**Who is Qualified to Determine What is Kosher?**

The historical roots of the *Halachic* phenomenon of certifying food as kosher, are rooted in the rise of industrialization, and its effects on the Jewish communities of the United States in the late 19th and early 20th centuries. The production of accessible and cheap processed food steered the consumer towards the purchase of products the kosher (“*kashrut*”) status of which required prior investigation.[[1]](#footnote-1) The Jewish housewife began to turn less and less to the local religious slaughterer with a chicken in her hand, and more and more began frequenting the local butcher shop selling pre-certified kosher meat. Thus, in short, a market for *kashrut* certificates (or the granting of a “*hechsher*” or certification as kosher) was created. Today, the grant of these certificates has become a widespread global market. The regulatory tool of the *kashrut* certificate is intended to express the testimony of a *ne’eman* (trustworthy person) that the laws of *kashrut* and religious slaughter have been observed. In a sense, the certificate is intended to reflect the basic *halachic* (Jewish religious law) rule set by the Babylonian Talmud that *eid echad ne’eman b’isurin* (“one witness is credible in matters of prohibition”).[[2]](#footnote-2) In accordance with the tradition of *Halachic* case law, as long as the prevailing legal requirement for two witnesses is not explicitly stated, a single individual’s testimony is sufficient to prove conduct that may be considered prohibited. Thus, *inter alia*, it is enough for one *ne’eman* – reliable or trustworthy person – to testify to the fact that the food in his possession is kosher.[[3]](#footnote-3) Without being able to apply this basic rule to the laws of *kashrut*, “no person could eats with his fellow, and no person could reply on the members of his household.”[[4]](#footnote-4)

The answer to the question of whether an edible object is indeed kosher does not depend on the ingredients alone, or just how they were treated. It is derived from a normative approach that also involves the characteristics and qualities of the person seeking to ensure that the food is kosher (for example, whether a gentile, a minor, or transgressors of the *halacha* either due to laxity – *a mumar lete’avon –* or ideology, a *mumar lehakh‘is*.[[5]](#footnote-5) The rule of testimony, which is closer by its nature to the rules of *trust*,[[6]](#footnote-6) shows that the determination of food as being kosher is not a priori and ontological (the calf is not kosher in and of itself),[[7]](#footnote-7) but depends on human action (kosher slaughter of the calf) as well as the evidential, epistemological testimony that the product is indeed kosher.[[8]](#footnote-8) Human actions constitute or limit the *kashrut* to such an extent that food transported on the Sabbath, even though its ingredients are kosher in themselves, or kosher wine that is poured by a gentile, lose their *kashrut* label. Food cooked in certain dishes, or by certain people, may also lose its status as being kosher.[[9]](#footnote-9) The decision on the *kashrut* of the food therefore lies in the human actions taken in relation to said food, and in the reliable or trustworthy point of view of the witness testifying to the prohibition. Clear evidence of this is found in the laws that deny the *kashrut* of a product prepared or supervised by a person suspected of transgression.[[10]](#footnote-10) It appears that for this reason, Rashi set the *halachic* precedent, which has served as the basis for extensive *halachic* rulings throughout the generations, that the application of the principle ‘A person remains part of the people of Israel even though he sinned’ [*Yisra‘el, af al pi she’kḥata, Yisra‘el hu*] on a transgressor, means that he remains within the definition of being a member of the Jewish community, but is considered ‘suspect,’ and therefore, “… you should not expel him from the Jewish faith, but he cannot be trusted with prohibitions, since he is suspect with respect to them”.[[11]](#footnote-11) On the other hand, a Jew who is defined as ‘wicked’[[12]](#footnote-12) even though he is disqualified from testifying in court, can, in the opinion of most *Halachic* adjudicators, be considered a trustworthy witness in matters of prohibition,[[13]](#footnote-13) as can a woman despite her disqualification from testimony in court.[[14]](#footnote-14)

The reflection of these laws regarding the transgressor and evildoer on contemporary secular Jews, has generated a plethora of literature and *halachic* controversy.[[15]](#footnote-15) But it seems that opinion is unanimous, and that there is no doubt that the status of the witness (and not the ontological status of the food) is what plays the crucial role in the question of whether or not a product is kosher, since there is no objective test that facilitates a determination of whether a product is kosher, regardless of the person taking part in its production and testifying to its nature. This *halachic* concept can thus be summarized as an epistemological concept at the heart of which stands the reliable witness who provides testimony on the nature of the food. It is mainly in a *Relationship of Trust* between the witness, whose role is to provide evidence, and the person who hears and accepts it. This, in essence, is the religious process through which kosher food has been consumed over the years, and of which the certificate of *kashrut* is a type of modern reflection.

The relationship of trust not only depends on the person, but also on place and custom. Jewish law produced a wide pluralistic range of laws concerning what is and isn’t kosher, stemming from various historical controversies that depended on place or ideology. The Talmud is replete with evidence of various eating habits: Rabbi Bar Bar Hanna of *Eretz Yisrael*, who used to cover his food with ‘permitted milk’ [*Translator’s Note*: Presumed translation – g.m.] arrived in Babylon, where it was forbidden;[[16]](#footnote-16) or of Rabbi Yossi HaGalili’s way of eating chicken in milk, because the chicken’s mother produces no milk;[[17]](#footnote-17) or the people of Babylon who would eat oil made by Gentiles, yet the people of the Land of Israel forbade it.[[18]](#footnote-18) Different *halachic* divisions and customs have been created over the years between the various communities in Spain and Central Europe (*Ashkenaz*),[[19]](#footnote-19) and 16th century Rabbi Moshe Isserle’s (the Rama) reservations about the rules in the *Shulchan Aruch* reflect the differences, as well as the legitimacy of there being differences.[[20]](#footnote-20) Another factor that evidences the widespread *halachic* diversity, is the multiplicity of types of “*Kashrut* Certificates” on the global market. As Rabbi Aharon Lichtenstein points out in an article dealing with the *halachic* status of the Rabbinate of Israel: “On a basic level, the *halacha* is clearly pluralistic. Within certain limits, it not only allows – but encourages – the existence of different and divided opinions, and the world of *halachic* discourse is characterized by the fact that “Both opinions are the word of the living God.”[[21]](#footnote-21)

In the State of Israel, *halachic* pluralism was never explicitly expressed, but the *halachic* principle of the human relationship of trust was reflected in the procedures for the enactment of the Prohibition of Deceit in *Kashrut* Act by the *Knesset* in the 1970s and 1980s. For example, the explanatory remarks to one of the Bills states: “The matter of *kashrut* is different from other properties of products, in that it has no material expression in the essence of the product, and it is difficult to determine the *kashrut* of a product by laboratory testing or a similar process.”[[22]](#footnote-22) When presenting the Bill to the *Knesset* plenum in 1982, the Minister of Religious Affairs at the time noted:[[23]](#footnote-23)

“*There are things that can be tested externally ... but with meat products, you do not know if the meat is from a kosher animal, and you do not know if the slaughter was performed in accordance with kashrut law, or whether the examination of the lungs was as it should be. Therefore, with respect to these products, there can be no external examination, but there should be a significant substantive examination [by a separate human party]*.”

A similar approach has been expressed in the literature. Engelrad writes this: “... the *kashrut* of food is not tested solely by fixed objective conditions. *Kashrut* is a normative religious concept. Therefore, the determination of a religious authority is the crucial factor for a religious person who considers himself subordinate to it.”[[24]](#footnote-24) In this chapter, I would like to focus on four legal cases that reviewed and designed *kashrut* laws in the public sphere in Israel, and the relationship of trust between the witness and target audience. Through legal-*halachic* analysis, I will seek to demonstrate how the Court’s dealing with fundamental questions from the world of *kashrut*, leads to a preference for certain *halacha*s over others, and sometimes even to the formation of new ‘*Erez Yisraeliot*’ [Land of Israel] *halachic* positions, products of the Supreme Court’s sitting as the High Court of Justice.[[25]](#footnote-25)

In order to understand the Court’s role in the phenomenon, we must first address the legislature’s actions. On the face of it, the Prohibition of Deceit in *Kashrut* Act grants exclusive authority to grant *kashrut* certificates to the Chief Rabbinate of Israel, and its extensions.[[26]](#footnote-26) The High Court of Justice is often required to address the issue due to various and diverse disagreements between business owners in need of the Rabbinate’s *kashrut* services, and the Rabbinate’s position.[[27]](#footnote-27) The Rabbinate’s position is not monolithic in this context, and two contradictory trends operate within it concurrently: On the one hand, the decentralised trend of *halachic* diversity and autonomy depending on the place of residence and the approach of the serving local rabbi. This approach is enshrined, in certain respects, in the law itself. Thus, Section 2 of the Act grants *parallel* authority to issue a *kashrut* certificate to both the Chief Rabbinate, and to the rabbis it certified for that purpose, as well as to the rabbis serving the various local authorities.[[28]](#footnote-28) On the other hand, a centralist approach of *halachic* unification, which was also recognized in case law as the central role of the Rabbinate, the entity intended to create uniform nationwide norms in matters of *kashrut*.[[29]](#footnote-29)

Often, the source of a controversy before the Court is the interpretation of Section 11 of the Act, which stipulates: “In issuing a *kashrut* certificate, the rabbi will consider **only the laws of *kashrut***.” Whether be it the *kashrut* laws employed by a local rabbi that contradict the approach of another local rabbi, or the nationwide position of the Chief Rabbinate – rabbinical entities tend to view the expression ‘only the laws of *kashrut*’ in Section 11 a whole world of *halachic* laws, only upon the satisfaction of all will the status ‘Kosher’ be granted to a product or business activity.[[30]](#footnote-30) In contrast to this approach, the Court tended to interpret the expression as limiting the considerations of the entity granting the *kashrut* certificate solely to the *halachic* rules pertaining to the *kashrut* of the food – which has been referred to as the ‘hard core’ of prohibited victuals laws.[[31]](#footnote-31)

The *Kashrut* of a Belly Dancer

The issue of the ‘hard core’ arose in full force in the judgement known as the *Raskin* case. In that case, the Rabbinate refused to grant *kashrut* certificates to places where ‘immodest’ performances (belly dancing in wedding halls) took place, claiming that such a show violates the *kashrut* of the place.[[32]](#footnote-32) A belly dancer named Ilana Raskin filed a petition to the High Court, claiming that following the Rabbinate’s approach, her freedom of occupation had been violated. In its judgement, the Court adopted her position, and rejected the expansive interpretation proffered by the Rabbinate of the expression “the laws of *kashrut* only” appearing in the Act. Thus it was held, that the Rabbinate acted *ultra vires* when reviewing the *kashrut* of conditions that did not relate to the *kashrut* of the food itself (the ‘hard core’), but to secondary aspects that are not at the heart of the authority granted to it by law. The Court therefore rejected the Rabbinate’s position on the basis of an argument from the field of public administrative law – a fundamental principle of administrative law is that a public body is only entrusted with the authorities granted to it expressly by enactment. The flipside of the principle is that anything that is not permitted, is forbidden. Therefore, when the Court held that the Rabbinate acted *ultra vires* in the *Raskin* affair, it in practice determined illegality in accordance with modern administrative law. The Court’s determination was grounded on the definition of the purpose of the Prohibition of Deceit in *Kashrut* Act, as a non-religious law – it was branded (at that stage) as a ‘secular-consumer’ law, designed to protect the consumer (any consumer) from being deceived with respect to the laws of food *kashrut*.[[33]](#footnote-33)

Although many saw the *Raskin* affair as a clash between the values of the religious world of rabbis and the secular-modern values ​​of the judiciary,[[34]](#footnote-34) the argument of this paper is that it should also be seen as a *halachic* ruling in and of itself. After all, at the end of the day, the *halachic* experience of the rabbis who sought to link the existence of belly dancing to the *kashrut* of food was rejected, and the Court’s position is the ‘*Halachic* *Ruling*’ that is currently binding in Israel. Justice Eliezer Rivlin aptly described this conclusion in his remarks in another case:[[35]](#footnote-35)

“*Were it not for the law of the land, every rabbi could, in accordance with his best understanding and conscience, give or refuse to grant kashrut to a food product. [...] Once the separation between religion and law has been broken –* ***the law of the state answers the questions of what a kashrut certificate is****, when it is to be granted, and when refused*.”

In addition to Rivlin’s right and proper remarks, additional evidence can be provided: *First*, on a practical level, there is now a directive from the Chief Rabbinical Council stating that *kashrut* departments at the various local religious councils are not allowed to consider the ‘atmosphere’ of the business, only the *kashrut* of the food itself.[[36]](#footnote-36) *Second*, the existence of a later petition on the same subject that was also filed by Ilana *Raskin,* and that granted her positive remedies, highlighted the prohibition on linking conduct at the business to the *kashrut* of the food.[[37]](#footnote-37) *Third*, and perhaps most importantly, the court in the *Raskin* case also employed *halachic* rhetoric. Thus, Justice Gabriel Bach, on his own initiative, quoted rabbis Moshe Feinstein and Ovadia Yosef in support of the approach that the *kashrut* of the food and the *kashrut* of conduct are not to be linked.[[38]](#footnote-38) Additionally, the *halachic* arguments presented by the Rabbinate were examined in depth, and dismissed. Thus, the *halachic* argument raised by the Rabbinate regarding ‘appearances’ [*Mar’it Ayin*], which is a *halachic* extension intended to prohibit actions which, in themselves, are not prohibited, but could be perceived as prohibited, or create the impression that other actions that are clearly prohibited, are not so, and thus to mislead.[[39]](#footnote-39) According to the Rabbinate (Rabbis Yitzhak Kolitz and Shalom Mashash) in the eyes of the diner “who is served a *glat kosher* meal against the background of a grossly indecent performance... two thoughts may come to his mind ... the first, that there are no prohibitions, and it is permissible to view such a show, as otherwise the rabbis would not grant *kashrut*. The other thought ... it is impossible to trust these rabbis, and their stamp of *kashrut* is meaningless.” According to them, this issue is similar to common examples of ‘appearances’, such as the ban on serving fish blood in a vessel, or almond milk in meat, and can also be evidenced from the general duty ‘and be guiltless before the Lord, and before Israel’.[[40]](#footnote-40) The Court rejected this reasoning on the grounds that it is an argument that “clearly has nothing to do with the *kashrut* of food” since it is based on a *halachic* line of reasoning according to which the *kashrut* certificate is granted for the nature of the business, and according to “acts done at the business over and above the *kashrut* of the food.”[[41]](#footnote-41) The Court presented an alternative *halachic* construction, ruling that the claim of ‘appearances’ of the type submitted by the Rabbinate may be relevant to a business interested in a general *hechsher* for all its activities, but not to the *kashrut* certificate, which only relates to the food served at the business. With respect to another claim submitted by the Rabbinate according to which the owner of such a business cannot be considered a ‘credible witness’ since “... he consents to the display of gross indecency in public in front of a large audience, and is not afraid to cause many people to stumble ... thus surely he acts in the same manner with respect to non kosher meat, and will deceive the supervisor”[[42]](#footnote-42) – the Court ruled that non-observance of other *halachic* laws could not constitute a legitimate *halachic* reason for revoking a *kashrut* certificate, since it was in fact an “indirect way of enforcing the obligation to observe all *halachic* laws.”[[43]](#footnote-43)

But even without the additional language and terminology familiar to us from the field *of halacha*, it seems that the ruling in the *Raskin* case can be classified as one that shaped and changed the religious sphere in Israel in terms of *kashrut*, also (and perhaps mainly), due to the crucial distinction it created between the ‘hard core’ of the heart of *kashrut* laws, versus seemingly ‘peripheral’ *halachic* law. This distinction, on the face of it, is not organic to Jewish law, whose provisions are densely interwoven, and whose rigid taxonomy, although it exists, is not one of its distinct characteristics.[[44]](#footnote-44) Thus, it can be argued, that in the *Raskin* case the Court also created a meaningful determination on the question of ‘how the *halacha* works’ or ‘what is Jewish *halacha*’ when it outlined core and periphery. This distinction has continued to accompany *kashrut* law in Israel.[[45]](#footnote-45)

The *Asif* Affair – A National ‘Sales Permit’ (*Heter Mechira*)

Let us review another example of a ruling on *kashrut* matters. The year 2007-2008 (5768) was a *shemita* (fallow year) year. Over the course of the year, petitions on behalf of farmers and merchants against the Chief Rabbinate came before the Supreme Court. They claimed that the demand set by local rabbis (including the rabbis of Herzliya and Jerusalem) of making the grant of *kashrut* certification to the farmers conditional upon refraining from ‘*Heter Mechira*’, should be abolished,[[46]](#footnote-46) and that the Chief Rabbinate should be instructed to require the local rabbinates to rely on a ‘Sale Permit’. The Chief Rabbinate, for its part, argued that the decision should be left to each and every local rabbi according to his location and ideology. This case was came to be known as the ***Asif*** affair. HH Justice Eliakim Rubinstein wrote the leading opinion of the judgement, and his use of Jewish sources is evident over many pages in which he extensively expanded on the *halachic* issue known as the “*Shemita* Controversy.”[[47]](#footnote-47) This extensive review of sources was preceded, as in other instances, by Rubinstein’s affirmation that the Court was not in any way a *halachic* authority.[[48]](#footnote-48) For our purposes, I would refer to such statements as ‘lip service’ – not because the declarant secretly sought to issue a *halachic* ruling, but because in practice, that is exactly what he was doing.[[49]](#footnote-49) It should be noted, that the very issue of the statement itself raises the suspicion that the actions here are not purely judicial, and that the rules of *halacha* are intertwined in it without any possibility of separating the two, even in the mind of the judge / arbitrator himself.

After fully presenting the *halachic* debate regarding *shemita*, Judge Rubinstein rejected the Chief Rabbinate’s position, and ruled that the issue must be resolved at the national level. In contrast to the pluralistic model of ‘each and every one has his own doctrine’, which Rubinstein saw as a “local diminishment of the institution of the national ‘sales permit’”,[[50]](#footnote-50) he preferred a centralist model, and held that the Rabbinate should not shy away from a *halachic* decision on a “very serious issue… a matter that the greatest rabbis throughout the generations dealt with from Rabbi Yitzchak Elchanan Spector of Kaunas in the nineteenth century, to Rabbi Kook and all his successors in the Chief Rabbinate in the twentieth century, and on the other hand, Rabbi Yaakov Dovid Wilovsky and Avrohom Yeshaya Karelitz (a.k.a. *Chazon Ish*) – could such a grave matter be handed over to the determination of every individual local rabbi, respected as he may be?”[[51]](#footnote-51) The solution to the *halachic* difficulty presented by rabbis who did not allow the use of a ‘sales permit’ was found, quite simply, in the appointment of a replacement of the local rabbi who ‘refused’, for that year; Rubinstein rejected the claim that this would be a serious violation of the city rabbi’s *halachic* standing, because “in the circumstances [such an infringement] is a necessity.”[[52]](#footnote-52) His ruling reveals, quite openly, also his personal *halachic* ideology, rooted in the duty to assist Israeli agriculture in the State of Israel, and therefore has a clear dimension of ‘*Erez Yisraeli*’ *halacha*. For Rubinstein’s part, the *halachic* need for a ‘sales permit’ was necessary and mandated, since “the controversy falls on the back of agriculture. Agriculture is the very issue of *shemita*; to it, to working the land, the *shemita* is directed. … the inspiration in fulfilling the *mitzvah* of *shemita* cannot ignore agriculture’s interests.”[[53]](#footnote-53) See also his remarks in which he mobilizes the “*halachic* knowledge” of the farmers alongside the “sale permit”:[[54]](#footnote-54)

“*Jewish farmers, who cultivate their fields, are called in halachic literature” “His angels, those mighty in strength, who perform His word, to hearken to the voice of His word” (Psalms: 103:20); This is explained by Midrash Tanchuma (from Buber and Leviticus 1) in the name of R. Yitzchak Nafha, “And why were they termed his angels, since he sees his field abandoned, and his trees abandoned, and the fences broken, and his fruit eten, yet he masters his passions and says nothing.” And also Midrash Tehilim (Buber) 103, according to R. Yitzchak: “It is the custom of the world that a person does a mitzvah for an hour or a day, but for a year? And Israel shall do for a year, and this is the matter of shemita” (Deuteronomy 15: 2), this in Gimatria is twelve, like the months of the year”. The heroism is thus in the face of the state of the field for a whole year. These farmers, these heroic angels, are entitled to follow the path of their own conscience, and their own halachic understanding...*”

Under the prism of the article, it seems to me that it is not difficult to read this ruling as a real *halachic* ruling, preferring one tradition over another. And all in an issue that is at the core of the laws of *shemita,* and at the core of a *halachic* controversy that is both weighty and has significant implications. From entering into the thick of the *halacha*, through focusing on the main issue according to Rubinstein – agricultural farming, and finally to the coercive power of a legal injunction that obliged the rabbis to use their authority and grant *kashrut* certificates based on “sales permits” – we have before us a *halachic* decision that is binding in the entire sphere of the Israeli public.

However, the judgement in the *Asif* case is interesting not only due to the *halachic* position of Justice Rubinstein, but also due to the *halachic* position expressed by Chief Justice Beinisch, who joined in his opinion. Beinisch also believed that the Rabbinate’s view of the laws of *shemita* was lacking, and chose to express an alternative religious position: “… the Rabbinate missed one of the most lofty purposes underlying the idea of *shemita*, which was to give the poor and needy, as they were described in the Torah, all the fruit growing in the field – which is the social design which originates in the commandments of the Torah: “And [the produce of] the Sabbath of the land shall be yours to eat for you, for your male and female slaves, and for your hired worker and resident who live with you, And all of its produce may be eaten [also] by your domestic animals and by the beasts that are in your land.” (Leviticus: 25, 6-7).[[55]](#footnote-55) Whether unintentionally or intentionally, Beinisch used here a *halachic* technique of employing the Biblical supralinear punctuation (‘*Ta’ama De’kara*’), and used it to draw a conclusion with religious-practical implications.[[56]](#footnote-56)

Moreover, in clear language, Beinisch presents the position, which had already been expressed in several previous judgements,[[57]](#footnote-57) that when the Rabbinate is faced with a *halachic* dilemma, it must choose the *halachic* solution that will minimally violate the fundamental rights recognised by the Israeli constitutional legal system:

“*When there is a halachic solution to the fundamental issue of maintaining kashrut laws, the Rabbinical Council is not authorised to expand its halachic policy and alter it to a stricter position, thus intensifying the violation of human rights, when doing so is not for the clear purpose for which it was granted the legal authority*.”[[58]](#footnote-58)

Indeed, this is the position of Israeli constitutional law regarding the effect of constitutional principles on religious law. **But this is also an explicit directive in religious law rulings for the Israeli public**. A serious study of its meaning, demonstrates that it obliges the religious arbiter to include in his basket of considerations human rights doctrine as a binding, even decisive, factor. This approach is fundamentally dramatic, since, ostensibly, by virtue of it, institutionalised Jewish law is subjected to modern-liberal constitutional jurisprudence.[[59]](#footnote-59) By virtue of them, the new ‘*Erez Yisraeli*’ *halacha*, as long as it is proclaimed by a competent institution, is committed to extra-*halachic,* or ‘secular’, values. Even if it transpires that such values can be deduced from Jewish law itself in any event (such as equality, dignity, individual liberty, distributive justice), in any event, the competent *halachic* arbiter may not ignore them in his ruling.[[60]](#footnote-60)

Even though this may be construed as creating a legal hierarchy, in which ancient religious law is subordinated to modern secular law, thereby losing its vitality, even becoming ‘secularised’, my suggestion is that it is actually an open statement about the symbiotic system underlying the state, of which the ‘sales permit’ affair is just one example of many. It seems that where national *halachic* ruling is forced, methodically, to “converse” with modern constitutional values, both metamorphosise. They merge into a unified Jewish-Israeli law.

The Marbak Affair – Marketing Unkosher Meat to Jews

A third case that establishes the background to the phenomenon of changing *kashrut* law under the auspices of the state, is the Supreme Court’s decision regarding the treatment of unkosher meat and the marketing of kosher meat only to *kashrut* observers, which found its embodiment in the **Marbak** case.[[61]](#footnote-61) Even prior to the enactment of the Prohibition of Deceit in *Kashrut* Act of 1983, in the 1960s, a dispute arose between two slaughterhouses and the Chief Rabbinate, regarding the *kashrut* certificates they applied for. The Rabbinate, which at that time acted mainly by virtue of British Mandatory arrangements that remained in force,[[62]](#footnote-62) refused to grant the certificates until two conditions were satisfied, that were at the centre of the dispute: (1) That the slaughtered meat would only be marketed to butchers holding *kashrut* certificates on behalf of the Rabbinate (*viz*., that it could not be marketed to a butcher who did not hold a Rabbinate issued *kashrut* certificate); (2) That the parts of the meat that remain after the slaughter, and are presumed unkosher, would not be marketed to Jewish merchants or butchers, but only to non-Jews, even to the extent of obtaining guarantees from the latter that they would not resell the produce to Jews. The matter was brought before the High Court. The Rabbinate’s position was that these conditions are integral parts of *halachic* requirements, and that “according to *halachic* considerations, the Chief Rabbinical Council decides when and how a *kashrut* certificate will be issued, according to its instruction, and it cannot depart from these considerations.”[[63]](#footnote-63)

The High Court’s decision does not specify the *halachic* considerations on which the Rabbinate relied, but at least with regard to the second condition (of marketing the unkosher meat only to non-Jews), it is likely that these are the rules relating to “selling forbidden things” (*HaMocher D’varim HaAsurim*), mainly a *halachic* ban on trading in forbidden foods.[[64]](#footnote-64) The five judges in the panel ruled, in a reasoned opinion, that the conditions set by the Rabbinate, in simple terms, are not rules of *halacha* regarding the grant of *kashrut* to meat slaughtered in slaughterhouses.[[65]](#footnote-65) The justices viewed these conditions as an attempt to “impose a regime of *kashrut* on Jews, who have no interest it such”, and a deviation from the authority granted to the Rabbinate to “Supervise *kashrut* for Jews interested in *kashrut.*”[[66]](#footnote-66) The Marbak case later served as an anchor for the extensive case law that followed the enactment of the Prohibition of Deceit in *Kashrut* Act, in which the Court clarified more than once that the Rabbinate has limited authority in complying with *kashrut* law, and cannot include extra-*halachic* considerations under the guise of *halacha*. In the critical words expressed by Chief Justice Olshen: “In its opinion it is enough that it [the Rabbinate] ... says loud and clear, that it does not always calculate its actions according to the rules of the *halacha,* and that is enough.”[[67]](#footnote-67)

Here, too, my contention would be that when the Court ruled on the issue of marketing unkosher meat, it produced its own *halachic* rule in state *kashrut* law. It prevented the Rabbinate, ostensibly the supreme religious institution,[[68]](#footnote-68) from employing the additional conditions it sought to impose, thus redrawing the boundaries of *halacha* within the borders of the State of Israel.[[69]](#footnote-69) The outcome, some believe, has led to a duplicitous *halachic*-religious price: Both a compulsion to sell unkosher meat to Jews, and an increasing infiltration of unkosher meat into the kosher meat market. For this reason, Tnuva’s rabbi, Rabbi Zeev Whitman, for instance, suggested marketing the unkosher meat in stores with a caption that clarifies to the buyer that it is an ‘unkosher’ product, but he encountered opposition, surprisingly, from ultra-Orthodox circles who believed that labelling the products highlighted the transgression of trading in forbidden foods, and that it would be better to leave the situation *halachically* ambiguous.[[70]](#footnote-70) His remarks testify to his feeling that the *halachic* outcome whereby unkosher meat is marketed and sold alongside kosher food is quite difficult: “*It is better to make sure that in the kosher food market everything is indeed kosher [by marking products with the label ‘unkosher’], rather than embody a general concern that the entire Israeli market be kosher, especially when as a result, the exact opposite happens*.”[[71]](#footnote-71) Rabbi Whitman’s proposal was not accepted. It seems that if it is possible to *halachically* permit the reality, after the fact, or whether it is possible to bring about a change in reality by means of various *halachic* solutions, the Marbak case constitutes another real *halachic* decision on the part of the Court. Reinforcement for this conclusion can be found in two ways:

*First*, today the Rabbinate does not try to impose those conditions in order to issue a *kashrut* certificate to a slaughterhouse.[[72]](#footnote-72) It can be assumed, that the Rabbinate itself sees this as a forceful manoeuvre on the part of the judiciary, and believes that it (the Rabbinate) is the entity that should decide questions of what the *halacha* is, but that it is *forced* to act in accordance with the Court’s instructions ‘retrospectively’ and having no other choice.[[73]](#footnote-73) However, even if it is just a power struggle driving *halachic* change, this does not dispel the binding validity of the *halacha*, even if it was created in retrospect. Throughout the ages many different constraints have forced *halachic* arbiters to shape their laws ‘in retrospect’ [*Bedi’avad*], to take into account the ‘hour of distress’ and the factors of the times, whether we call such factors ‘external’ or ‘internal’. In fact, there is extensive *halachic* ruling, even in the area of ​​prohibitions, which is shaped in retrospect.[[74]](#footnote-74) As the researcher of Jewish law, Wesner, points out: “Sometimes it seems that the law in retrospect does not only refer to the consequences of violating the prohibition, but “reopens” the question of the relation to the forbidden act itself, and ostensibly reflects a **change** in the *halacha’s* attitude tothe act which was forbidden in the first place.”[[75]](#footnote-75) The line between subordination to the norm adjudged by the legal system, and assimilation of the norm so that it becomes a ‘real’ binding *halachic* rule is, as stated, largely vague and diffuse.

*Second*, further reinforcement of my explanation in relation to the Marbak issue as a ‘*halachic* ruling’ can be found in the criticism voiced about the decision in that case, which says exactly that, albeit employing the language of grievance. Prior to his appointment as a judge, Yitzhak Engelrad devoted an article to the Marbak affair, that discussed the status of the Chief Rabbinate at the time. His main criticism revolves around the Court’s encroachment upon a subject it should not, because, in accordance with the “religious approach”, as Engelrad called it, the Chief Rabbinate is “the supreme *halachic* institution for all Jews in Israel. The *halachic* powers are not granted to the Chief Rabbinical Council from the secular regime, but from the *halacha* itself.”[[76]](#footnote-76) Following this line of thinking, Engelrad writes:[[77]](#footnote-77)

“*The secular government can recognise or not recognise the supreme halachic authority of the rabbinical institution, but it cannot become a halachic authority itself... The considerations employed by the Chief Rabbinate, acting as the supreme halachic institution, are by their very nature always halachic considerations… As a matter of principle, there is no halacha contrary to the halacha declared by this institution, just as there is no law contrary to Knesset law*.”

Engelrad relates here to the concept which he presents at length in his writings, of separation of church and state.[[78]](#footnote-78) In his view, religious law rules its own realm, just as secular law rules its own realm, and it is wrong for the two to meet, except for the point where secular law granted autonomy of action to religious law. From a religious point of view, Engelrad himself acknowledges the fact that from an internal *halachic* point of view, the status of the Rabbinate is not self-evident:

*“From the internal point of view of the halacha, the status of the Chief Rabbinate’s is quite problematic. Judaism has not recognised, since the abolition of the Great Sanhedrin, a supreme halachic institution. There are strong de-centralist currents in it. And indeed, as aforementioned, various religious circles do not recognise the Israeli Chief Rabbinate.”*

However, this does not dispel his critique: “But the argument is that if the state has already recognised a supreme *halachic* institution, it cannot be its business to examine whether that institution deviated from the powers conferred on it by a normative system **outside the state** [*i.e.,* the *halacha*].[[79]](#footnote-79)

The difficulty in applying Engelrad’s approach to modern reality, lies in the fact that in establishing an institution such as the Chief Rabbinate, that normative system was introduced *into* the state, and did not remain outside it.[[80]](#footnote-80) Thus, it seems that in the evolving Israeli reality of the intermingling of realms, Engelrad’s view reflects the matter as a negative: When the secular system is required to address religious law, which it enacted as one of its own, and when it has decisive authority to determine its character, content, and scope, it shapes it in a manner that necessarily (also) echoes in the realm of religion. For this reason, Engelrad’s critique demonstrates in our case to what extent the Court’s ruling in a matter such as Marbak, penetrates the world of *halacha* to the point that a scholar such as he is, rushes to ‘defend it’.

We will consider another critique of the Marbak affair and similar cases. Aviad Hacohen reviews in one of his articles various *halachic* arguments for and against judicial intervention in *halachic* questions. First amongst the ‘counter’ arguments, he claims that “a court is not a *Beit Midrash*, and a judge is not a *halachic* arbiter.”[[81]](#footnote-81) And thus he writes:[[82]](#footnote-82)

“*... From a halachic point of view, a “halacha” that emanates from the court has no meaning. Even if an unquestionable halachic sage sat in judgement, whatever he writes in judgment sitting on the bench, will not have the “halachic validity” it would have, had he written an “Answer”, and published in a ‘halachic treatise’*.”

We must ask, if the Court’s ruling is indeed not a ‘ruling’ in the *halachic* sense, why is this an argument against its intervention? After all, the adoption of the argument will indicate that, at most, when the Court intervenes in the *halacha*, it does not increase or decrease its validity and purity, and it is a religiously ‘neutral’ argument (although perhaps an argument that is valid on the political-social level). But it is not for no reason that Hacohen counts this as a *counter*-religious argument, and this becomes clear with the reading of the second *halachic* counter-argument he makes: The fear of a ‘secularisation’ of the *halacha*. The concern here is that a ‘secular’ preoccupation with *halachic* questions leads to a diminishment of the value of *halachic* law, and ultimately to the loss of its religious affiliation.[[83]](#footnote-83) The combination of both arguments demonstrates their shared concern about the intermingling of realms. This secular-religious hybrid creature is, at worst, a ‘secularised *halacha*’, and in the moderate case a valid *halacha* in which alien hands have meddled. This is enough to understand that the Court’s actions resonate in the religious world, and affect it. And on closer examination of the issue: They have an affect not only at the ‘technical’ level of obedience to state courts, even if it means acting contrary to a *halachic* position, but also on the substantive level of the ways in which *halachic* decisions are made, and the way the religious process itself operates in the Israeli sphere. When the Rabbinate was *de facto* forced to change the laws of *kashrut* following the Court’s ruling, the national public of kosher food consumers changed its conduct following it. But how do we know if the ‘tainted’ laws of *kashrut* are still *halacha* at all? Ostensibly, Hacohen’s critique that the ‘true’ *halacha* does not change at all, refutes my claim, at least from the introspective point of view of the *halachic* sages. But even Hacohen admits in this context that the question of what is a ‘true’ *halachic* ruling, is not simple at all:[[84]](#footnote-84)

“*This issue involves the complicated and complex issue of what a “halachic ruling” is, and how – in the absence of a single authoritative body accepted by all (such as the “Sanhedrin”) – can it be distinguished from just an academic paper. As opposed to the complex theoretical level,* ***on the practical level*** *its acceptance as a “halachic ruling” is to a large extent determined voluntarily by the public who consider itself subjugated to it*.”

His conclusion is that the answer can be found on the level of the public’s *practical* conduct. Remember, this was also our analytical conclusion. Examining the level of practice in the context of *kashrut,* reveals that not only do publics apply to the Court *on behalf of* Jewish law and religion in order to obtain a ‘*ruling*’ on *kashrut* matters,[[85]](#footnote-85) but other entire communities, consciously or not, act in accordance with the Court’s *halachic* rulings, thus reinforcing its authority to produce binding religious law for them.[[86]](#footnote-86) In our case, the fact that the Chief Rabbinate acts in accordance with the judgements in the *Raskin*, *Asif* and *Marbak* cases as stated above, even if simply absent any other choice, has the effect that the test of outcomes in this context has proven itself. The Israeli and non-Israeli public that rely on the *kashrut* certificates issued by the Rabbinate rely, knowingly or unknowingly, in fact (also) on *kashrut* law outlined by the state courts.

Intermezzo: The Target Audience of the Supreme Court’s *Halachic* Ruling

Before we examine the fourth case (the *Gini* affair), a significant point must be raised, which will come up again in the *Gini* case, and that is the question of the target audience of Israeli case law. In the rulings in the cases of *Raskin, Asif* and *Marbak*, the question arises whether the *halachic* point of view of the Rabbinate is intended to serve a limited audience, who can be defined as religious or ‘very religious’, or whether the Rabbinate is intended to serve the general Jewish-Israeli public (and perhaps even non-Jews)? And should the Rabbinate’s point of view, as an arm of the executive branch, concerning the target audience it is meant to serve, be adopted by the judiciary? In all three judgments, it seems that the Court does not address the same focused sector of the public that follows the Rabbinate, but employs an ideological expansion of the target audience: in the *Raskin* case it does so by legitimising a certain form of entertainment (belly dancing) as not contradictory to religious practice, and in the *Asif* affair by applying the ‘sales permit’ as a solution for the entire public, even if that means a frontal contradiction to the city rabbi’s personal *halachic* approach. Strong evidence of this is found in Justice Rubinstein’s rejection of the position expressed by Rabbi Yaakovovich, the rabbi of Herzliya, in that case, who argued that farmers are in any case able to sell their produce to those who do not adhere to *kashrut* law at all, and therefore should not be required to adopt a *‘*sales permit*’* solution.[[87]](#footnote-87) Rubinstein, who did not even dignify the claim with a reasoned rejection, believed that it was not appropriate to address it at all.[[88]](#footnote-88) In other words, in the eyes of a Court that considers itself as a judicial *halachic* arbiter for the *entire* public, the broad point of view cannot afford to assume that Israeli agricultural produce will find its “*halachic*” solution with an audience that does not consume kosher food. In other words, notwithstanding the *minimisation* of the religious target audience, and with it the limits of the concept of *kashrut*, the Court chose to *expand* them to include as many communities as possible, even if these are not necessarily interested in one or other *halachic* solution for the issue of the *shemita* year.

The *Marbak* affair also illustrates a redrawing of the target audience of the ‘consumer of religion’. The decision that it is not permissible for unkosher meat to be marketed exclusively to ‘non-Jews’, and that unkosher meat must be marketed alongside kosher meat, takes an active part in dismantling socio-*halachic* partitions that have been practiced in Jewish law from ancient times, between Jews and Gentiles. The ban on the sale of unkosher meat is, ostensibly, a fundamental and clear *halachic* prohibition. The *halacha* forbids Jews from selling unkosher meat to Gentiles as well, but has created a series of reliefs in the matter.[[89]](#footnote-89) The sale of unkosher meat to Jews is all the more so prohibited, either because “You shall not place a stumbling block before a blind person” [*Lifnei iver lo ti'ten michshol*] or because of “aiding a transgression.” [*Si’yu’a ledvar ave’ra*].[[90]](#footnote-90) The historical logic in the creation of such *halachic* rules stems simply from a society in which the distinction between a Jew and a Gentile is the crucial social distinction. However, in the context of Israel in the 1960s, when the *Marbak* judgement was rendered, the Jewish-secular status was the prototype for the average Israeli. The decision rendered by the Court, which *de facto* also granted a *kashrut* certificate to places where unkosher meat was sold to secular Jews and to Gentiles, drew the social divisions in Israel elsewhere: In stead of between Jews and non-Jews, the divide transferred to separate the secular from the religious. Thus, the definition of the religious identity gained centrality.

The *Marbak, Raskin,* and *Asif* cases seem to provide a relatively long-term perspective of about 40 years, during which issues that were at the core of *kashrut* law (according to the Rabbinate) were discussed and reshaped with modern Jewish-democratic law tools, giving rise to various *halachic*-religious conclusions that are prevalent today. Similar cases have raised similar questions in the past.[[91]](#footnote-91) In relation to each one of them, it can be argued, that the Court ruled on the question of what the religious *halacha* is, when formulating, by means of its legal authority and tools, the definition of the religiously-loaded term ‘kosher’.[[92]](#footnote-92)

What is the significance of the fact that the Court justifies its ruling with *halachic* rhetoric, and not just with analytical legal rhetoric drawing from administrative law? Why was it not satisfied with reasons of acting *ultra vires,* or legal stopcock concepts such as reasonableness or administrative discretion? In the eyes of many, this implies a significant deviation from its role as a neutral judicial authority trusted with the application of legal principles in an egalitarian manner. But this is of course a non-binding assumption. Under the idea that judges are authentic actors within an institution that is (also) religious, religious rhetoric is not disingenuous, it stems from being an integral part of the Jewish-legal narrative that established the Supreme Court in Israel. In Robert Kaver’s terms, the Court does not function as an ‘imperial’ entity – applying abstract norms to the neutral masses in equality, but as a ‘paideic’ entity – operating from within the community, for its future education with respect to a set of common values.[[93]](#footnote-93) Due to the proximity of religion and law in Israel, there is a real difficulty in separating the elements which maintain a symbiotic relationship.

To sum up thus far, we have seen how the Court’s ruling on a focused issue, *kashrut* law in Israel under the Prohibition of Deceit in *Kashrut* Act, has led to a renewed *halachic*-religious processing of key basic concepts in Jewish law. Whether by creating the distinction in the *Raskin* case between a ‘hard core’ of *kashrut* laws and other laws that are, ostensibly, on the periphery of the *halacha* – a distinction that is not organic to the *halacha,* and may be producing a new legal division; or in the merger between traditional *halacha* and the values ​​of Israeli constitutional law, to which *kashrut* laws are subjected, a merger that found expression in the *Asif* affair which dealt with the ‘sales permit’; or whether in the rejection of *halachic* rule demands for a prohibition on the sale of unkosher meat to Jews, demands that directly affect the religious sphere in Israel, and the *halachic* conduct of the Rabbinate (and the public who listens to it), which were set forth in the *Marbak* case. In all of these, the Court played a key role in shaping and formulating the face of Jewish law in the Israeli sphere, and to a large extent served as the ‘decisive *halachic* arbiter’. After establishing the historical and case law background on the subject of *kashrut* under the prism of the theory of designing the *halacha* by the state, I will now turn to review the recent *Gini* affair, which is something of a ‘peak’ of the phenomenon.

The *Gini* Affair

“It is true that you are kosher people, but that was not my intention” (the words of Rabbi Nachman of Breslov, as quoted by Justice Solberg in his judgement in the *Gini* *I* case).

The *Gini* affair dealt with the question of the interpretation of Section 3(a) of the Prohibition of Deceit in *Kashrut* Act, which stipulates: “A restaurant owner shall not present the restaurant in writing as being kosher, unless he has been issued with a *kashrut* certificate.” My interest in it stems from the fact that the controversies in this affair go to the root of a question with meta-*halachic* religious implications: ‘Who determines what is kosher?’ That is, who is the religious authority in whose hands the *halacha* entrusts the power to determine what is kosher. As we will see, the controversies that arose in the *Gini* case touched on fundamental questions such as how ‘*kashrut*’ status is granted. What is required to grant this status? And what are the *halachic* consequences of the status? The affair is therefore an infrastructural test case for one of the most critical aspects in the world of religious Judaism – the laws of forbidden foods and *kashrut* laws in their encounter with the Jewish-democratic state. The nexus is the state institution of the Rabbinate, that draws its power from two wells: The well of *halacha,* and the well of state law.[[94]](#footnote-94)

The disagreement in *Gini* arose when two restaurant owners in Jerusalem who held “alternative” *kashrut* certificates from an organisation called “*Private Supervision: Community Trust According to Halacha*”[[95]](#footnote-95) received a fine from the Rabbinate for hanging a *kashrut* certificate in violation of Section 3(a) of the Act. This was preceded by the fact that the same restaurants had previously operated under Rabbinical *kashrut*, but abandoned its certificates after, according to the owners’ claims, the Rabbinate were not sufficiently strict about *kashrut* law, and they lost faith in it.[[96]](#footnote-96) It is easy to analyse the affair also as a reflection of a controversy not only in matters of church and state, but also as a critical manifesto against the Rabbinical *kashrut* supervision system, that suffers from many dysfunctions.[[97]](#footnote-97) Despite the disagreements amongst the panel judges, which we will discuss below, it appears that this was a key point on which all the judges agreed.[[98]](#footnote-98) In the background of the case, therefore, was a deeper conflict over the question of the privatisation of religious services in the country, and the separation, at least in matters of *kashrut*, of religion from the realm.[[99]](#footnote-99) The petitioners not only sought the fine be quashed, but sought to challenge the very constitutionality of the provisions of the Prohibition of Deceit in *Kashrut* Act, and in particular the provision stipulating that only the Rabbinate may issue *kashrut* certificates. They argued, that if the law cannot be interpreted in a way that recognizes a ‘free market’ in *kashrut* certification, then the provisions contradict Basic Law, and in particular: Basic Law: Freedom of Occupation, and therefore must be declared unconstitutional. The first judgment (*Gini* *I* case) was rendered in 2016, and rejected the petition by a majority opinion. The minority opinion, from the single Justice Uri Shoham, was that a business may present an alternative *kashrut* certificate as long as the term ‘kosher’ is not used.[[100]](#footnote-100) Following the publication of the judgement, the petitioners submitted a request for a re-hearing at the High Court. Exceptionally, the application was granted, and in 2017 the second judgement (*Gini* *II*) was rendered, reversing its predecessor.[[101]](#footnote-101) I will attempt to briefly outline the power play behind this interesting affair, and afterwards attempt to elucidate what this has to do with the question of shaping Jewish law in Israel.

*Gini* – The First Incarnation

The legal battlefield in the *Gini* case looks something like this: On one side of the barricade stood private entities, in this case the organisation ‘Private Supervisors’ as well as the restaurant owners, who believed that a business owner had a right to present his goods as being ‘kosher’, even if he did not hold a *kashrut* certificate issued by the Rabbinate of Israel. It is interesting to note, that ideologically, these parties were supported by many other groups, including the ultra-Orthodox community, who also do not recognize state *kashrut* certificates, and rely only on the *kashrut* certificates issued by their own communities. Although they were not directly involved in the *Gini* case (they were not parties to the dispute),[[102]](#footnote-102) their voices were heard over the pages of the judgement,[[103]](#footnote-103) as well as at *Knesset* debates concerning the enactment of the Prohibition of Deceit in *Kashrut* Act in 1983.[[104]](#footnote-104) On the other side of the barricade, stood the state Rabbinate. As far as they were concerned, the legislative conception in the State of Israel grants them complete exclusivity in the question of classifying food as being ‘kosher’, in accordance with Jewish law, and in issuing *kashrut* certificates attesting to this fact. These placed their faith mainly in the language of the Act, which states that only the Chief Rabbinate is allowed to issue *kashrut* certificates.[[105]](#footnote-105) In the midst stood the Attorney General and the Ministry of Justice. They sought to find a compromising interpretation, that would allow a business to present a ‘*kashrut* presentation’ without literally using the term ‘kosher’ and its various grammatical inflections, and as long as it is stated that the certificate was not issued by the Rabbinate.[[106]](#footnote-106)

The controversy was reflected in the composition of the judges sitting in judgement. Justice Solberg, who wrote the majority opinion, sided with the Rabbinate. His view, which deviated from the previous case law traditions regarding the Prohibition of Deceit in *Kashrut* Act, found in the Act a purpose *additional* to the consumer-secular purpose that had been the customary interpretation in case law until then.[[107]](#footnote-107) Solberg believed, that the Prohibition of Deceit in *Kashrut* Act was also simply intended to “ensure that a product presented as kosher, is in fact kosher.”[[108]](#footnote-108) This purpose, later referred to as the ‘*halachic*-religious purpose’,[[109]](#footnote-109) focused on the fear of misleading the consumer in relation to the product *itself*, rather than focusing on misleading the consumer in relation to the *identity of the person* certifying the food as kosher. In Solberg’s words:[[110]](#footnote-110)

“*The purpose of the Prohibition of Deceit in Kashrut Act is not only to prevent deceit or misleading in relation to the* ***identity*** *of the person on whose behalf the kashrut certificate was issued. The purpose of the law is broader, and is to prevent deceit or misleading in relation to the* ***very kashrut*** *of the product sold. That is to say, that even if restaurants are forced to make it clear… that their certificate of supervision is not on behalf of the Chief Rabbinate (and I am prepared to assume that the vast majority of consumers will not be mistaken in thinking otherwise), there is still a concern that the food presented as kosher* ***is not in fact kosher****, whether due to lack of the necessary proficiency on behalf of the party supervising the laws of kashrut, or whether because of a deliberate deceit driven by economic interests.*”

For this reason, Solberg opined that the Act could not be interpreted in a manner that does not grant a *kashrut* monopoly to the Rabbinate.[[111]](#footnote-111) On the other hand, was the judge who sought to remain on the tested path of previous case law, according to which, the purpose of the Act is primarily consumer-secular, opining that the *halachic*-religious purpose was irrelevant. Justice Shoham believed that there would be no contradiction of the Act’s language, or its purpose, if a business owner does not wish to receive and present a *kashrut* certificate on behalf of the Rabbinate, and presents a different *halachic* presentation in relation to his wares. He saw this as an interpretation that gives due weight to “different views held by *kashrut* observers in Israel” among which are various *Badatzim* [*Translator’s Note*: Acronym for *Beit Din Tzedek*, which literally means court of justice, but in its most common use refers to organisations in the ultra-Orthodox community that issue their own *kashrut* certificates – g.m.], as well as the ‘Private Supervision’ organisation, saying: “This customer base **puts its trust** in the restauranteur, that he is in fact strict about the *kashrut* laws prescribed by the certificate presented at the restaurant, and **on the basis of this trust**, they consume the food sold there.”[[112]](#footnote-112)

In the middle stood Judge Rubinstein, who joined Judge Solberg’s opinion, but added a reservation that the judgement would only be applicable for two years.[[113]](#footnote-113) Of the panel, Rubinstein was the only one to colour his opinion in shades of “*halacha*” or “Jewish law”, as was usually his custom. He devoted two paragraphs to describing the importance of *kashrut* in the Jewish world, and alongside quoting Maimonides and Rabbi Yechiel Yaakov Weinberg on the importance of *kashrut*, he also quoted Rabbi Chaim David Halevi who stated: “But it is simply clear that one should not rely at all on the ordinary *kashrut* of a butcher with a restaurant, unless one if very familiar with the owner and knows him to be trustworthy, and as I often say by way of jest ‘I don’t eat at places that have a Rabbinate *kashrut* certificate’”.[[114]](#footnote-114) But Rubinstein did not choose, at least not in open rhetoric, a certain *halachic* opinion that aids his legal decision, and as aforementioned, he joined the position of Justice Solberg, on the basis of his understanding of the purpose of the Act, “It literally means what it title says, that the person coming to a restaurant should know whether the restaurant is kosher or not, without needless complexity.”[[115]](#footnote-115)

What Does All This Have To Do With The *Halacha*?

Even before addressing the second and decisive incarnation of the judgment, it seems that the first incarnation of the *Gini* affair did not significantly affect the field of *halacha* or religion. Justice Solberg’s position, which was adopted in the first judgement, dismissed the attempt to ‘circumvent’ the Prohibition of Deceit in *Kashrut* Act, or disqualify it directly, and preferred to fortify the meaning accepted in respect of it by the public – The Chief Rabbinate of Israel has a monopoly over *kashrut* matters in the public sphere, because it was granted, by law, the authority to declare a product or business as “indeed kosher”. But deeper delving into the matter may inspire different insights.

The majority opinion gave the Act another ‘*halachic*-religious’ purpose, thus adding it to laws which are clearly religious. If until that point the legislature and the judiciary saw the Prohibition of Deceit in *Kashrut* Act as an integral part of consumer protection legislation, and therefore as essentially a ‘secular’ or ‘national’ law, the judgement, and in particular Justice Solberg’s opinion, gave the law another, central, different tone – it strengthened the connection between it and the *halacha*.[[116]](#footnote-116) Although the Act was not intended to increase consumption of kosher food in Israel (it does not require or encourage businesses to operate with rabbinical *kashrut*), it was intended to prevent, or at least restrict, consumption of ‘other’ kosher food – food that was not granted rabbinical *kashrut*. For this reason, it is legislation that serves a religious and particular standard.

Contrary to the position that the purpose of the Act was to prevent deception in relation to the identity of the *kashrut* supervisor, Solberg argued that the law’s focus was on preventing deception in relation to the *very* *kashrut* of the product itself, and not in relation to the *identity* of the supervisor.[[117]](#footnote-117) This transfer from ‘*Gavra*’ [The person] to ‘*Heftza*’ [The object], was an innovation in the judgement, and it raises certain *halachic* questions. One can argue that Judge Solberg’s interpretation of the law as intended to achieve the purpose of a ‘true presentation’ in relation to the very *kashrut* of the product *itself* is inconsistent with the essence of the *halachic* idea regarding the relationship of human and subjective trust that generates the concrete *kashrut* status, which we discussed at the beginning of the chapter.[[118]](#footnote-118) Yet interestingly, this purpose has been referred to in the judgment as ‘*halachic*-religious’.[[119]](#footnote-119) It is not disputed that Solberg does not directly argue with the *halacha* over the pages of the judgement (on the contrary, he probably believes he was correct in his understanding of the spirit of the *halacha*), but his interpretation assumes that there is a particular and definitive status of *kashrut* deception, **which** **is precisely** what the Act was intended to prevent.[[120]](#footnote-120) However, *halachically* speaking, the status of *kashrut* is achieved not only by completing a series of actions with respect to the food, but also requires the testimony of the trustworthy witness in respect of the prohibition, which in turn depends on the witness’ credibility in the eyes of the audience to whom he is testifying. In fact, it is the testimony of the credible witness that generates the *kashrut* standard.

It was actually the opinion of Justice Shoham, the most secular of the panel judges, which captured the spirit of *halacha* in this context in a more convincing way. Shoham interpreted the Act as intended to prevent deceit in relation to the *identity* of the supervisor. According to this approach, the deception that the Act sought to prevent, lies in the witness trusted by the audience interested in *kashrut*, and it is not limited to a mechanical order of operations. From Shoham’s approach it becomes clear that as long as the test of the fiduciary relationship between the consumer and the testifying supervisor is satisfied, and as long as the business clarifies that the *kashrut* is not on behalf of the Rabbinate, the result will be adhering to the basic *halachic* principle of ‘one witness is credible in matters of prohibition’, and therefore the business is not committing *kashrut* deceit under the Act.

The judges’ disagreement over the substance of the Prohibition of Deceit in *Kashrut* Act therefore goes to the very root of the religious question ‘How is *kashrut* achieved?’ It also demonstrates how the judgement was based on the fundamental dispute over the question of how the *halacha* should operate in the State of Israel, which returns to the question of the *target audience*: Who does the Rabbinate rule for? Is it for ‘All of *Yisrael*’ – in which case the justification for an exclusive *kashrut* monopoly prevails, or does it serve as a *halachic* arbiter for certain sectors, more or less pious – in which case it is not appropriate for the Rabbinate’s method to be the only method in *kashrut* matters, since it is a field in which, as stated, there have been many disputes and different practices. Said dilemma concerns the sensitive nerve of the social status of the institution of the Rabbinate. If the Rabbinate determines *kashrut* law for all of the People of Israel who are interested in it, is it not required, from a *halachic* point of view, to be ‘trusted’ by them? If different communities do not trust the Rabbinate’s ruling, has it not lost, as far as they are concerned, its *halachic* status as a ‘credible witness’? Ostensibly, the *halachic* sin here is twofold: It is not only a matter of monopolising the term ‘kosher’, in a way that goes against fundamental *halachic* intuition, but also of entrusting the monopoly to those who, in the eyes of many, do not meet the basic ‘credibility’ requirement.

2.C. *Gini* – The Second Incarnation

As aforementioned, the businesses that submitted the petition in the *Gini* *I* case, applied for a re-hearing before a wider panel of judges, and the Court granted their application. In the setting of the re-hearing, there was a shift in the position of the Attorney General, who opined that the majority opinion from the previous hearing (Justices Solberg and Rubinstein) should be adopted, subject to the reservation that the judgment will be effective and binding only for two years.[[121]](#footnote-121) The disagreement therefore remained between the petitioners – the restaurant owners, and the respondents – the Chief Rabbinate of Israel, the Ministry of Religious Affairs, and the Religious Council for Jerusalem. In the second incarnation, the Court created an intermediate-solution, and held, by a majority led by Chief Justice Naor, that a business is entitled to declare the nature of its goods, and provide detail pertaining to the actions it takes in relation to the food, and how they comply with *kashrut* laws, as long as it does not generate any general proposition on the basis of the information – *i.e.* it does not conclude and declare, in writing, that the business is ‘kosher’, and does not present a ‘presentation of *kashrut*’. According to Naor, “Kosher is kosher is kosher – and those not in possession of a *kashrut* certificate, cannot use the title ‘kosher’.”[[122]](#footnote-122) Although this rhetoric approximates Justice Solberg’s view that there is *one* true *kashrut* to which the Act directs, Naor’s later words demonstrate otherwise:[[123]](#footnote-123)

“*At the same time... I cannot accept the respondents’ determination that a restaurant can enter through only one of two gates – the “kosher gate” the keys to which (the kashrut certificate) are held by the Rabbinate, and the “unkosher food gate” in which a restaurant will be considered unkosher regardless of the type and quality of the food it sells. This is a far-reaching determination, and fails to give proper weight to the diner’s autonomy…* ***There is also a “Third Gate”****. A shopkeeper can testify with respect to his wares. There is nothing in the law that shows that a restaurant cannot present a true presentation pertaining to the food it sells.*”

Naor’s approach separates the mechanical actions from the provision of testimony concerning their nature, and in this respect seems to create a new, third, *halachic* approach. Moreover, as long as a credible witness testifies that the business’s actions are indeed kosher, one can argue that the rule of ‘one witness is credible in matters of prohibition’ has been restored. Admittedly, this is a somewhat emasculated testimony, since the witness must refrain from using the term ‘kosher’ or the symbiotic field that surrounds it. He must not impersonate the issuer of a *kashrut* certificate, and must conceal the *halachic* conclusions of his testimony. On the face of it, we have returned to the pluralistic *halachic* model, albeit a reserved pluralism. For this reason, some have described the judgement as “opening the door to breaking up the Chief Rabbinate’s monopoly in the *kashrut* market.”[[124]](#footnote-124) Now a business may plant in the minds of its customers the impression that it adheres to *kashrut* laws ‘to some extent’, and these may choose whether to eat there or not in accordance with that presentation and the credibility of those who attest to it. Justice Solberg’s position was rejected, and a ‘free market’ of *kashrut* continues to exist, albeit under linguistic and formal restrictions that are far from simple: Can the testimony of the credible witness that the food is kosher without using the term kosher, be considered credible testimony? On the other hand, if a business owner is allowed to present a document specifying the manner of preparing the food according to *kashrut* laws, he can also specify in which dishes the food was cooked, and whether this was done by a Jew, as well as whether the Jew is an observant Jew.[[125]](#footnote-125) The test, as recalled, is the test of *credibility* – and as long as there is a Jewish community that puts its faith in the testimony of someone or other (whether an official supervisor, or another credible witness) it may be enough to also bring about a real *halachic* conclusion.

Evidence for the existence of such communities, for which *kashrut* is established *only* upon the realisation of the relationship of trust permitted by the *Gini* affair in its second incarnation, is presented by Justice Shoham:[[126]](#footnote-126)

“*In my opinion in the Gini case, I referred to various groups of food consumers. The first group, includes those who observe kashrut, who only enter restaurants that hold a kashrut certificate issued by the Chief Rabbinate. Alongside this group, there is a second group, which can be divided into two subgroups. One, is a subgroup whose members will only patron eateries that provide food that has received the approval of private oversight bodies (such as Badatzim or certain rabbis), as to the approach of those persons, such oversight bodies set stricter criteria than those set by the Chief Rabbinate. The second subgroup, includes observers of kashrut who want to eat kosher food, “but the question of whether the food received the Chief Rabbinate’s national seal of approval is not a significant consideration for them.” This consumer public trusts the restaurant owner, who presents in writing the manner in which he purchases and prepares the food he serves, and from the point of view of this public – this meets its kashrut demands.*”

**I would therefore argue that the opening of the ‘third gate’ for those businesses that want to pass through it, which the *Gini* case did, constitutes for those communities a religious *halachic* ruling by the Supreme Court, as well as an extension of the *target audience* of *kashrut* consumers.**[[127]](#footnote-127) This point is crucial in reality, and is also significant evidence of the strengthening of the thesisof *halachic* design by the state, since for those persons who will patron a businesses *only* if it presents the alternative certificate established under the auspices of the ‘third gate’, but will *not* patron them if no certificate or information is presented at all, the Court’s ruling *de facto* provided the seal of *kashrut*. It granted a ***halachic* permit** to go eat in such places, which previously, especially under the judgement of the previous panel, did not exist. Indeed, following the judgement, an established national-religious organisation called ‘*Tzohar*’ formed a parallel and well-established *kashrut* system, which currently operates alongside other private organisations that provide “*hechsher*” without *kashrut* from the Rabbinate, while ensuring that no ‘kosher presentation’ is presented.[[128]](#footnote-128) In this way, it is possible that the Supreme Court’s judgement changed the religious practice of some in the Israeli public. This also clarifies the extent to which the state authority, in a Jewish state, takes part in shaping and expanding the religious target communities. In accordance with its decision, residents who may previously have preferred eating in a business without a *kashrut* certificate over a business holding a *kashrut* certificate from the Rabbinate, whether for ideological or financial reasons, may prefer eating in places that hold an ‘alternative’ certificate, thus preserving (even if solely in their own eyes) some live religious dimension.[[129]](#footnote-129) Of course, the opposite is also true: Persons who previously used to eat only in places with a *kashrut* certificate from the Rabbinate, may now also eat in places that hold alternative *kashrut*, since it has been ‘made kosher’ by the Supreme Court.

Judge Solberg opened his opinion in the *Gini* *I* case by quoting a saying attributed to Rabbi Nachman of Breslov, “True, you are kosher people, but that was not my intention.”[[130]](#footnote-130) In doing so, I believe, he was trying to defend the restaurant owners who petitioned him, and avoid hurting their feelings. True, in their eyes their *kashrut* is *kashrut*, but there is no escaping the fact that this was not the legislature’s intention. The complete irony, through which Solberg winks at the reader, is revealed only when reading Breslov’s full statement: ‘Though you are kosher people, but that was not my intention, I meant that I would have such people roaring to the blessed Lord night after night like wild animals in the forest’.[[131]](#footnote-131) The intention of the poet from Breslov was almost the opposite of the intention of the Israeli legislature, as Solberg understood it. According to the Breslavian conception, ‘really’ kosher behaviour is not necessarily derived from strictness with respect to food. It is derived from man’s passion and striving towards the divine regardless of the dictates of society, and perhaps even contrary to them. Examining the issue from such an angle will reveal, perhaps, that the petitioners in the *Gini* case, the applicants for the ‘other’ *kashrut* certificates which are trusted by *them*, are the ones who met this ‘*halachic*’ criterion. Apparently, more so than the Rabbinate met it.

**Conclusion**

In mid-June 2021, a new Israeli prime minister was sworn in by the *Knesset* plenum. Naftali Bennett, who wears a *yarmulke* on his head, is also the first prime minister to be identified with Orthodox religious circles, and who hails from the National-Zionist camp. Among the many pressing issues that the new prime minister could have mentioned in his speech, he chose, *inter alia*, to state his intention to open up the *kashrut* market, and break the Rabbinate’s monopoly in the field. Presumably, many saw this as an expression of an economic agenda in line with his liberal-capitalist spirit. Others, certainly those from the ultra-Orthodox community, saw this as an opportunity for political point scoring, even though many of them do not consume the services of the Rabbinate at all, but comply with additional, private, *kashrut* in addition to the Rabbinate’s *kashrut*. For members of religious Zionism and the wider traditionalist public who value the rabbinical institution, it is possible that Bennett’s approach is also portrayed as anti-*halachic* and anti-state. I do not seek to decide the matter. I only wanted to shine a spotlight on the insight into how Bennett’s solemn proposal, whether it fits the *halachic* approach in its original form, or whether it errs against it, focuses on a religious subject of the highest order, and seeks to shape it using the tools of government given to him, and one can assume also from a religious perspective.

This chapter also generates another insight, which is to what extent the Court functions, *sotto voce*, as a party to whom the assets of the Jewish religion and *halacha* belong, no less than to the Rabbinate. This is a perception that involves the essence of the state as ‘Jewish’, and the religious validity of this term, on which I expanded in the methodological chapter. The aforesaid symbiotic practice did not end with the *Gini* affair of 2017, and it must be assumed that Bennett’s statement will only fulfil it more forcefully.

In stead of a conclusion, I would like to mention a recent case that strengthens the Court’s place within this process of designing Israeli *kashrut* laws, and blurs the boundaries between secularisation and religion in the State of Israel. In 2020, the High Court published its judgement on the issue of *chametz* ]leavened food] in public hospitals during the days of Passover.[[132]](#footnote-132) The petition was filed by an organisation called “The Secular Forum Society”, which objected to the practice employed by hospitals in Israel to prohibit visitors and patients from bringing *chametz* onto the hospitals’ premises during the seven days of Passover. The practice entailed a pedantic search of the personal belongings of each and every visitor. The judgement held, by a majority, that there was no source at law that gave the hospitals the *legal* authority to search visitors’ belongings, and prevent them from bringing *chametz* onto the hospital premises. The hospitals’ argument that the actions were forced on them by the demands of the Rabbinate, as a condition for the grant of a *kashrut* certificate, was rejected. The hospitals were caught up therefore, in the words of Justice Hendel (who was in the minority) “between a rock and a hard place.”[[133]](#footnote-133) The Rabbinate’s position, that the aforementioned rule was based strictly on *kashrut* considerations and the rules of observing Passover, was indirectly dismissed when the Court ruled that a more lenient *halachic* path could be adopted.[[134]](#footnote-134) And thus, although this was not explicitly stated in the judgement (since the Court order issued was directed at the hospitals, prohibiting *them* from conducting a *chametz* search), the Rabbinate must decide whether it can grant a *kashrut* certificate to a public institution which formerly – according to *its own* perception of the rules of *halacha* pertaining to Passover – could not be issued with a *kashrut* certificate.[[135]](#footnote-135) The question of how the Rabbinate will act in this matter, as in the many cases presented above, will constitute further evidence for the claim that the decision on the manners of expressing and shaping the Jewish religion in Israel, is often made by its “secular” authorities, acting as “*halachic arbiters*”. In this context, it is worth noting, in brief, the minority opinion of Judge Handel, the most religious of the panel judges. Handel believed that the petitions should be dismissed, and that there was no scope for the Court to intervene. Although this was his legal position, he did not shy away from expressing his displeasure with the Rabbinate’s approach for not employing some *halachic* solution that would have obviate the need for the Court’s intervention:[[136]](#footnote-136)

“*I will not hide my personal view that the power of halacha is reflected in its ability to find “live with them” [VeChai Ba’hem] solutions for different places and in different times.... It does not seem that the halacha – for all its creativity and depth – is not able to solve the problem of food in a hospital, in a way which requires a decision by the Court.*”

All that one can say of this matter, is that one must wonder whether the judgment of the Court does not itself produce the creative *halachic* solution where the “representatives of *halacha*” failed to do so?

1. Timothy D. Lytton, *Kosher*, Harvard University Press, 2013, pp. 3– 32. [↑](#footnote-ref-1)
2. BT, *Gitin* 2b-3a; BT, *Hullin* 10b. See also Lytton, p. 91. Lytton finds the regulatory foundations of kosher certifications in ancient rabbinic regulations. Amongst them he mentions the “presumption of trustworthiness based on a common religious commitment to kashrus” (Lytton, p. 14). [↑](#footnote-ref-2)
3. Rashi, *Hullin* 10b s.v. “One witness”: “As the Torah regards every individual to be trustworthy and did not call upon witnesses for the matter and the Torah does not require witnesses except for pecuniary punishment, the death penalty, or sexual crimes, as is derived [from the verse’s use of the word] *davar* [in these contexts] and [in the context of testimony regarding] money.” See also Adin Steinsaltz, *The Talmud: A Reference Guide* (New York: Random House, 1989), 236 – 237. [↑](#footnote-ref-3)
4. Rashi, BT *Yevamot* 88a, s.v. “*VeAmar.*” [↑](#footnote-ref-4)
5. See, e.g. HCJ **Adler**: On the conduct of a kosher supervisor who impaired his ability to be considered a God-fearing supervisor (HCJ 1448/20 **Rabbi Shmuel Adler v. Chief Rabbinical Council of Israel – Disciplinary Committee**, published on the Judiciary’s Website (10 May 2020)). [↑](#footnote-ref-5)
6. It should be noted that the ‘laws of reliability’ also have relatively lax rules of basic evidentiary inquiry, unlike, for example, the rules relating to testimony in court which are more rigid. See *Ketzot HaChoshen*, 46:17 on the basis of the determination in *Nimukei Yosef* (Sanhedrin 5b s.v. “False Oath”) that a distinction must be drawn between testimony and reliability. [↑](#footnote-ref-6)
7. The opposite is not necessarily true. That is, animals that are not kosher can be considered ontologically so, especially if they cannot be made kosher. [↑](#footnote-ref-7)
8. The question of ontological realism versus epistemological or nominalist religiosity is complex, and I do not intend to go into it here in depth. I therefore adopt terminology that seems intuitive to me but, is also based on literature. For more information, see Christine Hayes, “*Legal Realism and the Fashioning of Sectarians in Jewish Antiquity*.” Sects and Sectarianism in Jewish History. Brill, 2011. 119-146. And *Cf*. Yair Lorberbaum, ‘*Halachic* Realism’, Jewish Law Almanac 27 (5772–5773), pp. 61–130. One could imagine, for example, that the ontological status of all food is “not kosher,” until it has been made kosher, at which point the status changes. Alternatively, it is possible to distinguish between food which can be made kosher, in which case the realistic status does not apply, from food which cannot be made kosher, such as vermin and creepers, or swine, the impurity and therefore prohibition of which are ostensibly ontological (see Lorberbaum, p. 77, note 39 – regarding ‘natural’ reasons such as the uncleanliness of the pig that are not necessarily attributable to *Halachic* reality. Thus, for instance, Maimonides’ reason for the prohibition of swine is its polluted environment, but a clean pig does not escape the forbidden status. See *The Guide for the Perplexed*, III:48. *Cf*. Dafna Barak-Erez, *Laws and Other Animals: Religion, State, and Culture in the Light of Swine Laws*, Keter Books Publishing, Jerusalem 2015, pp. 29–38). [↑](#footnote-ref-8)
9. It seems that one must distinguish in this context between food products that can be considered kosher *per se*, such as certain fruit and vegetables, as well as certain dairy products, as opposed to meat with respect to which the actions of slaughter and testing make it kosher. See on this point, for example, Rabbi Moshe Feinstein, who permitted Gentile milk today (*Responsa,* *Igrot Moshe*, *Yoreh De‘ah* 47, 5714). However, even here, one can manufacture more complex sub-divisions. Fruit and vegetable in Israel, for example, require tithing, which is a human action, to be considered ‘kosher’; in addition, today, there are those who will not eat certain leafy vegetables and fruit unless they have been grown under certain *Halachic* conditions and supervision. Finally, if otherwise kosher food is transported on the Sabbath, they will not be considered kosher and edible. [↑](#footnote-ref-9)
10. See *Shulchan Aruch*, *Yoreh De’ah*, 119:1–20. [↑](#footnote-ref-10)
11. *Responsa* Rashi, 173, pp. 193-194. For further analysis and expansion, see Katz, *Halacha and Kabbalah*, pp. 269–255; Grossman*, Beliefs and Opinions in Rashi’s World*, pp. 305-304, as well as Brand, *People of Israel Who Sinned*, pp. 13–47. A distinction must be drawn between a transgressor who has repented, in respect of whom Rashi ruled that he is a Jew eligible for everything (*Responsa*, Rashi, 168, p. 188) and one who converted to Christianity and remained committed to Christianity – who remains a part of ‘Israel,’ but his testimony regarding prohibitions cannot be trusted. [↑](#footnote-ref-11)
12. See the well-known controversy (BT, *Sanhedrin* 27a) Between Rava and Abaye, on the question of whether the wicked person disqualified to testify is only an *‘ed ḥamas’*, a corrupt witness – that is, one who transgresses ‘out of appetite’, or the evildoer is also one who transgresses ‘out of anger’ (an ideological transgressor). Maimonides’s ruling is, according to Abaye’s opinion, that even a person who eats unslaughtered animals out of anger is an evil person who is disqualified to testify (*Mishneh Torah*, *Hilchot Edut*, *Halachot* 1–3). [↑](#footnote-ref-12)
13. See Maimonides, *Mishneh Torah*, *Halachot Edut*, Chapter 11: 7-8: “One witness can be trustworthy for prohibitions even though he is disqualified for other testimony, since an evildoer who slaughtered an animal according to the law, his slaughter is kosher and he can be trusted to proclaim ‘I slaughtered in accordance with the *Halacha*’”. See also, *Ketzos HaChoshen*, Title 46, 160 17, on the basis of the determinations of *Nimukei Yosef* (*Sanhedrin* E, 72, D-E “False Oath”): “XXXX [*Translator’s Note*: Sentence in Aramaic – g.m.]”. [↑](#footnote-ref-13)
14. See *ibid.*, and Haddad, *Equalise the Law for Woman and Man* [Hebrew] p. 39. [↑](#footnote-ref-14)
15. See, for example, Shochatman, *Religious Legislation in a Secular Society*, and the many sources cited by Brand and Stern, pp. 83–86, 93–100. [↑](#footnote-ref-15)
16. BT, *Pesachim*, 51:71. [↑](#footnote-ref-16)
17. *Mishna*, *Hullin* 8, d; And BT, *Hullin*, 113:71. [↑](#footnote-ref-17)
18. BT, *Avoda Zara*, 35:72– 36:71; JT, *Shabbat*, 10:72. [↑](#footnote-ref-18)
19. See, for example, *Ta-Shema*, *The Ancient Ashkenazi Customs*, pp. 16–17: “In the world of *Ashkenazi* Jewry… There is almost no law or *halacha* that are not enveloped in a convoluted outline of custom, the purpose of which is to regulate all the details and sub-details that were not defined in the principal *halacha*… This quantitative phenomenon has no equal in other Jewish communities”; And on page 47: “The origin of customary authority in the Jewish community... and its hold over life, was related, mainly, to the decentralized tradition of communal autonomy... in the absence of a central organizational framework for the communities.” See also Arusi, *The Clash of Laws* [Hebrew] at p. 139: “The Jewish people have often been deprived of sovereignty over their land. Even when they were in their country, they did not always have a nationwide spiritual institution with effective authority over all parts of the country. All the more so when they were exiled from their land, and scattered in all parts of the world. Thus, in Jewish law, differences of local custom developed. Different regulations have been enacted by different local courts. And the *halachic* rulings of one court, were different from that of another court. These differences caused a clash of laws between Jews and themselves.” [↑](#footnote-ref-19)
20. A paradigmatic example is the question of ‘*Glat* Kosher’ meat (*Shulchan Aruch*, *Yoreh De’ah*, 39:A, 13), but this is just one of many examples. See Israel-Fleisshauer, *Multiplicity and Diversity* [Hebrew], p. 17, who writes about the *Shulchan Aruch*: “It is difficult to imagine an essay that establishes to a greater extent, in its current form (with the Ramah’s editing), a multi-congregational approach. This book of *halacha* enables and promotes *halachic* diversity.” *Cf*. Hagai, *Differences and Disagreements* [Hebrew]; Arusi, *The Congregational Factor* [Hebrew]; Arusi, *The Clash of Laws* [Hebrew], p. 158: “The congregational element in *halachic* rulings creates many cases of clashes of law, for the *halachic* and customary difference between the different congregations are many, and in various fields. There are differences in the laws of prayer, in the laws relating to the dates of festivals, in the laws of *kashrut*, in the laws of marriage and divorce, and more.” [↑](#footnote-ref-20)
21. Lichtenstein, *Chief Rabbinate of Israel*, p. 5. See also Engelrad, *Mysticism and Law* [Hebrew], p. 32, as well as the words of President Shamgar in the **Butchers’ Industry** High Court of Justice case, p. 6: “It happens that a matter of *halacha* is not unequivocal and monolithic. It is obvious and well known that these are matters that have many facets, and about which there can be different approaches.” [↑](#footnote-ref-21)
22. Explanatory Notes to the Prohibition of Deceit in *Kashrut* Bill, 1974-5734, Legislative Bills 1139, 277. This is a previous version of the Bill that was not passed, but the matter is also relevant to the law that was ultimately passed. [↑](#footnote-ref-22)
23. *Knesset* Annals 96, 2091 (5733). [↑](#footnote-ref-23)
24. Engelrad, *The Status of the Chief Rabbinate Council* [Hebrew], p. 78. [↑](#footnote-ref-24)
25. According to Section 15(c) of the Basic Law: The Administration of Justice “The Supreme Court shall also sit as a High Court of Justice; when sitting as aforesaid, it will deliberate matters in which it deems necessary to grant relief for the sake of justice, and which are not within the jurisdiction of any other court or tribunal.” [↑](#footnote-ref-25)
26. Section 2(a) of the Prohibition of Deceit in *Kashrut* Act states: “The following may issue a *kashrut* certificate for the purposes of this Act: (1) The Chief Rabbinical Council of Israel or a rabbi authorised by it for this purpose; (2) A local rabbi who serves at the eatery, the place of slaughter, or the place of manufacture of the commodity; (3) For the purposes of a *kashrut* certificate in the IDF – The Chief IDF Rabbi, or some military rabbi he certified for the purposes of this Act.” [↑](#footnote-ref-26)
27. See, for example, the matter of **Aviv Delicacies** (in which case the High Court forbade the Rabbinate to deprive a slaughterhouse of its *glat* kosher certificate, only because it sells unkosher meat to Jews); **In re Orly S.** (The HCJ approved the Rabbinate’s refusal to grant a *kashrut* certificate to food products bearing the name of non-kosher brands); HCJ **Mitral** (rejection of the Rabbinate’s refusal to permit the import of kosher meat by those who also import unkosher meat); **In re Marbak 1995** (The HCJ approved the Rabbinate’s refusal to grant a *kashrut* certificate to meat slaughtered in a remote slaughterhouse); HCJ **Peles** **Hotel** (High Court approval for the Rabbinate’s refusal to grant a *kashrut* certificate to a hotel that rented an adjacent space to a non-kosher restaurant); HCJ **Pnina Comporti** (HCJ rejected the condition that the Rabbinate’s *kashrut* certificate be granted to a confectionery under excessive conditions of close supervision and depositing the business’ keys in the hands of a *kashrut* supervisor, because the owner belonged to the Jews for Jesus sect). [↑](#footnote-ref-27)
28. The Court has recognized this diversity in the past by saying, for example: “There may be fields where two local rabbis may reach different conclusions, without any defect in their decisions. With respect to the *kashrut* laws themselves, different approaches may be possible, all according to custom and strictness passed down from one generation to the next.” See **In re Orly**… and *Cf.*: “Although the local Rabbinates are limited to *kashrut* considerations only, it is well known that even within this limited framework, there are different opinions and ideas” (The **Marbak Affair 1995**). [↑](#footnote-ref-28)
29. See, for example, HCJ **Golan Hospitality** and the ***Asif* Yanov** High Court case. [↑](#footnote-ref-29)
30. See, for example, the **Mizrahi** High Court case, where a debate between different municipalities was held over the *kashrut* of canned sauerkraut. The petitioner, the owner of a falafel stand in Rehovot, claimed that the city Rabbinate refused to grant him a *glat* kosher certificate, whereas neighbouring city Rabbinates had no difficulty doing so. [↑](#footnote-ref-30)
31. See the ***Raskin*** case. Naturally, controversy arose over the laws contained in that ‘hard core’. See, for example, **In re** **Marbak 1995**, where Justice Barak accepted the claim that the rule of ‘foreign slaughter’ [*Sh’khutei Hutz*] (any meat slaughtered in one place and sold elsewhere is not kosher) is also found in the same ‘hard core’. *Cf*. Barak-Erez, *Laws and Other Animals* [Hebrew], p. 15. [↑](#footnote-ref-31)
32. For the position of the Rabbinate and its *halachic* reasons, see the article by rabbis Kolitz & Mashash, *Kashrut* *Instead of Immorality*. [↑](#footnote-ref-32)
33. See, for example, the ***Raskin*** case, the words of Justice Or in paragraph 5: “The issuance of *kashrut* certificates is prescribed by a secular law. ... The fact that in *kashrut* matters the rabbis, to whom the authority to issue *kashrut* was granted, rely on the laws of the *halacha*, is insufficient to prevent this Court’s intervention, in ruling if the rabbis did not act *ultra vires* the authority conferred on them by law”; And in paragraph 6: “In our case, there is no dispute that the “*kashrut* laws” mentioned in Section 11 are from the *halacha*. The disagreement is only with respect to the question whether the secular legislature, when speaking of “*kashrut* laws only”, and taking into account the purposes of the Act, meant and intended only the *kashrut* laws of the food product, sold or served, and not other *halachic* laws.” [↑](#footnote-ref-33)
34. See for example Kolitz and Mashash, *Kashrut* *instead of Immorality*; HaCohen, *Bagatz* [HCJ] *or Badatz*, pp. 420-429, describing this as a violation of the religious freedom of the rabbis and as “anti-religious” coercion (“... many judgments in which the court orders a rabbi to give a certain product or place a *kashrut* certificate, even though it is contrary to the *halachic* opinion of the rabbi”); Kirschenbaum and Desberg, *Eat No Abominations*. [↑](#footnote-ref-34)
35. HCJ **Aviv Delicacies**. [↑](#footnote-ref-35)
36. See Racheli Malk-Boda ‘*Thus Far the Shabbat Area*’, [Hebrew] *Makor Rishon* (June 27, 2019) available at <https://www.makorrishon.co.il/culture/150037/> “There is an unequivocal instruction from the Chief Rabbinate Council, which stipulates that the *kashrut* department in every religious council must deal exclusively with food and not with the atmosphere. They have no right to do so, at their own discretion. There is no question of atmosphere in *kashrut*”; It should be noted, that this was also clarified to me from a conversation with the Chief Rabbinate’s legal counsel. [↑](#footnote-ref-36)
37. HCJ ***Raskin* *II*.** [↑](#footnote-ref-37)
38. See paragraph 3 of Justice Bach’s ruling: “A question was posed to the late Rabbi Moshe Feinstein ... that referred to a Jewish sports centre whose restaurant sold non-kosher food to the public. The esteemed rabbi was asked for his opinion, if it would be possible ‘… to act so as to make the place kosher and be under the supervision of the rabbis ... but on the condition that they be allowed to serve anyone who wants to drink milk ... after a meat meal ...’ The rabbi’s response was positive.” Kirshenbaum and Desberg, *Eat No Abomination*, criticized the Court for “wearing the hat (or rather the yarmulke) of the *halachic arbiter*.” It should be noted, that a distinction must be drawn between the *kashrut* of the behaviour of the supervisees, and the *kashrut* of the behaviour of the supervisors, see, e.g. recently HCJ **Adler**, where the petition of a slaughterer rabbi who complained about being suspended from his position on behalf of the Rabbinate was rejected, after he was seen intimate with an employee who was not Jewish, and therefore his *halachic* status as ‘God-fearing in public’ was harmed. [↑](#footnote-ref-38)
39. See for example the entry ‘*Because of Appearances*’ in Rakover, *Nivi Talmud*, p. 252. [↑](#footnote-ref-39)
40. See Kolitz and Mashash, *Kashrut* *Instead of Immorality*, pp. 454-455; *Shulchan Aruch*, *Yoreh De’ah*, 66:I (regarding the blood of fish); The words of the *Rama* in the *Shulchan Aruch, Yoreh De’ah*, 87:C (regarding almond milk, which should be marked, and almonds placed by its side). [↑](#footnote-ref-40)
41. The ***Raskin*** case, paragraphs 14-16 of the judgment of Justice Or. [↑](#footnote-ref-41)
42. From the opinion of Rabbi Mashash, the Sephardic Chief Rabbi of Jerusalem, and also see *Responsa* Shamash and Magen, *Chayud* 41, ‘*Belly Dancing in Kosher Halls My Writing as Sent to the HCJ*’ p. 183: “And therefore Mr. Nami, the landlord, we saw has an object and a desire to cause the people to stumble in other matters such as the prohibition against lewdness etc., and brings cheeky dancers for all to view.” Rabbi Mashash bases his reasoning on the story in the Gemara (BT, *Kiddushin*, 40, 70A), regarding R. Tzadok’s encounter with a woman who seduced him to prostitution, and offered him forbidden food, and R. Tzadok’s words: “XXXXX [*Translator’s Note*: Sentence in Aramaic – g.m.]? Meaning that a person who is intimate with a Gentile woman is worthy of unkosher food. Mashash learned from the story that whoever is suspected of ordering belly dances, is also suspected of the *kashrut* of his food, and the business owner cannot be trusted not to cheat the *kashrut* supervisor also with respect to the *kashrut* of the food itself (see Kolitz and Mashash, *Kashrut* *Instead of Immorality*, p. 456); Another argument raised by Mashash and Kolitz, was that the supervisor could not be there because he was committing the sin of lewdness, and this is in the nature of ‘XXXXX [*Translator’s Note*: Sentence in Aramaic – g.m.]’ (*ibid*., p. 455). This claim was also relatively easily rejected by the Court. [↑](#footnote-ref-42)
43. The ***Raskin*** Affair, p. 687. [↑](#footnote-ref-43)
44. See, for example, Alon, *Religious Legislation* [Hebrew], p. 103: “... [in the world of the jurist] there is scope to examine and distinguish (**in the world of *halacha* is there such a possibility of examination and distinction at all?!**) if [the Rabbinate’s] decision stems from *halachic* considerations and interpretations – Then the Supreme Court will not intervene, if its decision does not stem from considerations in the interpretation of *halacha*, then the Supreme Court will determine whether these considerations are “valid” or “invalid”. One cannot avoid the feeling of strangeness attributed to the *halachic* scholar from this analysis and distinction in the words of the ruling by the Chief Rabbinate, the supreme *halachic* authority, analysis and distinction which are a direct result of the composition of *halachic* law and its institutions in the general, secular law, and its institutions.” [↑](#footnote-ref-44)
45. See, for example, the words of Justice Rivlin in the **Pnina Comforti** High Court case, para. 8 of his opinion: “The question must be asked, whether the laws of reliability, which are essentially the *halachic* tool of supervising the *kashrut* of food, are part of the ‘hard core’ of *kashrut* law. It is possible that this question is foreign to Jewish law, which does not necessarily separate the parts of the question – that is, the question at the core of the *halacha*, and the question that is mainly evidential. However, the *Kashrut* Act, as stated, is a consumer-secular law in its essence and purpose, and the criteria set forth in the law require an appropriate decision on this question.” [↑](#footnote-ref-45)
46. A ‘sales permit’ is a *halachic* solution designed to enable performance of prohibited action to be carried out on Israeli land in a year of *shemita*, by way of selling the land to a non-Jew. The legitimacy of the use of the solution lies at the core of a long-standing arbitral controversy known as the ‘*Shemita* Controversy’. For more information, see Tokaczynski, *The Book of* *Shemita*; Auerbach, *Book of Delicacies of the Land*; Brown, *The Sanctity of the Land of Israel*; Edrei, *Rabbi Kook and the Shemita Controversy*. [↑](#footnote-ref-46)
47. See paragraphs 8-21 to Justice Rubinstein’s opinion in the ***Asif*** case. As stated, the essence of the controversy is the question of whether it is permissible to sell the land to a gentile for the year of *shemita* (this is the ‘sales permit’) and thus to circumvent the prohibition imposed on Jews to cultivate the land and trade in its produce over the course of such a year. [↑](#footnote-ref-47)
48. Paragraph 8 of Justice Rubinstein’s opinion in the ***Asif*** case. For a similar statement of his, see, for example, HCJ ***Hassan***, para. 13. [↑](#footnote-ref-48)
49. *Cf*. Edrei, *I Am No Halachic Arbiter*. [↑](#footnote-ref-49)
50. Rubinstein, ***In re Asif***, para. 28. It is not for no reason that he uses the phrase “you have allowed each and every person to have his own doctrine” (*Mishnah Shvi’it*, II, A). [↑](#footnote-ref-50)
51. Rubinstein, *ibid*. On the distinction between *halacha* as pluralistic or centralistic, see the chapter on methodology above. See also *Ta-Shema*, *Ancient Ashkenazi Customs*, pp. 13-47, on the distinction between Ashkenazi jurisprudence that tends to customary pluralism, versus the rulings of Spain and North Africa. [↑](#footnote-ref-51)
52. Rubinstein, *ibid*., para. 31. [↑](#footnote-ref-52)
53. *Ibid*., para. 29. [↑](#footnote-ref-53)
54. *Ibid*., para. 34. It should be noted, that the *midrashim* presented in these words by Justice Rubinstein are inconsistent with his intention: They speak of the heroism of the farmer who faces the difficulties of the seventh *shemita* year, and ‘conquers his passion and does not speak’, while the ‘sale permit’ solution actually neutralises such demonstrations of heroism. [↑](#footnote-ref-54)
55. In re ***Asif***, para. 4 to the opinion of Justice Beinisch. [↑](#footnote-ref-55)
56. To the sages’ dispute between Rabbi Shimon and Rabbi Yehuda (regarding “thou shalt not plunder a widow’s garment”) on the question of whether it is possible to rule according to the reason underlying the Biblical commandment, see TB, *Baba Metzi’ah* 115:70A. For more information on the idea, see Lorberbaum, *Maimonides on the Institution of Law*; Lorberbaum, *Halachic Religiosity*; *Cf*. the entry “*Ta’ama De’ka'ra*” Talmudic Encyclopaedia Vol. 20, 501 (5751). [↑](#footnote-ref-56)
57. See, for example, the **Balladi** High Court case, which dealt with the ruling of arbiters regarding the retrospective koshering (salting and rinsing) of thawed imported frozen meat. The majority opinion was that the lenient *halachic* ruling should be adopted, which the Rabbinate had been taking until then, rejecting the new, stricter approach the Rabbinate sought to apply of koshering the meat at the place of slaughter overseas. Thus, another arbiters’ dispute was decided, against the Rabbinate’s *halachic* position. *Cf*. Maza’a, *Child Support*, p. 564, footnote 330, and the citations therein to similar case law. [↑](#footnote-ref-57)
58. In re ***Asif***, para. 3 to the opinion of Justice Beinisch. [↑](#footnote-ref-58)
59. This insight is recognized and established in the context of the rulings of the Rabbinical Courts in matters of marriage and divorce. See, for example, Radziner, *Between the High Court and Badatz*; Yefet, *Israeli Family Law*. [↑](#footnote-ref-59)
60. See In re ***Asif***, Beinisch, para. 3: “When on one side of the scales we have a *halachic* solution that was accepted nationally for many years, with the support of the greatest scholars, and accepted by the Chief Rabbinate itself, and on the other hand is a forced solution that meets the approach of those who would be stricter but disproportionally harms the general public, it is the Rabbinate’s duty, as an institution of the state that operates according to the law, to decide the matter in a way that will reduce the infringement of human rights.” [↑](#footnote-ref-60)
61. See **In re** **Marbak** **1964**. That decision was quoted extensively as a ‘judgment’ that clarified why the Court has the authority to oversee the Rabbinate’s *halachic* considerations (see, for example, *inter alia*, the ***Shkediel*** case that refers to the **Marbak 1964** case and states: “... the “Religious consideration” is subject to judicial review, both with regard to the very existence of a *halachic* consideration, and with regard to its content”; The **Plato Sharon** High Court case calls the decision a “judgment” in several places). In practice, it was not a judgment but rather a “decision” with respect to the issue of a conditional injunction against the Rabbinate, which did not show up for the proceedings, only submitting its position in writing, because it believed that the Court had no authority to hear the case. [↑](#footnote-ref-61)
62. Engelrad, *The Status of the Chief Rabbinate Council* [Hebrew], pp. 73-74. [↑](#footnote-ref-62)
63. In re **Marbak 1964**, p. 330; See also the words of the Rabbinate as presented in the decision: “The considerations of the Chief Rabbinical Council are only *halachic* considerations, and in this matter it is subject to the laws of the Torah, and cannot accept ‘other instructions on what and how to rule’.” One can of course argue with the Rabbinate and claim that other *halachic* traditions show differently. [↑](#footnote-ref-63)
64. See *Shulchan Aruch*, *Yoreh De’ah*, 117:1: “Anything forbidden by the Torah, even if it is permitted for enjoyment, if it is some special food, cannot be traded with.” As well as 119:15: “A person who sells forbidden articles, is moved on and considered as dead; and he has no remedy until he goes to a place where he is not known, and returns a lost important item, or slaughters for himself and takes unkosher food for himself in an important thing, which he must have made repentance without trickery, since he does not spare his money.” Admittedly, the prohibitions are not concerned with the question of whether the food was prepared or slaughtered properly, but they project on the ‘*kashrut*’ of the place and the butcher. See Lytton, pp. 13-14. [↑](#footnote-ref-64)
65. In fact, the Justices sided with the position of the petitioners who held this view (see **Marbak 1964**, p. 334). One may wonder how it is that the petitioners are more familiar with the rules of *halacha* concerning the *kashrut* of the slaughtered meat than the Rabbinate was. [↑](#footnote-ref-65)
66. *Ibid*., p. 335. [↑](#footnote-ref-66)
67. *Ibid*., p. 331. [↑](#footnote-ref-67)
68. For its definition as such, see Engelard, *The Status of the Chief Rabbinate’s Council*, and *cf*. Lichtenstein, *The Chief Rabbinate of Israel*. [↑](#footnote-ref-68)
69. The Court made a similar move in the matter of **Aviv Delicacies**. As stated, in that case, which was discussed after the enactment of the Prohibition of Deceit in *Kashrut* Act, the Rabbinate’s claims that it could not grant a *glat* kosher certificate to a poultry slaughterhouse that markets unkosher birds to Jews, were rejected. The Court’s ruling forced the Rabbinate to grant a ***glat kosher*** certificate to that slaughterhouse, and held that its *halachic* arguments were unconvincing. [↑](#footnote-ref-69)
70. *Ibid*., p. 326. Today the goods arrive to the supplier with a label that states “unkosher”, but are not sold with such label to the final consumer. As stated, the opposing arbiters believe that this actually **increases** the prohibitions, and it is better to leave things in their ambiguous state. Rabbi Whitman’s article is devoted to proposing a solution to the *halachic* difficulty that the **1964** ***Marbak*** affair allegedly gave rise to (although he does not mention the affair by name). But following the publication of the positions of Rabbi Yesh Elyashiv and Rabbi Shmuel Wesner, who opposed the solution, he stated that he withdrew his opinion in deference to them, and the proposal was dropped (see *ibid*., footnote 4). [↑](#footnote-ref-70)
71. Whitman, *ibid*., p. 326. [↑](#footnote-ref-71)
72. See, for example, the guide for *kashrut* supervisors issued by the Rabbinate (‘Supervision and *Kashrut* – The Guide for *Kashrut* Supervisors’, Examination and Certification Department of the Chief Rabbinate of Israel (5775), available at: <https://www.docdroid.net/DrgKADJ/document.pdf>). There are no provisions in the guide prohibiting the granting of *kashrut* in the absence of the satisfaction of these conditions. On the contrary, in the chapter “Slaughterhouses” under the heading “Marketing”, the following rules appear: “Unkosher meat or carcases will only be transported in a separate truck”; “In addition to marking the unkosher meat, one must also keep accurate records of all sales of unkosher meat...” (identical instructions appear in previous guides, dating back to 2001). However, in the chapter entitled ‘Fish’ – with respect to which it has not been decided that there is no marketing ban for Jews – the following instruction appears: “Fish which has been disqualified will be sold to the non-Jewish public… with the knowledge and approval of the supervisor”, and: “In the event of contaminated produce without the ability to treat it, the supervisor must ensure that the produce is marketed to the non-Jewish sector only, knowing that the unkosher trader has no marketing relationships with a kosher chain or stores.” The fact that the provisions pertaining to ‘fish’ are not duplicated with respect to ‘slaughterhouses’, evidences the application of the rule from **In re Marbak 1964**, as well as to the application of the rule from **Aviv** **Delicacies** regarding poultry. From conversations with parties inside the Rabbinate, I was informed that the Court’s ruling in the matters of **Marbak** and **Aviv Delicacies**, as all judicial decisions, is strictly observed at the Rabbinate’s directive. Finally, see Whitman, *The Treatment of Unkosher Animals in the State of Israel*, at p. 315: “To date, the slaughterhouses in Israel usually market the unkosher meat and the unkosher portions, in their entirety. These parts are often sold directly to stores owned by Jews, and in other instances sold to non-Jews, who also sell the unkosher food to Jews.” [↑](#footnote-ref-72)
73. For a theory of legal positivism based on power as the creator of law, see the John Austin, in the Stanford University Encyclopaedia of Philosophy <https://plato.stanford.edu/entries/austin-john/>. [↑](#footnote-ref-73)
74. See Wesner, *Between ‘to Begin With’ and Retrospectivity* [Hebrew]; The entry ‘*To Begin With*’ in the *Otzar* Israel Encyclopaedia, Part VI, online edition (New York, 1951), pp. 48-49. *Cf.*, for example, Kirschenbaum and Desberg’s critique, *Eat No Abomination*, who believe that the Court erred in the ***Raskin*** case when it used Rabbi Feinstein’s ruling, because he ruled ‘in retrospect’, whereas the Chief Rabbinate of Israel must rule ‘*To Begin With*’. [↑](#footnote-ref-74)
75. Wesner, *Between ‘to Begin With’ and Retrospectivity* [Hebrew], pp. 46-47. [↑](#footnote-ref-75)
76. Engelrad, *The Status of the Chief Rabbinate Council* [Hebrew], p. 69. [↑](#footnote-ref-76)
77. *Ibid*., p. 70. [↑](#footnote-ref-77)
78. See, for example, Engelrad, *The Status of Religious Law* [Hebrew], pp. 270-316; Engelrad, *Integration of Jewish Law* [Hebrew]; And the opinion of Justice Engelrad in the **Shavit** case, in particular paragraphs 16, 21. [↑](#footnote-ref-78)
79. Engelrad, *The Status of the Chief Rabbinate Council* [Hebrew], p. 70, footnote 4. [↑](#footnote-ref-79)
80. This is true also with respect to the Rabbinical Courts. [↑](#footnote-ref-80)
81. HaCohen, *Bagatz or Badatz* [Hebrew], p. 418. [↑](#footnote-ref-81)
82. *Ibid*., pp. 418-419. [↑](#footnote-ref-82)
83. *Ibid*., p. 419. For a similar argument, but from a legal and non-religious angle, *cf*. Hacohen, *Teach the Young In His Own Way* [Hebrew], p. 182: “From a substantive legal point of view, judicial review has difficulty ... to decide with the aid of legal tools, issues the heart of which are not legal, or in respect of which the determination is not absolute and unequivocal, and are deeply publicly controversial. For instance: The validity of the theory of evolution; the question of whether a certain text is indeed a ‘prayer’; or the question of whether a certain product is “kosher” according to Jewish law. **Even if the Court “makes an effort” and produces a “*halachic* ruling” on these issues, it is doubtful whether this “over-involvement” is justified, and whether its gain is not a pyric victory**.” It should be noted, that the reason that HaCohen presents here to encourage non-interference, lies in the fact that the Court’s win is pyric – meaning an instrumental rather than an intrinsic reason. For more on the religious argument in favour of separating church from state on grounds of harming religion, see Statman and Sapir, *Religion and State*, pp. 89-104. [↑](#footnote-ref-83)
84. HaCohen, *Bagatz or Badatz*, p. 419, Footnote 101. [↑](#footnote-ref-84)
85. The ***Gini*** case that will be discussed below, is largely a paradigm for the phenomenon of actors applying to the Court and (*inter alia*) submitting religious claims. It represents other communities mentioned in the judgment itself, see, for example, paragraph 4 of Justice’s Shoham’s opinion in the ***Gini I*** case. For another example, see HCJ **Mizrahi**, where the petitioner and his legal counsel sought to have a discussion of principle on the question of making kosher sauerkraut. [↑](#footnote-ref-85)
86. It is for good measure that after the judgement on the matter, the Rabbinate’s *kashrut* certificates were referred to as “High Court *kashrut* certificates.” Even though this was intended pejoratively, it represents the roots of a deeper insight, in the setting of which the Court takes an active part in shaping the incidence of religiosity in Israel. It is to be noted, that also *kashrut* observing tourists tend to adhere to state *kashrut* certificates. See also a nationwide survey conducted by the Survey Institute ‘*Miskar*’ on the question “The *Kashrut* System – Preservation or Privatization?” The survey’s findings demonstrate that 43% support to keeping the status quo in which the Rabbinate has a monopoly, 47% (the majority) support the possibility of issuing *kashrut* certificates by private bodies under the supervision of the Rabbinate (the Rabbinate as regulator); While 10% support full privatization and opening up the market. This means, in our case, that the vast majority (90%) believe that the Rabbinate should be left ‘in the picture’, but its *halachic* laws remain subject to *halacha* laws issued by the Court. The survey is available at: [miskar.co.il/he/פרסומים-וסקרים/161](file:///C:\Users\nitsa\Google%20Drive\תזה%20המדינה%20כפוסקת%20הלכה\miskar.co.il\he\פרסומים-וסקרים\161). [↑](#footnote-ref-86)
87. I thank Aryeh Edrei for drawing my attention to this interesting point in the judgment. [↑](#footnote-ref-87)
88. See Rubinstein, para. 29 “... the scales have two sides ... the weight of harm to farmers (and I will refrain from addressing Rabbi Jakubowicz’s claim that the path is open for farmers to sell their produce to those who do not observe *kashrut*), was not addressed.” [↑](#footnote-ref-88)
89. See the prohibitions in the *Shulchan Aruch*, *supra,* footnote 41. For the development of *halachic* law in this context, see Rabbi Ze’ev Whitman’s article on the subject: Whitman, *The Treatment of Unkosher Food in the State of Israel*. [↑](#footnote-ref-89)
90. See Whitman, *ibid*., pp. 321 ff. [↑](#footnote-ref-90)
91. For details of additional cases, see *supra,* footnote 2. [↑](#footnote-ref-91)
92. The **Mitral** High Court case, which allowed the import of kosher meat alongside unkosher meat, is another clear example. There, the Court reviewed the halachic arguments submitted by the Rabbinate in depth, and held that they do not apply to the case before it. The Court reasoned its ruling with the claim that *halachic* rulings on the point (quoted from Rabbi Moshe Feinstein) concern cases in which the danger of mixing kosher meat with unkosher meat is obvious and clear, whereas in the case before the Court that fear did not exist (see *ibid*., pp. 627-628 of the judgment). For this reason, *inter alia*, it was held that the *halachic*-religious status “kosher” must be granted – even to a place that imports and sells unkosher meat. It is easy to view this as a “new *halachic* ruling” which has become the custom of the nation today. [↑](#footnote-ref-92)
93. Kaver, p \*\*. It is probable that Kaver would not have agreed with this conclusion, since he saw the main role of the Courts as “*nomos* killers”, *i.e.* killers of alternative law narratives, due to their (violent) judicial duty to decide between opposing narratives and different patterns of law. When it turns out that the judge is the sage of *halacha* to whom one turns to tie the ends of the *nomos*, it seems to me that the picture changes. [↑](#footnote-ref-93)
94. On the double allegiance required of religious public figures who serve in a national institution, see HaCohen, *Divrei HaRav*. [↑](#footnote-ref-94)
95. The certificate was called a “Trust Alliance.” [↑](#footnote-ref-95)
96. See the case of ***Gini I***, para. 3-4 of the opinion of Justice Solberg; and Kobi Nachshoni et al. ‘*The Restauranteur Who Petitioned Against the Rabbinate*’ *Ynet* (September 13, 2017) available at: <https://www.ynet.co.il/articles/0,7340,L-5016220,00.html>. [↑](#footnote-ref-96)
97. For comprehensive reviews see Pilber, *Arranging Kashrus*; Friedman and Finkelstein, *Is it Kosher Here*?; Friedman, *The Erosion of the Status Quo*, pp. 86-92. See also, the numerous references to this in the opinion of all the justices in the ***Gini I*** High Court case. [↑](#footnote-ref-97)
98. For example, paragraph 22 of Justice Shoham’s opinion, ***Gini I*** case: “Another reason ... lies in the ailments of the *kashrut* law supervision system, which operates on behalf of the Chief Rabbinate. […] doubt arises as to whether one can guarantee to the consumer, that a restaurant bearing a *kashrut* certificate on behalf of the Chief Rabbinate, strictly (literally) adheres to the observance of *kashrut* law”; And see paragraph 70 of Justice Solberg’s opinion: “The matter has reached the point that we have heard about rabbis who do not trust the *kashrut* they themselves grant. It is also public knowledge, that the members of the Chief Rabbinate’s Council, who all eat freely at its table, but only some of them trust the *kashrut* issued by it”; See also paragraphs A-C and N of the opinion of Vice President Rubinstein. [↑](#footnote-ref-98)
99. There is a private supervision organization that operates, in addition to a system of *kashrut* certificates, also a system of private marriages, known as “*Chuppot*”. See the link: <https://www.chuppot.org.il/>. [↑](#footnote-ref-99)
100. At the first hearing, Justice Shoham joined Justice Rubinstein’s suggestion that the verdict would be effective and binding only for two years (contrary to Justice Solberg’s dissenting position). Therefore, Shoham’s different position in the interpretation of the law was called an “individual opinion” (and not a minority opinion), since his conclusion joined the majority of the panel that the petition should be rejected, but his reasons were different. For the purpose of the analysis here, the “majority opinion” is that of Justices Solberg and Rubinstein, who agreed with the Rabbinate. [↑](#footnote-ref-100)
101. Applications for a re-hearing at the High Court are rarely granted. Section 30(b) of the Courts [Consolidated Version] Act 1984-5744, stipulates that an application for a re-hearing may be granted if the precedent created conflicts with previous Supreme Court case law, or due to its importance, difficulty, or the innovation in the ruling on the case there is scope for further discussion. In the case of ***Gini I***, it was the incoming Attorney General who announced that in his opinion there was scope for a further hearing, since the precedent established was on an important and fundamental issue (see paragraph 12 of President Naor’s judgment in the ***Gini II*** case). [↑](#footnote-ref-101)
102. On the other hand, in the re-hearing (***Gini II***), various parties submitted numerous applications to join the proceedings as ‘friends of the court’ and present their position. Among them: the Hotel Association in Israel, the Association of Restaurants in Israel, the Alliance of Torah and Labour Trustees in Israel, the “*Koshrot*” Association, and MK Elazar Stern. [↑](#footnote-ref-102)
103. See, for example, paragraph 19 of Justice Shoham’s opinion in the ***Gini I*** case: “In the wide diversity of communities that observe *kashrut*, there is a large sector of the public for whom a *kashrut* certificate issued by the Rabbinate is a condition to their entering an eatery. However, alongside this sector of the public, is another group, who are not satisfied with the *halachic* supervision of the Chief Rabbinate with respect to the *kashrut* of food, and yet another group that does not demand it at all. *Kashrut* observers, members of the first group, will only patron eateries that sell food that has received the approval of private supervision entities, called “*Badatzim*” … or from certain rabbis, and who, as far as they are concerned, set stricter criteria than those set by the Chief Rabbinate in matters of *kashrut*. Members of the second group who observe *kashrut*, want to ensure that they are eating food which is kosher according to the laws of *halacha*, but the question of whether the food received the state seal of the Chief Rabbinate is not a significant consideration for them. For that public, it is sufficient that the food served or sold in the restaurant received written approval from alternative *kashrut* bodies. This customer public trusts the owner of the restaurant, that he does in fact adhere to the *kashrut* rules mandated by the certificate presented in the restaurant, and on the basis of this trust it consumes the food sold there.” Shoham did not list the group that observe *kashrut* but ideologically are not interested in *kashrut* issued by the Rabbinate. [↑](#footnote-ref-103)
104. See, for example, the words of MK Shulamit Aloni (as quoted in the ***Gini I*** case): “… In the State of Israel and in Judaism, a rabbi is someone who has been trained as a rabbi, and it is impossible to force the position that the Chief Rabbinical Council, elected under a secular law, will be the only entity to determine who is and isn’t a rabbi. A rabbi of Naturi-Karta, who do not recognise the chief Rabbinate at all, can he or can’t he issue a *kashrut* certificate? A rabbi from *Agudat* Israel ... The definition should be: A rabbi – a person recognised by his community as a rabbi, and who has received rabbinical certification. Without a need for the approval of the Chief Rabbinate”; and the words of MK M. Wirszowski: “... not every person who wants to eat kosher food necessarily needs it to be declared kosher by the Chief Rabbinate Council, a Conservative rabbi can declare it kosher ... On the other hand, *Naturi-Karta* or *Agudat-Yisrael* are not satisfied with the Chief Rabbinate’s *kashrut*, but seek certification on behalf of such or other community rabbi” (Minutes of Meeting No. 127 of the Constitution, Law, and Justice Committee, 10th *Knesset*, 13-17 (June 27, 1983)). [↑](#footnote-ref-104)
105. S. 2(a) of the Prohibition of Deceit in *Kashrut* Act. [↑](#footnote-ref-105)
106. The phrase ‘presentation of *kashrut*’ takes on different meanings depending on different approaches. Below we demonstrate that a ‘presentation of *kashrut*’ in the eyes of some judges, for example hanging a sign bearing the words ‘certificate of trust’ is wrong, compared to the position of others, who thought that as long as the word ‘kosher’ does not appear, there is nothing wrong with hanging a ‘trust’ sign. [↑](#footnote-ref-106)
107. Until that time, case law repeatedly stated that the Prohibition of Deceit in *Kashrut* Act is secular in nature, and that its purpose is a consumer purpose, in a way that is no different from the purpose of the Consumer Protection Act. See, for example, the ***Raskin*** case; In re ***Orly S.***, p. 820; The matter of ***Aviv Delicacies***; the ***Golan Hospitality*** case, para. 7 of the judgment; the ***Pnina Comporti*** case, para. 8 of the judgment of Vice President Rivlin; and the ***Periner*** case, para. 32 of Justice Meltzer’s opinion. [↑](#footnote-ref-107)
108. Paragraph 40 of Justice Solberg’s opinion. [↑](#footnote-ref-108)
109. See paragraph 6 of Justice Shoham’s opinion. [↑](#footnote-ref-109)
110. Solberg, para. 65 (emphasis in original). [↑](#footnote-ref-110)
111. Justice Solberg also rejected the petitioners’ claim of unconstitutionality, arguing that it violates the margins of freedom of occupation, which involves exercising the occupation and not entering it, and that in light of the “correct” purpose of the law (which concerns product *kashrut,* and not only the *kashrut* of the party), the proportionality test, and in particular the second sub-test (the less harmful means), cross the hurdle of constitutionality. See paragraphs 59-69 of Justice Solberg’s opinion. [↑](#footnote-ref-111)
112. Para. 18-19 to the opinion of Justice Shoham. [↑](#footnote-ref-112)
113. Paragraph A of Justice Rubinstein’s opinion, ***Gini I***. The reservation was accepted by a majority of Rubinstein and Shoham. [↑](#footnote-ref-113)
114. See paragraph F to Justice Rubinstein’s opinion. [↑](#footnote-ref-114)
115. *Ibid.*, para. I. It is interesting to note, that in the judgement in the ***Asif*** case regarding a ‘sales permit’, Justice Rubinstein apparently proceeded from the premise that the purpose of the exact same law was to prevent misleading in relation to the *identity* of the party declaring the *kashrut* (in that case, it was the local rabbi who refused the ‘sales permit’). For this reason, he believed that replacing the rabbi, incidentally to informing the public, would be in line with the purpose of the law. As you may recall, Rubinstein favoured a solution whereby the local rabbi who refused to grant a ‘sales permit’ would be replaced by another rabbi who did. See his remarks: “As long as there is no presentation according to which the local rabbi is the party granting the *kashrut*, there is in essence no violation of his *halachic* autonomy” (para. 29 of Justice Rubinstein’s opinion in the ***Asif*** case). [↑](#footnote-ref-115)
116. For a similar occurrence regarding the prohibition of pork, see Barak-Erez, *Laws and Other Animals*. The answer to the question of whether the Prohibition of Deceit in *Kashrut* Act is a ‘religious law’ is not simple. Ostensibly, paradigmatic religious legislation has mandatory elements of coercion, such as the prohibition on working on the Sabbath under the Hours of Work and Rest Act 1951-5711, the prohibition on public display of *chametz* for sale in the Passover (Prohibition of *Chametz*) Act 1986-5746, or the obligation to marry in accordance with institutionalised religion under the Marriage and Divorce (Registration) Ordinance and the Rabbinical Courts Jurisdiction (Marriage and Divorce) Act 1953-5713. (For an opinion that the law does **not** prohibit private marriage see Neta-el Bendel ‘*The Knesset’s Legal Counsel: The Act Permits Private Marriages*’, *Makor Rishon* (December 2, 2018), available at: <https://www.makorrishon.co.il/news/96371/>). For the position that the *Knesset* has *halachic* authority to impose religious precepts, see Shochatman, *Religious Legislation in a Secular Society*. The fact that *kashrut* in the public sphere is subject to choice, has classified the Prohibition of Deceit in *Kashrut* Act as belonging to the consumer-civil sphere. However, the position of Justices Solberg and Rubinstein as if “there is no *kashrut* other than Rabbinate *kashrut*” brought the *kashrut* industry closer to an exclusive coercive religious authority. [↑](#footnote-ref-116)
117. “The purpose of the Prohibition of Deceit in *Kashrut* Act is not only to prevent deception or misleading in relation to the **identity** of the person on whose behalf the *kashrut* certificate was issued. The purpose of the Act is broader, and it is to prevent deception or misleading in relation to the **very** *kashrut* of the product being sold” (para. 65 to the opinion of Justice Solberg, emphasis in original). [↑](#footnote-ref-117)
118. It is indeed in line with the ontological reality perception of *kashrut*. [↑](#footnote-ref-118)
119. Although Solberg extracts this insight from the legislature’s language, the words of the legislature actually reinforce the opposite conclusion, that the emphasis is on the party that grants the *hechsher*, and not on the objective *kashrut* of the product. Indeed, this is what Justice Shoham concluded. [↑](#footnote-ref-119)
120. We will recall Justice Solberg’s words: “The purpose of the Act ... is to make sure that a product that is presented as kosher – is indeed kosher” (para. 39). We must assume that Justice Solberg, himself a religious person, recognized the fact that the law operates in accordance with the principle of “one witness is credible in matters of prohibition”, but believed that the secular state has given the authority to determine who that witness is, to an exclusive body – the established Rabbinate. The method of examination presented here does not seek to contradict this, but to present another, overlapping position, according to which sociologically and theologically there is also a **religious** significance to the Court’s interpretation. In it’s setting, the religious practice was changed by state authorities and their interpretations. [↑](#footnote-ref-120)
121. See ***Gini*** ***II*** Case, para. 14 of President Naor’s opinion. Some will point to the fact that in the meantime the Attorney General was replaced, and the retiring Attorney General Yehuda Weinstein was replaced by Avichai Mandelblit, who is a religious person. [↑](#footnote-ref-121)
122. ***Gini*** ***II*** case, para. 26 of President Naor’s opinion. [↑](#footnote-ref-122)
123. *Ibid*., para. 27. [↑](#footnote-ref-123)
124. Friedman and Finkelstein, *Is it Kosher Here*?, p. 37. As expected, in the re-hearing it was the religious justices in the extended panel, Solberg and Rubinstein, who criticized this approach in their opinions: see ***Gini II***, para. 25 of Justice Solberg’s opinion: “... in the world of *kashrut,* there is great importance not only to the question of the nature of the food served, but also to questions such as when it was cooked, by whom, and in what dishes”; And in the opinion of Justice Rubinstein, para. B: “... the manner of preparation itself ... has very significant *kashrut* implications, and *kashrut* does not live on the products alone ... The question about these is not in my opinion for the sake of the rabbinical seal ... but the very *kashrut* proper.” Although, in my opinion, these insights actually reinforce the emphasis on ‘*Gavra*’ and not ‘*Heftza*’. [↑](#footnote-ref-124)
125. For example, for the question of opening and pouring wine. See in this regard Ben Zazon, *The Wine of a Shabbat Desecrator*, pp. 381-391. [↑](#footnote-ref-125)
126. ***Gini*** Case II, para. 4 to the opinion of Justice Shoham. [↑](#footnote-ref-126)
127. In this respect, the ***Gini*** affair is another case in the list of cases that I have presented as case law background, of expanding the target audience for whom *kashrut* law is relevant. [↑](#footnote-ref-127)
128. See Shuki Friedman, *The Erosion of the Status Quo*, pp. 91-92. [↑](#footnote-ref-128)
129. In Kaver’s terms, *supra* footnote \*\*, if at the beginning of the *Gini* case the majority position was an example of the Court’s role as a “law killer”, *i.e.* a body whose authority is to choose a particular normative narrative (nomos) and thus omit other nomoi, the end of the affair was granting valid status to a wider variety of nomoi (see *ibid.*, p. \*\*\*). My focus, is on the claim that the Court also creates the additional nomos, and does not just validate it. It acts not only as an arbiter of narratives, but also as an authentic, regular player, in the narrative production factory. [↑](#footnote-ref-129)
130. See *supra*., footnote XXXX. [↑](#footnote-ref-130)
131. *Sirfei Kodesh* Discourse, B:120. [↑](#footnote-ref-131)
132. HCJ **The Secular Forum Society**. The majority of hospitals in Israel are public institutions, and even the private ones hold *kashrut* certificates. [↑](#footnote-ref-132)
133. See, *ibid*., Justice Handel’s opinion, para. 6c. [↑](#footnote-ref-133)
134. *Ibid*., Justice Vogelman’s opinion, para. 25, and in particular para. 68: “As hospitals overseas found *halachic* solutions that aid the observant Jew in eating kosher food over Passover, without affecting the dietary choices of the other patients, we also must reach a balance that will facilitate coexistence in such a diverse society as exists in the State of Israel.” [↑](#footnote-ref-134)
135. The judgement states that “the vast majority of public hospitals used for general hospitalization in the State of Israel hold *kashrut* certificates” (paragraph 44 of Justice Vogelman’s opinion). [↑](#footnote-ref-135)
136. *Ibid*., para. 6e to Justice Handel’s opinion. [↑](#footnote-ref-136)