hartman needs to suggest sources from Maimonides' other writings from which there clearly follows the halakhic jurisprudence that he attributes to him in the *Epistle on Martyrdom*.⁷⁷

The difference between Soloveitchik's theoretical model and that of Hartman can be elucidated further by means of a distinction widely used in the philosophy of law, that between a general theory of law and a particular theory of law. A general theory of law is concerned with providing a conceptual framework that underlies legal systems as such. Such a theory involves a number of *a priori* assumptions that serve, among other things, to identify certain social institutions as systems of

77 On Maimonides' theoretical approach, see J. Levinger, *Darkei ha-Mahshava ha-hilkhatit shel ha-Rambam* (Jerusalem, 1965); M. Halbertal, "Maimonides' *Sefer ha-Mitzvot*: The Architecture of Halakhah and Its Exegetical Theory," *Tarbiz* 59 (1990): 457-80 (and see there, 474 n. 31).

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law, also enabling us to distinguish between them and those systems which are similar to law, such as ethical norms (or common religion) or pre-legal social situations. Thus, for example, Austin's "command theory" is a general theory of law, as it was developed, inter alia, in order to distinguish between social norms that are legally valid and social norms that are not legally valid. According to Austin, in the absence of a sovereign regarding whom there are habits of obedience, who issues general commands that are accompanied by threats (sanctions), a society does not have a system of law. Hart's theory of law is likewise general and it too was developed (on the ruins of Austin's theory), among other things, in order to draw a distinction between social rules and legal rules. According to Hart, a society which has not developed a "rule of recognition" is in a pre-legal state. A rule of recognition is a second-order social rule that allows one to distinguish between social rules and legal rules, and it is that which allows for the creation and change of valid legal rules. According to Hart, these characteristics are required for any system of law. By contrast, a "particular theory of law" does not underlie, at least not necessarily, every system of law; it does not establish a conceptual picture by whose means one may identify a social institution as a legal system. A particular theory of law deals with the general characteristics of a specific legal system. The absence of these characteristics from other legal systems does not place their "legality" in doubt; those legal systems do not as a result become common morality or a pre-legal system. Thus, for example, the principle of binding precedent as being obligatory is a theoretical principle that characterizes Anglo-American legal systems. It does not characterize, at least not to the same extent, continental legal systems. The absence of this principle does not upset their status as legal systems.⁷⁸

78 J. W. Salmond, *On Jurisprudence* (London, 1966; 12th ed.), 1-5; T. E. Holland, *Elements of Jurisprudence* (London, 1966), 10-11; Austin (above, n. 36), 365-73; Hart (above, n. 36).

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The distinction between a general theory of law and a particular theory of law may serve to illuminate an additional aspect of the debate between Hartman and Soloveitchik, and thereby also to clarify a methodological-theoretical principle in the study of halakhah. The theoretical model adopted by Soloveitchik is clearly a general theory of law. This model is intended, not only to indicate the specific features of a particular system of law (in our case: the halakhah) but primarily to determine the limits of law and thereby to distinguish between “law” and other social institutions that are distinct from it. As noted above, positivism (with all its various streams) is typically a general theory of law that is particularly interested in this distinction. Soloveitchik’s claim that the *Epistle on Martyrdom* is outside the realm of the halakhah is based on this aspect of positivism as a general theory of law. Hartman’s interpretation of the *Epistle on Martyrdom* requires a theoretical model that is not necessarily characterized as a general doctrine of law, and certainly not as an exclusive model. His main argument is devoted to establishing the assertion that the non-positivistic model is legitimate and possible, and that it is necessary for interpreting Maimonides’ *Epistle on Martyrdom*. As opposed to the rival positivistic-formalistic-exclusive model, Hartman’s model is inclusive: it is intended, among other things, to include within the framework of law (for our purposes: halakhah), sources, modes of thought, and reactions to social situations which, from the viewpoint of the competing model, are considered outside of the confines of the law or halakhah. It seems that Hartman makes use of his theory as a particular doctrine of law. This theory explains well Maimonides’ approach in the *Epistle on Martyrdom*, and possibly also his approach to halakhah in general, but does not negate the possibility that other halakhists may make use of a formalistic approach.

Scholars of halakhah, like scholars of law, deliberate on meta-halakhic questions pertaining to the general characteristics of halakhah. In so doing, they also consider the question of what is included within the boundaries of halakhah and what must be considered as outside of its limits. Study of these questions utilizes distinctions and models that have been developed in legal theory, and it is even desirable they

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should do so. Nevertheless, their application to halakhah requires great caution, as not only does halakhah lack fixed contents, but the meta-halakhic approaches are also likely to be subject to controversy among halakhists from various different places, times, and ideological tendencies. Moreover, it is reasonable to assume that, specifically when dealing with a controversy concerning basic questions of the “legal theory” of halakhah – including, among other things, its manner of interpretation, the status and function of the halakhic authority, the degree of activism and creativity conferred to him, and its understanding of the limits of halakhah⁷⁹ – are among the main factors for the changes that take place in its contents in different places and eras.⁸⁰ The student of the history of halakhah is therefore required to be sensitive, not only towards the outlooks and decisions regarding halakhic matters that arise from the sources and subjects of research with which he has chosen to deal, but also with the meta-halakhic approaches, that is, the theoretical models implicit therein.⁸¹

79 For example: regarding the status of aggadah as a binding legal source, the Geonim stated that “one does not rely upon aggadah” (R. Sherira Gaon, quoted in B. M. Lewin, *Otzar ha-Geonim le-Masekhet Hagigah* [Jerusalem, 1938], 4.60). As against that, the Ashkenazic sages accepted the aggadah as a binding source. See A. Grossman, *Hakhmei Ashkenaz ha-Rishonim* (Jerusalem, 1990), 1.429-32; idem, “The Roots of Martyrdom” (above, n. 64), 107 and *ibid.*, n. 21. On the relation between aggadah and halakhah, see Y. Lorberbaum, *Tzelem Elohim: Halakhah ve-Aggadah* (Jerusalem-Tel Aviv, 2004), ch. 3, 105-45.

80 Thus, for example, it has been claimed that the root of the disputes between Bet Shammai and Bet Hillel lies in their different meta-halakhic approaches. See H. Shapira and M. Fish, “The Debates between the Houses of Shammai and Hillel: The Meta-Halakhic Issues,” *Tel Aviv University Law Review* 22 (1999): 461-97.

81 See in this context the comments of H. Ben Menahem, “The Judicial Process,” *Mahanaim* 13 (1996): 178: “The term *Mishpat Ivri* (Jewish law) incorporates within itself a variety of different social arrangements such that, even if they have a significant socio-cultural common denominator, it is highly doubtful whether they may be viewed, from the perspective of legal theory, as a single legal system.”