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"Some say this, some say that": Pragmatics and discourse markers in Yad Malachi's interpretation rules

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Abstract

The common formulations of 'some say p and some say q' (and the related variations) reflect the compositional relationships between the four pragmatic premises that I initially presented: 'Some' as a formula, which diminishes the quantitative weight of those holding a position; the commutativity of 'and'; the pragmatic non-commutativity of 'but'; and the possibility of replacing 'but' by 'and'. These premises underlie halakhic decision rules discussed by R. Malachi HaCohen Montefoscoli (1695-1772) of Livorno and previous sources which he brings in his classic book Yad Malachi (Livorno, 1766-1767). This exemplifies a broader phenomenon: certain parts of the halakhic rules literature include rules that embody pragmatic assumptions. Because the rules of interpretation consist of a higher linguistic awareness than that of everyday discourse, pragmatic analysis of these rules may enrich pragmatics as a whole, with insights they raise from ancient sources, even if not formulated as part of a full-fledged pragmatic study.

1. "Some say" as a legal and linguistic problem

In the framework of discourse, the speaker often raises differing opinions, ostensibly without deciding between them. There are different formulations of such statements, such as: "S1 says p, and S2 says q"; "S1 says p, but there are those who disagree with him", or "Some say p and some say q". In terms of the propositional meaning, the speaker seems indifferent regarding the final decision. However, analyzing these statements using pragmatic tools can reveal the implicatures regarding his concealed preferences, and, quite often, his decision between the two opinions. Pragmatic theory, especially research on discourse markers, generally seeks to do this through "life" text analysis taken from everyday discourse, however, this can similarly be learned through the analysis of legal texts, especially through legal decision rules. These rules reflect, through a partial and semi-formulated linguistic awareness, the pragmatic assumptions of legal interpretation, which seek to restore the intent of the original legislators. In this article, I will present a pragmatic analysis of seven decision rules as formulated in one of the most important halakhic rule books, *Yad Malachi*, by Rabbi Malachi HaCohen Montefoscoli (1695-1772) of Livorno. [1]

Halakhic literature is an outstanding legal work in many respects. It presents its

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readers, especially those who are unfamiliar with it, with challenges that other legal literatures do not pose. From its inception in the Talmudic period, we find that it emphasizes the discussion over the decision, and even when a choice is made between differing opinions, it does not nullify the rejected opinion, but rather preserves it for the continuation of the discussion. [2] This is even more pronounced in later rabbinic literature, in which the absence of a supreme rabbinical body led Halakhah into a long process of decentralization. Due to the maxim which recognizes earlier authorities as superior to later ones, the *Aharonim* (late authorities, from the 16th century and on) were hesitant to come to an unequivocal decision between the opinions of the *Rishonim* (early authorities, up to the 16th century), because it was a sign of insolence towards the opinion being rejected. In light of these circumstances, linguistic forms were created in halakhic literature which expressed a **latent decision** or **soft instruction**. Although both of these phenomena represent a tendency to avoid making a complete and outspoken decision, a distinction must be made between the two: a latent decision is a situation where a halakhic authority arrives at an absolute decision, but prefers not to present it definitively, usually, in order to avoid appearing pretentious. In contrast, a soft instruction is a situation in which the halakhic authority does not side with one opinion in a conclusive manner, but simply expresses his recommendation. [3] From the readers' perspective, this recommendation is akin to a decision, but still leaves the possibility of acting in accordance with the less preferred option, since it is not rejected entirely. This is different from a latent decision, where, from authority's standpoint, the instruction is not a recommendation, but rather an obligatory directive.

The linguistic patterns that I presented above: "S1 says p, and S2 says q"; "S1 says p, but there are those who disagree with him"; or "some say p and some say q", etc., are some of the chosen phrases of halakhic authorities when presenting a dispute among authorities who preceded them. Despite the similarities, these phrases may imply different degrees of decision or preference. Consequently, the reader requires high level linguistic skills, of which he himself was often unaware, to decode the implicit intentions of the great halakhic texts. In other words, he requires healthy pragmatic senses. Some of the insights afforded by these healthy senses were formulated in writing by later halakhic arbiters, who transformed the tenuous linguistic sensitivities into formulated rules.

The conceptualization and systematization of the rules of halakhic interpretation became a literary genre known as 'rules literature'. [4] This literature, which developed in the absence of centralized authority in the halakhic tradition, gathers rules from the Talmud and later sources, which the reader can use to analyze the decision making process in the Talmud and halakhic books, and sometimes even its methods of adjudication. Some of the rules listed in this literature are **authority-rules**, namely normative rules for making the halakhic decision, whether these are 'principled' rules, which determine general tests, [5] or personal rules, that determine a hierarchy among the different authorities. Another type of rules are the **interpretative rules**, i.e., rules that assume that the decision has been already been reached, and attempt to help the reader identify the decision in the words, which sometimes conceal it. [6] Among the latter rules, there is one group which is prominent, which I call **'pragmatic rules'**, and which sometimes includes **'discourse rules'**. I do not

argue that they are part of an early pragmatic study, but simply that they reflect conscious or semi-conscious pragmatic fundamental assumptions, which the researcher is invited to uncover.

The discourse rules do not refer to the semantic value of the words, but to their pragmatic value. They refer to certain formulations of the text as discourse markers, i.e., as words and phrases whose unique role is not in affecting the truth value of the sentences (true or false) or make any substantial contribution to the propositional content of the statement. Rather, their role is to connect the sentence to the situation in which it is made (including: to the speaker, the listener, the context, etc.), and the emotive dimension of the statements. [7] However, when it comes to conventional implicatures, the goal is to expose contents that have semantic value, especially the hidden assumptions latent in the text. [8]

Elsewhere, I showed the importance of discourse markers for understanding the nature of theological disputes in age-old traditional cultures. [9] There, I argued that such cultures often sanctify early canonical texts that include numerous contradictions and tensions between different statements. The later generations tend not to choose between them; either because they are unable to, or unwilling to, or afraid to impair their sanctity. Faced with this situation, they reaffirm the tension- filled statements, and their preference for one value over the other is not expressed by an explicit **decision** in favor of it, but rather through **emphasis**, which grants them what modern pragmatics calls **salience**. The exposure of this emphasis is often accomplished through the use of discourse markers, especially the word 'but': the salient point in the statement is the one that comes after the 'but', and the one, that comes before it, is secondary. The ostensibly simple question regarding what statement should be put before the 'but' and what after it, is liable to have serious religious implications.

This holds true for halakhic disputes as well, especially where the author wishes to present the spectrum of conflicting opinions on a given topic and assert his ruling, or at least his recommendation, using veiled language. Here too, the use of implicatures and discourse markers generally reflect the author's tendency not to unequivocally choose between different opinions of important authorities, while simultaneously expressing his own opinion, despite this commitment. In general, one can assume that this convoluted form of writing is unintentional; the author writes what he has to say, whereas later generations try to decipher his original intention using interpretive insights. However, in the halakhic realm, unlike the theological realm, reference books were created (rules literature mentioned above), which were designed to guide the reader through the tangle of implicit formulations. [10]

From this standpoint, the rules of halakhic rule literature–and more specifically, those parts of it which deal with discourse rules–can be seen as reflecting greater pragmatic awareness than those of the "ordinary" speaker in everyday discourse, even if it still lacks the complete and systematic awareness of the modern scholar of pragmatics. In many ways, this could be applied not only to halakhic literature, but to legal interpretation in general. However, in this context, Halakhah has an advantage that serves as its greatest disadvantage as well. Due to problems of authority described above, a need arose to decode the authors' implicatures to a greater extent than in 'normal' legal systems. While in normal

legal systems the legislator's desire is to express the norm in maximal linguistic determinacy, and in the event of a dispute he attempts to adjudicate, the main halakhic texts do not always reflect such aspirations, at least on the conscious level. One prime example is the most important and authoritative codex written since the 16th century, the *Shulhan Arukh* (Literally: The Set Table); a composition consisting of two layers, written by two different authors, who disagree with one another on hundreds of issues. Even within these layers there are sometimes expressions of differing opinions, and in certain cases the decision is not complete or not explicit. In these situations, the authors use the formulations presented above: "Some say p", "some say p and some say q", and so on. There is no doubt that literature rules following this composition dealt heavily with its interpretation, and in doing so, developed numerous discourse rules, which attempted to decipher the preferences of its authors as reflected in these expressions. Such a skill was not generally required, or if it was, to a much lesser extent, in interpretative literature of "normal" legal systems. It appears that the halakhic system demanded a greater degree of interpretative sensitivity from its readers, including towards pragmatics and discourse rules.

With that in mind, I wish to return to the question of the relationship between religious literature and the theory of discourse markers. While in the aforementioned article, I examined the relationship between this theory and the expression of preferences in the field of theology, I would now like to analyze this in relation to preferences in the field of law. In the previous article I used modern tools to analyze traditional texts; whereas in this article I would like to do the opposite: use traditional texts to enrich modern literature.

I chose the book *Yad Malachi* as the starting point for my discussion because it is considered one of the classic books of rules, and it is known for its clear and organized writing style. However, this choice is not binding and in reality another one of the earlier or later books of rules could have been chosen for the same goal. I will focus on one chapter, which deals with the interpretation of the *Shulhan Arukh*, and specifically on one issue: how the *Shulhan Arukh* brings different opinions, specifically while using variations of phrases such as "Some say p and some say q". I analyzed R. Malachi's rules using the basic foundations of pragmatics; mainly the four premises I will present below, and the compositional relationship between them. Rabbi Malachi collected the rules in his book from the spectrum of halakhic works which preceded him, and therefore he often brings contrasting opinions about the implicit significance of these rules. [11] In these cases, I will analyze the pragmatic reasoning underlying each of the opinions and demonstrate that the dispute arises from conflicts between premises.

For the benefit of readers who are not familiar with halakhic literature, I will give a short background on the *Shulhan Arukh*, the book to which the rules I have picked from *Yad Malachi* are referring (readers who are familiar with this subject are invited to skip to the next chapter). I will subsequently introduce the four pragmatic premises which will guide my analysis of *Yad Malachi's* rules and interpretive disputes presented within, and I conclude by analyzing the rules themselves, one by one, in view of those premises.

2. A Quick Overview of the *Shulhan Arukh*

The *Shulhan Arukh* is undoubtedly the most influential halakhic book today. All Orthodox Jews see themselves as bound by it, and every halakhic authority will refer to it as a foremost source of authority. Even if other authorities occasionally reduce or reject some of its provisions, they generally do so with caution and respect, almost with a sense of a lack of choice. Halakhic authorities today cannot write any halakhic ruling without referring to it. It is also regarded as a milestone in terms of the history of Halakhah. According to many, it serves as the transition point between the period of the *Rishonim* and the period of the *Aharonim*. This distinction is not merely historical, it also has normative significance: according to accepted halakhic conventions, the *Aharonim* cannot dispute the opinion of the *Rishonim* where there is a consensus among them.

The *Shulhan Arukh* was written by Rabbi Joseph Karo (1488-1575), and published in Venice in 1565. Karo structured the book according to an order set by an earlier halakhic composition, *Arba'ah Turim*, (literally: Four Rows), known as the *Tur*, written by Rabbi Jacob ben Asher (1269-1343?), which is divided into four parts: *Orah Hayim*, which deals with the commandments of everyday life, especially the laws of blessings, prayers, Sabbath and holidays; *Yoreh De'ah*, which deals with other ritual commandments, such as slaughter and kosher food, swears and vows, Torah study, etc.; *Hoshen Mishpat*, which deals with jurisdiction, the laws of procedure and evidence, and civil law; and *Even Ha'ezer*, which primarily discusses family law. [12] Karo wrote the *Shulhan Arukh* in the same order, and even kept the internal division of the chapters. Prior to writing the book, he laid the foundations in a well thought-out manner: he wrote a comprehensive commentary on the *Tur*, called *Beit Yosef*. In that book he reviewed every instruction discussed within the *Tur*, examining its origins in Talmudic literature and the works of the halakhic authorities who preceded him, and generally decided among them according to a hierarchy of authorities that he established. Only after he had completed his work, did he turn to write his own codex, the *Shulhan Arukh*, in which, for the most part, he briefly summarizes his rulings in the *Beit Yosef*.

Rabbi Joseph Karo was born in Spain and later resided in Safed, Israel. At about the same time another halakhic authority sat in Krakow, Poland, working on a very similar project. Rabbi Moshe Isserles, known as REMA (1525-1572), also wrote a comprehensive commentary on the *Tur*, and intended to write his own code of Jewish Law, but at the same time he received Karo's *Shulhan Arukh* and changed his plans. Isserles saw that on most issues he agreed with Karo, and decided there was no need for two overlapping compositions. Instead, he decided to write a complementary composition where he would only include his critiques on the *Shulhan Arukh*, and he called it *Mapat Hashulhan* or, as it became known, the *Mapah* (Litreally: The Tablecloth). As Isserles notes in his introduction to the *Mapah*, the main problem in Karo's oeuvre is that his sources mainly reflect the Sephardi (Spanish and Oriental), tradition, and therefore he took it upon himself to modify the composition for Ashkenazi (Northern-European) Jewry, the other major Jewish center. One of the ways he accomplished this was not only by relying on books, but also on customs. [13]

From the end of the 16th century, printers have incorporated Isserles's comments into the text of the *Shulhan Arukh*, usually in a slightly different font, and since then the two integrated compositions have been called together *Shulhan Arukh*.

Most of Karo's instructions were not adorned with critical remarks by Isserles, and therefore they were accepted as authoritative by nearly the entire Jewish world. In places where such comments do appear and where the two authorities disagree, the instructions were followed according to ethnic background. Karo's directives were accepted as authoritative in the Sephardi sector (today: the Jews of Islamic countries), while Isserles's were accepted in the Ashkenazi sector (today: European Jews and the countries to which they migrated). In the years following its publication, the *Shulhan Arukh* earned its authority, and extensive interpretive literature emerged in the two geographical regions. Besides the writing on substantive law, an extensive literature continued to develop in the field of rule literature, and some of it referred to the formulations of the *Shulhan Arukh*.

3. Pragmatic Fundamental Premises of our Analysis

As a theoretical basis for our discussion, I would like to present four pragmatic premises:

1. When the word *yesh* (some) precedes a verb, and especially one that denotes taking a position – such as "some say", "some wrote", "some think" and the like [14] – it comes to play down the quantitative weight of those who hold that position.

Pragmatic study has already understood the importance of the word 'some' for pragmatic analysis, often in comparison to the word 'any'. [15] I would like to discuss its role as a quantifier within the pragmatic context of quantification. [16]

On the logical level, the quantifier 'some' does not exclude the possibility of 'all', yet from a pragmatic standpoint, especially in ordinary language use, it usually implies a portion and not all. [17] In many cases, an even stronger allusion is hinted to: Michael Israel lists it as one of the expressions which indicate, according to his classification, an 'attenuating positive polarity item'. [18] In our context we can refine this distinction and assume that at least when it comes before a verb which indicates taking a position or before behavior that expresses taking a position, it implies that few share this position, perhaps even a minority, though not necessarily an unimportant one. The word 'some' denotes a decrease in the quantity of those holding the position, but is neutral regarding their qualitative value. In any case, this formulation serves as an expression of some doubt concerning the argument which follows, thus downgrading it from the status of a conclusive argument. Had the speaker simply said p, it would have served as a conclusive argument; however, when he says, 'some say that p', he describes the position of those who say it, rather than his own.

2. In the context of taking a position, the connective *'and'* is generally commutative, [19] not just from a logical- semantic point of view, but also from a pragmatic one.

From a logical- semantic point of view, it is clear that the particle 'and' is commutative: the truth value of the sentence $P \wedge Q$ will always be identical to the truth value of the sentence $Q \wedge P$, and thus can determine the logical bi-conditional:

$P \wedge Q \equiv Q \wedge P$

From a pragmatic standpoint, however, this is not always the case. Scholars have already indicated that in temporary contexts the 'and' can denote the relation between earlier and later, and sometimes, subsequently, between cause and effect. [20] Therefore there will be a significant difference between the sentences 'Simon was injured and ran home' and 'Simon ran home and was injured'. However, in the context of the description of people's attitudes, there will, for the most part, be no such distinction. The sentence 'the Tories supported the proposal and the Whigs opposed it' is the same as the sentence 'the Whigs opposed the proposal and the Tories supported it', not only from a logical-semantic point of view but also from a pragmatic one.

3. The connective 'but' is commutative from a logical- semantic point of view, but often non-commutative from a pragmatic one.

On the logical- semantic level, the connective 'but' acts entirely like the connective 'and', in that it marks logical conjunction. [21] If we denote the connective 'but' with the mark *B* then we can say that from a logical- semantic perspective the truth value of the sentence $P \wedge Q$ is always the same as the truth value of the sentence PBQ, thus from a the logical- semantic point of view the logical bi-conditional is:

$PBQ \equiv P \wedge Q$

However, from a pragmatic point of view there is a difference between 'and' and 'but'. Scholars have pointed to the discourse marker 'but' as indicating tension or contrast between the two sentences that flank it, [22] while the sentence which follows the 'but', contradicts the listeners' previous expectations. [23] Some have noted that the sentence that precedes the 'but' is intended to express the obvious, while the second sentence comes to tell something of a more innovative nature. [24] In this respect, while the 'and' preserves the commutativity on the pragmatic level as well, i.e., it represents a balanced affirmation of the two sentences and, therefore, in principle, their places could have been swapped in relation to the 'and', 'but' is definitely non-commutative, meaning PBQ will pragmatically function differently than QBP.

The non-commutative character of 'but' often arises in another one of its aspects: by emphasizing the next part after the 'but'. [25] It could be said that it enjoys a greater degree of **salience**, in the broadest sense of the word. [26] This issue does not apply to all of the uses of this discourse marker, but it is certainly true for a number of them. [27] When someone says 'p but q' it is very different than if he says 'q but p'. If the finance minister says 'we need to maintain fiscal discipline, but we promised that we would act for the lower class' it is almost the opposite of saying 'We promised that we would act for the lower class, but need to maintain fiscal discipline'. The listener immediately understands that in the first sentence he is attempting to explain why he is opening the public coffers, while in the second sentence he is explaining why he is going to close it. If I say 'The weatherman said it is going to rain today, but it looks sunny outside,' it is reasonable to assume that the listener will not take an umbrella ; however, if I say 'It looks sunny outside, but the weatherman said it is going to rain today,' the listener will most likely take an umbrella. If the pharmacist tells you, 'this drug will cure the sickness entirely, but it has unpleasant side effects' you will understand that he is encouraging you not to buy it; conversely, if he says 'this drug has

unpleasant side effects, but it cures the sickness entirely', you will understand that he would recommend buying the drug. It is clear in this context that regarding the implied tension between the first and second sentences through the use of the word 'but', the sentence following the 'but' is the one the speaker wishes to emphasize, with the hope that the listener will follow through in practice. The position of the sentences in relation to 'but' is therefore a crucial issue, as opposed to their position in relation to 'and'.

4 . Sometimes the connective 'and', functions as a replacement for 'but'.

Notwithstanding the assumption in section 2, sometimes the particle 'and' is used in lieu of 'but'. [28] In these situations, the 'and' is not simply a commutative connective, rather much like 'but', alludes to the tension between the two statements which it divides. This confirms both statements despite the tension, while simultaneously highlighting the second statement. In these cases, the 'and' can be replaced with 'but' without changing the message of the sentence not only on the logical-semantic level, but also on the pragmatic one. Thus, for example, the verse "כָּל הַנְּחָלִים הֹלְכִים אֶל הַיָּם וְהַיָּם אֵינֶנּוּ מָלֵא" (Eccl. 1:7) is properly translated in KJV: "All the rivers run into the sea, yet the sea is not full", i.e., the Hebrew "וְ" (=and) is properly translated as "yet" (which is tantamount to "but"). Similarly, Isaiah says: "אִם תֹּאבוּ וּשְׁמַעְתֶּם–טוּב הָאָרֶץ תֹּאכֵלוּ, וְאִם תְּמָאֲנוּ וּמְרִיתֶם–חֶרֶב תְּאֻכְלוּ" (Isa. 1:19-20). KJV rightly translates: " If ye be willing and obedient, ye shall eat the good of the land, but if ye refuse and rebel, ye shall be devoured with the sword". Again, the Hebrew "וְ" is replaced by the English "but". And another verse from Isaiah: The prophet says: כָּל מַלְכֵי גוֹיִם כֻּלָּם שָׁכְבוּ בְכָבוֹד אִישׁ בְּבֵיתוֹ, וְאַתָּה הָשְׁלַכְתָּ מִקִּבְרְךָ כְּנֵצֶר נִתְעָב" (Isa.14:18-19) . KJV properly translates: "All the kings of the nations, even all of them, lie in glory, every one in his own house, but thou art cast out of thy grave like an abominable branch". Here, too, the "וְ" was translated as "but".

These four basic premises will stand before us in the next chapter when we examine 'the rules of *Shulhan Arukh* and REMA in *Yad Malachi*.

4. A selection of Yad Malachi's Rules of the *Shulhan Arukh* and REMA: Translation and Analysis

In the following paragraphs, I will quote a number of sections from the book *Yad Malachi* relating to our topic, namely rules relating to expressions such as 'some say this and some say that', which can be analyzed through the use of pragmatic tools. We will discuss seven of the twenty one rules presented by R. Malachi in the chapter 'rules of the *Shulhan Arukh* and REMA'. Some I will bring in full, some only excerpts. For each rule, I will first present R. Malachi's words (in my translation) and then proceed to analyze the pragmatic meaning of his words in light of the four basic premises of the previous chapter. In most of these rules R. Malachi presents a controversy, and in these cases I will try to analyze these disputes as clashes between different pragmatic premises, that were resolved by the disputing halakhists in different ways.

For marking claims brought in the Shulhan Arukh I will use the letters p and q, with q almost always meaning ¬p. For marking the source, namely the speaker of the statement, I use the symbol S.

1. "S says that p and was dissented"

Rule 10: When Karo writes the opinion of an authority in the *Shulhan Arukh* and then adds "and he was dissented [by others]", it seems that he means to say that since he had dissenters the law is not decided according to him, for if it were not so, he should have written "and there is someone who said", as he regularly does when citing both opinions (*Kenesset HaGedolah*, Hoshen Mishpat, sec. 175, comments on Beit Yosef, article 28). However, *Havot Yair* (sec. 119) wrote in the name of Rabbi Manahem Azariah [of Fano] that when he [Karo] writes "and some disagree" he is referring to a minority [of authorities], and he himself does not agree with them (see there). Now in truth, from the words of the *Sefer Meirat Einayim* (*SMA*), art. 96 and *Siftei Kohen* (*SHAKH*) in Yoreh De'ah, sec. 182 it is evident that our Master [Karo]'s opinion is that in [such cases] we have to heed the opinion of the dissenters. See *Ginat Veradim, Hoshen Mishpat*, unit 1, sec. 2, and ibid. unit 3, sec. 29. [29]

Analysis:

R. Malachi refers to places where Karo uses the formula: "S says that p and was dissented".

He cites two opinions on this matter:

Kenesset HaGedolah (Rabbi Hayim Benveniste, 1603-1673): Karo made a latent decision like S.

Havot Yair (R. Yair Haim Bachrach, 1638-1701): Karo made a latent decision like those who dissent S.

R. Malachi presents additional sources that support the opinion of *Kenesset HaGedolah*, or potentially represent a third opinion: Karo gave a 'soft' instruction (recommendation) like those who dissent S.

It seems that the root of the controversy is as follows:

In the above dispute, *Kenesset HaGedolah* interprets the 'and' in the phrase ('and was dissented') as tantamount to 'but' (premise 4). Since 'but' generally implies that the speaker prefers the statement following the 'but' (premise 3), the conclusion must be that Karo preferred the dissenting opinion.

Havot Yair interprets the 'and' as representing regular logical conjunction (in line with premise 2). Moreover, he assumes that the phrase 'and was dissented', is the equivalent of the phrase 'and some dissent'. The word 'some' implies the speaker's tendency to play down the quantitative weight of those authorities who hold the opinion at stake (premise 1). Therefore, not only does the statement following the 'and' not enjoy more salience than the one prior, it holds even less salience.

As aforementioned, the position of R. Malachi on this dispute is not entirely clear. He may be coming to agree with the opinion of *Kenesset HaGedolah*, but while *Kenesset HaGedolah* uses a language of decision ('the Halakhah dissents from him'), R. Malachi employs the language of a soft instruction ('we have to heed'). [30]

2. "There is someone who says that p"

Rule 12: When he [Karo] decides the law in the *Shulhan Arukh* using the phrase "There is someone who says", it seems that the ruling [at hand] is one that is not mentioned by other authorities and no one dissents. See *SMA, Hoshen Mishpat*, sec. 16 art. 8; and the same

was written by *Kenesset HaGedolah* ad loc., sec. 35, Comments on the *Tur*, art. 7 and elsewhere; and see ibid, sec. 420, art. 39. And the same was written in *Peri Tzaddik*, page 116c, and in *Benei Yaakov*, page 28a and chap. 7 art. 73. Thus is also written ibid, page 48a and 139c in regard to [the phrase] "and some say", in *Peri Toar* on *Yoreh De'ah*, sec. 111 art. 12, and in *Peri Hadash*, ad loc., sec. 122 art. 15. It is possible that this is also REMA's usage. See *Kenesset Hagedolah Hoshen Mishpat*, last volume, sec. 62, Comments on the *Tur*, art. 2, and ibid, sec. 175, Comments on *Beit Yosef*, art. 33.

And you should know that this is not a fixed rule for all the uses of this phrase, since in [*Shulhan Arukh*] *Hoshen Mishpat* (sec. 66 art. 24 and in sec. 126 art. 20) we find the phrase "There is someone who says", and *SHAKH* wonders why he [Karo] wrote these words whilst it is a definitive law as proven by the Talmud and halakhic authorities. He similarly wonders on [Karo's phrasing] *in Yoreh De'ah* sec. 62 (see there), where he wrote: "I do not understand why the author [Karo] wrote this law under "there is Someone who says", for this is the uncontested opinion of Rabbi Shlomo ben Aderet (RASHBA] and the *Tur*" etc. And see further there, sec. 39 art. 7, and chap. 3 art. 21, and [chap.] 124 art. 10, and [chap.] 325, art. 5. From his words we learn that he does not accept this rule, as he questioned Rabbi Joseph Karo [presuming that] he ought to have written the law as a definitive statement, since no one dissents it. For if he had contended that this is the way of the halakhic writing, why would he have questioned the wording "There is someone who says"? You will find the same in *Yoreh De'ah* sec. 38 where he writes "There is someone who says" in regard to a ruling dissented by Rabbi Shlomo ben Aderet (see *Peri Hadash*, ibid). The meticulous [scholar] may find other places where there are counter-examples [for this rule]. And the greatest amongst them is none other than Rabbi Joseph Karo himself, who in [Shulhan Arukh] Yoreah De'ah sec. 112 article 8 used [the formulation] "and there is someone who says" in regard to a law on which he himself ruled contrary [to the opinion of that "someone"], in sec. 2. Therefore I understand that what the *SMA* meant to say is that in most appearances [of this phrase] that is the case, but not in all of them. [31]

Analysis:

R. Malachi refers here to places where Karo uses the formula: ' There is someone who says that p'.

He cites two opinions on this issue as well:

SMA (R. Joshua Falk Katz, c.1555-1614) and those who share his view: Karo made a latent decision that p.

SHAKH (R. Shabtai Cohen, 1621-1662): Karo did not decide that p.

R. Malachi leans towards the latter opinion. He does not claim that when Karo's uses the formula 'There is someone who says that p' he necessarily ruled against p, rather that the language is ambiguous, and allows for the possibility that he decided p and remained in doubt about it.

It seems that the root of the controversy is as follows:

Both the opinions of *SMA* and the one attributed to *SHAKH*, agree that the word "some" – or in this case "there is someone"–comes to identify a reduction in the quantitative weight of those authorities who hold the position (premise 1). However, according to *SMA*'s opinion, Karo uses this formulation when there are no dissenting opinions on p in halakhic

literature, and therefore he chooses that opinion. The "some", therefore, only comes to play down the quantitative weight of those halakhic authorities who hold the opinion, but does not diminish the authoritativeness of their ruling.

However, according to *SHAKH*, the use of the word "some" testifies not only to the reduction of the quantitative weight of those halakhic authorities who hold the opinion, but also to a diminution of the authoritativeness of their ruling, which implies that Karo dissented them.

3. "Some say that p and some say that q"

Rule 13: When [Karo] writes in the *Shulhan Arukh* "some say… and some say…", we rule according to the latter opinion. Thus wrote *Kenesset HaGedolah, Orah Hayim*, sec 318, page 47c, and in the Rules of the *Poskim*, rule 62. And so wrote the author of *Eliyah Rabbah* on *Orah Hayim*, in the beginning of sec. 612. And it appears that this is also the view of the book *Nehepah BaKesef*, page 186b, see there. I found the same idea *in Beit David* on *Orah Hayim* sec. 62 and 114, and on *Yoreh De'ah* page 105c, and *Ginat Veradim, Hoshen Mishpat*, unit 5, sec 11. …

And I found that the author of *Ginat Veradim* wrote in *Hoshen Mishpat* unit 1 sec. 2, that when [Karo] writes "some say… and some say…" the law is not decided, and one may act according to either of the opinions. I also found that the author of *Avodat HaGershuni* wrote the same view in sec. 45 in the name of R. Menahem Azariah [of Fano], and it seems that this is also what can be learned from the words of *Bayit Hadash, Orah Hayim*, sec. 27 art. 2. [32]

Analysis:

R. Malachi refers to the place where Karo uses the formula: 'some say that p and some say that q'.

Again, R. Malachi brings two opinions:

Kenesset HaGedolah and those who share his view: Karo made a latent decision that q.

Ginat Veradim (R. Avraham Halevi, 1650-1712), in one of his statements: Karo did not decide between p and q.

R. Malachi does not unequivocally decide between the two interpretative views, but it seems that he leans towards the first.

Seemingly the root of the dispute is as follows:

Kenesset HaGedolah interprets the 'and' in lieu of 'but' (premise 4), and therefore believes that the following statement is the more salient and authoritative (premise 3). In contrast, *Ginat Veradim* interprets the 'and' as standard logical conjunction (premise 2), that considers the two statements flanking it as equal in weight. Moreover, Karo uses the word 'some' for both opinions, which allusively plays down the quantitative weight of both of them; hence, due to the small numbers of authorities on both sides, there is no way to reach a decision.

4. "Some say that p and S says that q"

Rule 14: The maxim stating that in "some say… and some say…" we rule according to the latter opinion is only when [Karo] says "There is someone who says … and the is someone [else] who says…"; but when he writes "These is someone who says… and S prohibits or permits [it]" – he may be implying that the latter opinion is an opinion of [only] one authority. Thus wrote the author of *Kenesset HaGedolah*, in his [book] *Shiyarei*

***[Kenesset HaGedolah]*, sec. 320, Comments on *Beit Yosef*, art. 7. [33]**

Analysis:

R. Malachi is referring here to the place where Karo uses the formula: 'some say that p, and S says that q'. He cites the opinion of the *Kenesset HaGedolah* that in such cases Karo is expressing a latent decision like the first opinion.

It seems that the root of the distinction lies in the fact that the word 'some' implies a small number greater than one, while the mention of S explicitly identifies it as only one individual. In such a situation, the majority opinion is preferred, even if its quantitative superiority is only relative, being greater than one. This understanding will be explained further in the following section. In any case, it is noteworthy that R. Malachi assumes here that the 'and' does not function as 'but', as we see by the fact that no supremacy is given to the second statement.

5. "Some say that p and there is someone who says that q".

Rule 16: When [Karo] writes in the *Shulhan Arukh* the phrase "some say" as the former opinion and the phrase "there is someone who says" as the latter, it implies that he intends to rule according to the former, who are numerous, and not the latter, who is one individual (Responsa *Ginat Veradim, Even HaEzer*, Unit 4, sec. 30 in the name of Rabbi Jacob, to whose words he consented). And indeed, the author of *Kenessaet HaGedolah* seems to hold this maxim (*Hoshen Mishpat* sec. 25, rules of burden of proof in matters of law, article 52). However, I found [elsewhere] that he changed his mind in his [book] *Shiyarei [Kenesset HaGedolah]*, and wrote that the authorities often write "There is someone who says" even when they are two (*ibid*, Rules of the *Poskim*, article 27). And since that is the case, one should not follow this rule. [34]

Analysis:

R. Malachi refers to the place where Karo uses the formula: 'some say that p and the is someone who says that q'.

Again, R. Malachi presents two opinions, but this time the two opinions are of the same halakhic authority, *Kenesset HaGedolah*, one from his earlier work and the other from his later work.

Early *Kenesset HaGedolah*: Karo made a latent decision that p.

Late *Kenesset HaGedolah*: Karo did not decide between p and q.

R. Malachi decided like the second opinion.

It seems that the root of the difference is as follows:

Had the two statements used the same language, namely, both read 'Some say' or both used 'These is someone who says', it is likely that *Kenesset HaGedolah* would not have preferred the first statement. Instead, he would have adopted one of the following rules: either the second statement is preferred (i.e., the 'and' would function as a 'but', in accordance with premise 4), or both are of equal weight (i.e., the 'and' would function as standard logical conjunction in line with premise 2). However, in this case there was another variable that need be taken into account, the grammatical number of claimants quoted: 'some say' indicates many, while 'there is someone who says' indicates an individual. The Early *Kenesset HaGedolah* thinks that this makes a difference, and claims accordingly that Karo preferred the view expressed in the first statement. The Late *Kenesset*

HaGedolah, in contrast, determined that Karo was not punctilious in his numerical definitions and thus the two statements can be taken as equal-weighted, resulting in no decision being made between them.

6. "p, and some say q"

Rule 17: When [Karo] writes in the *Shulhan Arukh* one opinion as a closed statement [without any additional clause] and the other one with "some say", he intends to rule the former (*Kenesset HaGedolah, Orah Hayim*, sec. 318, Comments on the *Tur*, and in his Rules of the *Poskim*, rule 62). And I also found the same view in Rabbi Menahem Azariah of Fano in his *Responsa*, sec. 97, and in *SHAKH, Hoshen Mishpat*, sec 66 art. 61 and *Yoreh De'ah* sec. 84 art. 12 and sec. 177 art. 38, as well as in *Peri Hadash, Yoreah De'ah* sec. 50 art. 4 and sec. 118 art. 11 and sec. 121 art. 15; *Beit David* on the *Tur, Orah Hayim* page 45b ; *Yad Aharon* on *Orah Hayim* at the beginning of sec. 631; *Batei Kehunah*, page 128d; and *Eliyah Rabbah* on *Orah Hayim*, at the end of sec. 81, and elsewhere. [The author of] *Bayit Hadash* (*BAH*) also writes this in *Yoreah De'ah* sec. 190 art. 34, and ibid, sec. 198 art. 33 and sec. 220 at the end of art. 3 as well as at the end of his "Concluding Treatise", ibid, rule 6; see the lengthy discussion there. This is the consensus among the [various halakhic] authors, on which I have seen no dissent. … However, I found in the book *Bnei Yaakov* (Page 214d) that in several places our Master [Karo] in the *Shulhan Arukh* writes the rejected opinion as if it were an undisputed ruling and the opinion he understands as conclusive [is written as] "some say", see there. I also saw in [the book] *Zera' Avraham* on *Yoreh De'ah* (page 37b) that one ought not to rely on this maxim, since there are quite a few places that [demonstrate] the opposite. Yet, as I have already written, almost all the great Jewish authorities agreed to rely on it. [35]

Analysis:

R. Malachi refers to the place where Karo uses the formula: 'p, and some say q'.

Again, R. Malachi presents two opinions:

Kenesset HaGedolah and those who share his view: Karo made a latent decision that p.

Bnei Yaakov (R. Jacob Sasson , c.1681? – c.1712) [36] and *Zera' Avraham* (R. Abraham Yitzkhaki, 1661-1729) [37] : We cannot tell how Karo decided.

R. Malachi clearly leans to the first view.

It seems that the root of the controversy is as follows:

Kenesset HaGedolah and those who share his view interpret the argument p, when appearing without any non-truth- functional connective, as expressing a categorical assertion, while the argument q, as the minority claim, whose quantitative weight is played down by the phrase 'some say' (premise 1). *Bnei Yaakov* and *Zera' Avraham* do not disagree that this is the situation in many cases, however, they found that in some cases the claim under 'some say' is actually the one that Karo preferred, and expressed it in latent decision. They do not explicate why this is so, but their explanation can be reconstructed: in those few cases where Karo uses this formula and decides according to the 'some say', the 'and' functions as 'but' (premise 4), and therefore the statement that comes after it is emphasized and preferred.

If this analysis is correct, *Bnei Yaakov* and *Zera' Abraham* conclude that the formula 'p and some say q' places the reader before a clash between two pragmatic rules: On the one hand, we have the rule that the categorical statement is preferred over the statement under

'some say' (in light of premise 1), but on the other hand, there is the rule teaching that the statement after the 'but' is preferred to the statement before it (in light of premise 3). Since there is no way to determine when one rule takes precedence over the other, these two authorities believe that no rule should be established regarding this formula.

The following rule relates to Isserles (REMA), whose comments were published in the text of the *Shulhan Arukh* and as a response to the writings of Karo.

7. Karo writes p and REMA writes "some say that q"; Karo writes p and REMA writes q.

Rule 18: … When [REMA] writes "and some say", he intends to say that he heeds the opinion of those "some" who say it, however when he [REMA] writes the decided law alone – he also accepts that opinion (*Kenesset HaGedolah, Hoshen Mishpat,* sec. 184, Comments on the *Tur,* art. 3). [38]

Analysis:

R. Malachi presents two situations, which he explains according to *Kenesset HaGedolah*:

Situation A: Karo writes p and then Isserles writes q–Isserles decides q.

Situation B: Karo writes p and Isserles then writes 'some say that q'–Isserles gives a soft instruction (i.e. only a recommendation) to abide by q.

It seems that the root of the distinction is as follows:

When Isserles presents a categorical statement against a categorical statement of Karo, then his statement expresses an opinion. However, when he presents the statement simply as 'some say', he is introducing it as an inferior opinion from the start, since 'some' plays down the quantitative weight of those authorities who hold this opinion (in light of premise 1). However, he does not reject this argument altogether, because had he wished to do so he could have avoided citing it altogether, leaving Karo's teaching in place without reservation. The reasonable conclusion therefore is that when Isserles adds such a comment to Karo's words, he wants to make a soft instruction which he recommends following, but not a categorical obligation.

5. Summary

We have found that the common formulations of 'some say p and some say q' (and the related variations) reflect the compositional relationships between the four pragmatic premises that I initially presented: 'Some' as a formula, which diminishes the quantitative weight of those holding a position; the commutativity of 'and'; the pragmatic non-commutativity of 'but'; and the possibility of replacing 'but' by 'and'. These are all various examples of pragmatic premises underlying halakhic decision rules, such as the ones discussed by R. Malachi HaCohen and the previous sources which he brings.

In light of the above, I have proven my central point that certain parts of the halakhic rules literature, as presented here by *Yad Malachi*, include rules that embody pragmatic assumptions. Because the rules of interpretation consist of a higher linguistic awareness than that of everyday discourse, pragmatic analysis of these rules may enrich pragmatics as a whole, with insights they raise from ancient sources, even if not formulated as part of a

full-fledged pragmatic study.

6. Endnotes

[1] Malachi HaCohen Montefoscoli, *Yad Malachi*, vols. 1-3 (Livorno: Moshe Attias Press, 1766-1767). References below will be to vol. 2, pp. 182-185.

[2] Mishnah, *Eduyoth*, 1:5

[3] See: Benjamin Brown, "Soft Stringency in the *Mishnah Brurah*: The Jurisprudential, Sociological and Ideological Aspects of a Halakhic Formulation", in: *Contemporary Jewry 27* (2007), pp. 1-41.

[4] For more on this genre, see: Menachem Elon, *Jewish Law: History, Sources, Principles,* Philadelphia: Jerusalem - Jewish Publication Society of America, 1994, vol. 3, pp. 1541-1551; Yehuda Brandes, *Reshitam shel Kelalei HaPesikah: Mashma'utam, Hizatzrutam veHitpathutam shel Kelalei Pesikah HaMityahasim laTannaim uleSafrutam* [*The Emergence of Decision Rules: Meaning, Formation and Development of Decision Rules which relate to the Tannaim and Their Literature*], Doctoral Dissertation, Hebrew University of Jerusalem, 2002 (Hebrew).

[5] For example: 'The law is according to the later authorities' (RIF on *Kiddushin* 19A etc.); [Where] one disagrees with many, the halakhah is as the majority' (BT *Ber akhot* 37A; *Shabbat* 60B; ibid 130B; *Eiruvin* 46A; *Yoma* 36A; *Beitzah* 11A; *Yebamot* 40A; ibid 46B; ibid 47A; *Ketubot* 21A; *Bava Kama* 102A; *Avodah Zarah* 7A; *Bekhorot* 37A; *Nidah* 49A).

[6] For example, in the disputes between Rav and Shemuel, Rav's opinion is accepted as law on ritual matters, and Shemuel's is authoritative on questions of civil law (BT *Bekhorot* 49A); Rav Nahman's opinion was considered authoritative on questions of civil law, (BT *Ketubot* 13A). In disputes between Abaye and Rava, Abaye's opinion is accepted as law, aside from six specific disputes where the decision is according to Rava (TB *Kiddushin* 52A; *Bava Kama* 73A; *Bava Metzia* 22B; Sanhedrin 27). I borrowed the terms 'principled rules' vs. 'personal rules' from Brandes (supra note [4]), pp. 6, 17-26.

[7] Klaus Hölker, "Französisch: Partikelforshung", *Lexikon der Romantischen Linguistik* V.1, Tübingen 1991, pp. 77-88. There are multiple definitions and characteristics for this term: Yael Ziv, "*Zeh Bikhlal Lo 'Pashut*': *Samanei Siah Ba-Ivrit Ha-Meduberet* ["This not at all 'Simple': Discourse Markers in Spoken Hebrew]", *Balshanut Ivrit* 48 (2001): 17-29.; Deborah Schiffrin, Discourse Markers, Cambridge 1987, pp. 31-41, 327-329; Andreas H. Jücker and Yael Ziv, "Discourse Markers: Introduction", in: *Discourse Markers: Descriptions and Theory* (A.H. Jücker and Y. Ziv, eds.), Amsterdam and Philadelphia 1998, p. 1-12; For a comprehensive view of the existing definitions: Anna Feldman, Discourse ; Markers Codification of the 'Hearer-Old' Information, extended seminar paper (Yael Ziv, supervisor), Hebrew University of Jerusalem, 1999 (unpublished), pp. 88-12. Quirk has already pointed to the emotive element of discourse markers: Randolph Quirk et al., *A Grammar of Contemporary English,* London 1972, p. 413

[8] Lauri Karttunen and Stanley Peters, "Conventional Implicature", in: *Sintax and Semantics,* vo. 11: Presupposition (Choon Kyu Oh and David A. Dinneen), New York 1979, pp. 1-56;

Eric McCready, "Varieties of Conventional Implicature", *Semantics and Pragmatics* 3 (2010), pp. 1-57. For a critical approach to the theory, see: Kent Bach, "The Myth of Conventional Implicature", Linguistics and Philosophy 22 (1999), pp. 327-366.

[9] See: '"But me no Buts": Discourse Markers, Theological Rhetoric, and Varieties of Monism in the Debate between the Hasidim and the Mitnagdim', *Numen–International Review for the History of Religions* (in editing).

[10] The fact that rules literature relates specifically to halakhic texts and not to theological ones is due to two main reasons: Firstly, because of the prestige and importance Halakhah received in traditional Jewish society, which was generally greater than that which religious thought received; Secondly, because ultimately Halakhah is intended as practical guidance and clarification, its final word is required to achieve this aim.

[11] In these cases there are two orders of dispute: The first-order dispute is the one brought in the *Shulhan Arukh* with the words, 'some say this and some say that' and the like; the second-order dispute is that of the commentators who disagree regarding how to read these formulations.

[12] Halakhic criminal law is not enforceable today, and therefore the *Shulhan Arukh* does not address it, much like he does not deal with other laws that cannot be practically implemented.

[13] Elon, Jewish Law (supra, n. [4]), vol. 3, pp. 1345-1366

[14] The literal translation of the Hebrew יש is "there is/are", and therefore the literal translations of "יש אומרים" would be "there are those who say". However, the literal translation appears cumbersome in English, while "some" properly conveys the pragmatic sense of "יש" as it functions in common usage – i.e., as the accepted word for the existential quantifier . In view of this I translated the Hebrew "יש אומרים" (in plural) as "Some say". However, in the singular number I remained closer to the literal wording and translated "יש מי שאומר" as "There is someone who says".

[15] Robin Lakoff, "Some Reasons Why There Can't Be Any *Some-Any* Rule", *Language* 45 (1969), PP. 608-15.

[16] See: Laurence H. Horn, "Implicature", in: *The Handbook of Pragmatics* (Laurence K. Horn and Gregory Ward, eds.), Malden 2004, pp. 8-12; Jacob L. Mey, *Pragmatics: An Introduction*, Oxford: Blackwell Publishers 1993, pp. 102-103.

[17] Stephen C. Levinson, *Pragmatics*, Cambridge: Cambridge University Press 1983, pp. 132-146

[18] Michael Israel, "The Pragmatics of Polarity", in: *The Handbook of Pragmatics* (Laurence K. Horn and Gregory Ward, eds.), Malden 2004, p. 716. See also ibid, p. 703

[19] In commutativity I understand a situation where replacing the statements on both sides of the connective will not change their value. If we are dealing with logical-semantic commutativity we are referring to their truth value; if we are talking about pragmatic commutativity, then we are referring to their pragmatic value. The term 'symmetry' often appears in scholarly literature to denote this, but it seems that its meaning is generally broader than the meaning that I wish to attach to commutativity.

[20] For example: Diane Blakemore, *Semantic Constraints on Relevance*, Oxford: Basil Blackwell, 1987, p. 113-118; Kent Bach, "Pragmatics and the Philosophy of Language", in:

The Handbook of Pragmatics (Laurence K. Horn and Gregory Ward, eds.), Malden 2004, p. 480.

[21] Irving M. Copi, *Introduction to Logic*, New York and London: Macmillan, 1971, p. 249 (chapter 8.2); Mey (supra, n. [16]), p. 105.

[22] Diane Blakemore, "Denial and Contrast: A Relevance-Theoretic Analysis of But", *Linguistics and Philosophy* 12 (1989), pp. 28-35.

[23] Gottlob Frege, "Begriffscgrift, Selections", in: Michael Beany (ed.), The Frege Reader, Ofxord: Blackwell 1997, p. 63; Robin Lakoff, "If's And's and Buts about Conjunction", in: Barbara Hall Partee (ed.), *Studies in Linguistic Semantics*, New York: Holt, Rinehart and Winston, 1971, p. 131-149; Blakemore, Ibid, pp. 25-28.

[24] Lakoff, ibid, p. 148. For an overview of different studies of 'but' in research, see Bruce Fraser, "Contrastive Discourse Markers in English", in: *Discourse Markers: Descriptions and Theory* (A.H. Jücker and Y. Ziv, eds.), Amsterdam and Philadelphia 1998, p.309.

[25] Laurence R. Horn, "I Love Me Some Datives: Expressive Meaning, Free Datives and F-Implicature", in: Expressives and Beyond, ed. D. Gutzmann and H.-M. Gärtner. Leiden: Brill, (forthcoming; Internet access, November 2013: http://ling.yale.edu/sites /default/files/files/horn/Horn2013_DativesPaper.pdf) , pp. 148-149.

[26] Christian Chiarcos, Berry Claus and Michael Grabski, "Introduction: Salience in Linguistics and Beyond", in: Christian Chiarcos, Berry Claus and Michael Grabski (eds.), *Salience: Multidisciplinary Perspectives on its Function in Discourse*, New York: De Gruyter 2011, pp. 1-30; James Joseph Errington, *Structure and style in Javanese: A Semiotic View of Linguistic Etiquette*, Philadlephia: University of Pennsylvania Press, 1988, pp. 149-151 ; Jef Verschueren, *Understanding Pragmatics*, London: Arnold Press 199, pp. 173-175.

[27] Marcelo Dascal and Tamar Katriel, "Between Semantics and Pragmatics: The Two Types of 'But'–Hebrew 'Aval' and 'Ela'", *Theoretical Linguistics* 4:3 (1977), pp. 148. I built the main argument of my article (n. [9]) on this insight.

[28] Diane Blakemore, *Relevance and Linguistic Meaning: The Semantics and Pragmatics of Discourse Markers*, Cambridge: Cambridge University Press, 2002, pp. 99-100; Tuen A. Van Dijk, "Pragmatic Connectives", *Journal of Pragmatics* 3 (1979), p. 450. Blakemore brings additional examples of uses of the word 'but' without actually using the word 'but' itself (Blakemore, n. [20],) p.128).

[29] The Hebrew original (punctuation added)–*Yad Malachi* (supra, n. [1]), pp. 182d-183a:

כלל י': כשכותב מוהריק"א בש"ע דעת איזה פוסק ואח"כ כותב 'וחלקו עליו', נראה שכוונתו לומר דמאחר שחלקו עליו אין הלכה כמותו דאל"כ היה לו לומר 'ויש מי שאומר' כדרכו בכל המקומות שמביא ב' הסברות. כנה"ג חשן משפט סי' קע"ה הגהות הב"י אות כ"ח. א חוות יאיר סס"י קי"ט כתב בשם רמ"ע דכשכותב 'ויש חולקים'– מיעוטא נינהו ולא ס"ל כוותייהו, ע"ש. ואמת הדבר דמדברי הסמ"ע רס"י צ"ו וכן ממ"ש הש בי"ד סי' קמ"ב מוכח בהדיא שדעת מרן הוא דיש לחוש לדעת החולקים. ועיין גנת ורדים ח"מ כלל א' סי' ב' ושם כלל ג' סי' כ"ט.

[30] See my article above (n. [3]).

[31] The Hebrew original (punctuation added) - *Yad Malachi* (supra, n. [1]), p. 183a-b:

כלל יב: כשפוסק דין בש"ע בלשון 'יש מי שאומר' נראה שהוא הדין שאינו נזכר בשאר פוסקים ואין שום חולק בו. סמ"ע בח"מ סי' ט"ז ס"ק ח' וכ"כ הכנה"ג שם סי' ל"ה הגהות הטור אות ז' ובכמה דוכתי, ועיין שם סי' ת בטור אות ט"ל. וכ"כ עוד בספר פרי צדיק דף קי"ז ג' ובספר בני יעקב דף כ"ח א' ופ"ז סע"ג וכ"כ עוד שם דף מ"ח א'

וקל"ט ג' גבי 'וי"א' ובפרי תאר על י"ד סי' קי"א ס"ק י"ב ושם בפר"ח סי' קכ"ב ס"ק ט"ו. ואפשר שגם דה רמ"א כן, עיין כנה"ג ח"מ מהדורא בתרא סימן ס"ב הגהות הטור אות ב' וסי' קע"ה שם הגהות הב"י אות ל"ג.

ודע דלאו מילתא פסיקתא היא לכל המקומות אשר נמצא לשון זה, שהרי בח"מ סי' ס"ו סכ"ד ובסימן קכ"ו ס"ה כתוב בלשון 'יש מי שאומר' ותמה שם הש"ה למה זה כתבו בלשון 'יש מי שאומר' כיון שהוא דין מוכרח מן הש"ס ומן הפוסקים. וכן תמה עוד בי"ד סי' ק"ב ס"ב, יע"ש, שכתב בזה הלשון: 'לא ידעתי למה כתב המחב'[ר] דין זה ב"יש מי שאומר", שהרי הרשב"א והטור סוברים כן ואין חולק עליהם' וכו'. ע"כ. ועע"ש סי' ט"ל ס"ק ז' ופ"ג ס"ק כ"ז וקכ"ד ס"ק י' ושכ"ה ס"ק ה'. מתו דבריו אתה למד דלא ס"ל ה כללא, מכיון שתמה על מוהריק"א דהיה לו לכתבו סתם, כיון שאין חולק בדבר. דאם איתא דס"ל שכ היא דרכה של תורה, מה זו תמיהא למה כתבו בלשון 'יש מי שאומר'? וכן תמצא עוד בי"ד סי' ל"ח שכתב 'יש מי שאומר' בדין שהרשב"א חולק עליו, יע"ש בפר"ח. וכן במקומות אחרים ימצא המדקדק היטב הפ מזה. ומי לנו גדול ממוהריק"א גופיה שבי"ד סי' קי"ב ס"ח כתב בלשון 'יש מי שאומר' בדין א' שהוא עצמו פסק להפ בס"ב. לכן הנכון אצלי הוא דכוונת הסמ"ע הוא שברוב המקומות יהיה כן, לא שהוא כלל גמור לכל המקומו'[ת].

[32] The Hebrew original (punctuation added)–*Yad Malachi* (supra, n. [1]), p. 183b-c:

כלל יג: כשכותב בש"ע 'יש אומרים ויש אומרים' נקטינן כסברא שניה. כן כתב הכנה"ג בא"ח סי' שי"ח דף מ"ז ג' ובכללי הפוסקים כלל ס"ב, וכ"כ הר"ב אליה רבה על אורח חיים רס"י תרי"ב, וכן נראה בספר נחפה בכסף דף קפ"ו ב', ע"ש, וכן מצאתי בספר בית דוד על א"ח סי' ס"ב וקי"ד ובי"ד דף ק"ה ג' ובגנת ורדים ח"מ כלל ה' סי' י"א. [...]

ומצאתי להר"ב גנת ורדים בחלק ח"מ כלל א' סי' ב' שכתב דכשכותב בש"ע 'י"א וי"א' לא מכרעא מילתא ומאן דעבד כמר עבד ומאן דעבד כמר עבד. וכן מצאתי עוד להר"ב עבודת הגרשוני בסי' מ"ה שכ"כ בשם הרמ"ע וכן נראה מדברי הרב"ח א"ח סי' ז"ה ס"ב.

[33] The Hebrew original (punctuation added)–*Yad Malachi* (supra, n. [1]), p. 183c:

כלל יד: הא די"א וי"א נקטינן כסברא שניה היינו דוק'[א] כשכותב יש מי שאומ'[ר] ויש מי שאומר אבל כשכותב יש מי שאומר ופלו'[ני] אוסר או מתיר–אולי רצה לומר בזה דהסבר'[א] שניה היא יחידאה. כ"כ הר"ב כנ"הג בשיירי שלו סי' ש"ה הגהות הב"י אות ז'.

[34] The Hebrew original (punctuation added)–*Yad Malachi* (supra, n. [1]), p. 183c-184a:

כלל טז: כשכותב בש"ע סברא ראשונה בלשון 'י"א' והשניה בלשון 'יש מי שאומר' משמע שדעתו לפסוק כי"א קמא, שהם רבים, ולא כ'יש מי שאומר', שהיא יחידאה. שו"ת גנת ורדים חלק א"ה כלל ד' סי' ל' בשם מוהר"ר יעקב, והסכים הוא ז"ל לדבריו. ואמת הדבר שהר"ב כנה"ג בח"מ סי' כ"ה בכללי הקים לי אות נ"ב נראה שסובר כן, אבל מצאתי אליו ז"ל שחזר בו בזה בכללי הפוסקים בשיירי שלו אות כ"ז וכתב שדה הפוסקים לומר 'יש מי שאומר' אף על שנים, יע"ש. וכיון שכן, לא תציתו לה כללא.

[35] The Hebrew original (punctuation added)–*Yad Malachi* (supra, n. [1]), p. 184a-d:

כלל יז: כשכותב בש"ע סברא אחת בסתם והסברא האחרת בלשון 'יש אומרים'–דעתו לפסוק כאותה סברא שכתב בסתם. כ"כ הכנ"הג בא"ח סי' שי"ח בהגהות הטור ובכללי הפוסקים כלל ס"ב בשם מהרי"ק ומהר"ש הלוי ומוהרי"ט. ואני אוסיף על השמועה, שכן מצאתי להרמ"ע בתשובותיו סי' צ"ז ולהש"ה ח"מ סי' ס"ו ס"ק ס"א ובי"ד סי' פ"ד ס"ק י"ב וקע"ז ס"ק ל"ח ולהפר"ח בי"ד סי' נ' ס"ק ד' ובסי' קי"ח ס"ק י"א ובסי' קכ"א ס"ק ט"ו ולבית דוד על הטורים בא"ח דף מ"ה ב' וליד אהרן על א"ח רס"י תרל"א ובבתי כהונה דף קכ"ח ד' ובאליה רבה על א"ח סס"י פ"א ובכמה דוכתי. וכ"כ הב"ח בי"ד סי' ק"ץ ס' ל"ד ושם סימן קצ"ח ס' ל"ג ובסי' ר"ה סס"ג ובסוף קונטריס אחרון שם כלל ו' עיין שם בארוכה. וזה מוסכם מכל המחברים, לא ראיתי חולק על זה. [...] ומיהו מצאתי בספר בני יעקב דף רי"ד ג' שכתב דבכמה מקומו'[ת] מצינו למרן בש"ע שהסברא הדחויה כותבת בסתם והסברא העיקרית בשם יש אומרים, ע"ש. וכן ראיתי בזרע אברהם י"ד דף ל"ז ב' שאין לסמו על כלל זה דיש ויש כמה מקומות להפ. ואנן כבר כתבינן דכמעט כל גדולי ישראל הסכימו לסמו עליו.

[36] The dates are estimated according to: Shimon Vanunu, *Entziklopedya leHakhmei Turkiyah [Encyclopedia of Turkish Rabbis]*, Jerusalem 2006, pp. 351-352 (Hebrew). I noted that it was

approximate here, because according to Vanunu, Rabbi Sasson died between the years 1710 and 1714, at only 31 years old.

[37] The dates are according to: Shimon Vanunu, *Arzei HaLevanon [Cedars of Lebanon]*, Jerusalem 2006, pp. 39-40 (Hebrew).

[38] The Hebrew original (punctuation added)–*Yad Malachi* (supra, n. [1]), p. 184d:

[ה]כשכותב בסתם להלכ'[ב] [הרמ"א] 'ויש אומרין' דעתו לומר שחושש לסברת היש אומרין א כשכות'[...] כלל חי: פסוקה סובר כן. כנ"הג ח"מ סימן קפ"ד הגהות הטור אות ג'.