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Do We Have a Basis to Change Halacha to Fit More Modern Values?

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As part of the Hartman Fellowship for Emerging Jewish Thought Leaders, fellows were given a deceptively simple task: write a short persuasive essay or create a persuasive piece of multimedia that grapples with big Jewish ideas. The fellows proved themselves equal to the challenge and responded with an array of remarkable and powerful projects on a vast array of subjects, representing a wide array of political positions. We have highlighted a number of the pieces which showed particular originality or writing and production excellence below.

Do We Have a Basis to Change Halacha to Fit More Modern Values?

One day after class, my secular Israeli friend came up to me and exclaimed, “I figured it out! My grandmother and I discussed it, and we reasoned that you can’t be both an Orthodox Jew and a feminist!”

Honestly, I think she expected me to concede. Maybe she thought I’d give up and say, “You’re right! My religion doesn’t grant women equal rights. I must now choose a side!” If I wasn’t so passionate about those two issues, I probably would have. Instead, I offered an extensive response (one that I had carefully formulated over the years due to questions of the same nature). It consisted of the usual spiel: how, as a woman living in a liberal society, I am well aware of the rights and the basic notion of equality I should be able to demand, but that I’ve decided to give some of them up (the feminist choice!) in order to partake in my religious denomination, Modern Orthodoxy.

Anyone who knows me would utter the words “religious” and “Orthodox” somewhere in the first few sentences when describing me—even my friends in public school. Since transferring—and contrary to popular belief—I think I’ve become even more connected, since my faith wasn’t handed to me. But while strengthening my faith, public school also normalized the feminist thoughts I’d had to conceal in Jewish Day School—and even encouraged them. While I grew immensely in both aspects, a personal divide ensued within me.

What is a (religious, Orthodox) girl to do? How do I, as a woman, participate in a religion that tells its people: ¹האישה עם שיחה תרבה אל (because whoever does, ²גיהנום יורש סופו) and still claim to be feminist?

Modern Orthodoxy is full of concepts that work in the public sphere in certain areas but completely negate each other in others. Its mission is to show that Jews no longer have to choose between tradition or modernity. Rather, they can now get the best of both worlds. But that notion falls apart when we look at the physical separation of men and women in synagogues, or at women’s complete lack of involvement in davening and in religious authority.

When approaching others with these quandaries I encounter a wall—one set by the Rabbis themselves. The Torah gives us a limited understanding of the Jewish lifestyle we live today. Over the years, each generation interpreted the laws of the previous one to fit its own time, but at some point, this malleability stopped. Halacha now remains suspended in time.

What is commonly known as “Halacha” had started to shape into what we are familiar with today after the destruction of the second Beit Hamikdash. The Rabbis predicted the future—one of a crumbling Jewish society. As destruction loomed, they understood that with the

¹ “Don’t engage in too much conversation with women” (Avot 1:5).

² “He is destined to inherit Gehinnom (hell);” this is because, according to the Mishna, conversing with women leads to neglecting the study of Torah.

impending Galut,³ they needed to author a physical, tangible guide to redirect the focus back to the explicit word of the text and to preserve the tradition followed by the Jewish community in Judea at that time.

”המשנה, על רמות הרזולוציה הגבוהות שהיא יוצרת בתחומים שבהם היא עוסקת, מייצגת קפיצת מדרגה של ממש שהתחוללה בבתי המדרש של החכמים” (תולדות ההלכה והופעת ההלכה 3).

The first text that they physically inscribed, which began this shift from a general understanding to the explicit, infallible word (in most cases), was also the Rabbis’ desperate attempt to solidify the Jewish tradition. It was this drive that caused them to think about the long-term, despite a previously established tradition:

”אמר רבי אבא בריה דרבי חייא בר אבא אמר רבי יוחנן : **כותבי הלכות כשורף התורה**, והלמד מהן – אינו נוטל שכר... 'עת לעשות לה' הפרו תורתך' (תהלים קיט, קכו) אמרי **מוטב תיעקר תורה ואל תשתכח תורה מישראל**” (תמורה יד):.

Adapting to the times, the Rabbis did the unthinkable and founded a Halachic dynasty—but this time, instead of an oral one, it was to be written down to serve the goal of maintaining Jewish identity in Galut and teaching future generations. Since then, Halacha has coagulated and taken on a certain stance of infallibility. I believe that this attitude can be attributed to two main factors:

1. The uncertainty regarding what exactly Hashem⁶ wants.
2. Notions that the Rabbis established themselves.

The first factor is the uncertainty surrounding Hashem. We have nothing to rely on, ultimately, other than our own speculations when it comes to the accuracy of Halacha today. Orthodox Jews believe that the word of Halacha is essentially the word of Hashem, and that by sticking to its guidelines we are most likely to get to the Olam Haba.⁷

As we get farther and farther from the generation of the destruction of the Temple in 70 CE, we accept a certain communal understanding that anything we say and think in terms of Halacha grows decidedly less accurate—and gets farther from the Rabbis’ original intentions. Orthodox Jews believe that the Rabbis who wrote Halacha, having lived in a society that was closer in time to a period with a direct contact to Hashem, knew His intentions better than we do today.

³ The Hebrew word for “exile.”

⁴ “The Mishna, on top of the big resolutions it creates in the topics it discusses, signifies a substantial jump that occurred in the Beit Midrash of the Rabbis” (Origins of Halacha and the Appearance of Halacha 3).

⁵ “Rabbi Abba the son of Rabbi Chiya the son of Abba said that Rabbi Yochanan said: **‘those who write the Halachot are equivalent to those who burn the Torah**, and he who studies from them—doesn’t get any reward...’” (Temurah 14b). Other rabbis reply: “It is a time to act for God, violate your teachings’ (Psalms 119:126). **It was said: it is better for the Torah to be uprooted (written down) than to be forgotten from Israel**” (Temurah 14b).

⁶ A Hebrew name of God—literally means, “The Name.”

⁷ A Hebrew name for heaven—literally means, “The World.”

It is because of this that to some Jews, doubting the intentions of the Rabbis or even disobeying them is equivalent to doubting Hashem's wishes and disobeying Him.

Theoretically, we can reason that modern notions can negate the infallibility of the Rabbis, since they did not know the cases and advancements we must rule on today. We could say that it is possible to preserve the principal commandments deeply rooted in the Torah while holding that there are some commandments that shouldn't apply anymore today due to said advancements (like the rights of women) that we should have the power to nullify.⁸

The second factor, rooted in notions established by the Rabbis, is a little more complicated to discredit. The Gemara's most quintessential way of proving that it is following what Hashem wants is found in Bava Metzia, in the story that has come to be called "the Oven of Akhnai." Evidently, the majority group of Rabbis in this Machloket⁹ prove their opinion in coordination with a Pasuk in the Torah:

"לא בשמים היא לאמר מי יעלה לנו השמימה ויקחה לנו וישמענו אותה ונעשנה" (דברים ל: יב).¹⁰

The basic Machloket of the Oven of Akhnai revolves around the details of the laws of purity and impurity,¹¹ but it quickly takes a detour into a more existential divide: do we go by the voice of the majority, or does the heavenly voice have more authority? The Gemara describes a series of back and forth exchanges in which Rabbi Eliezer receives support from his opinion through a series of miracles, culminating with a heavenly voice that declares that despite being the minority opinion, he is correct. It is concluded as such:

אמר להם: אם הלכה כמותי, מן השמים יוכיחו. יצאתה בת קול ואמרה: מה לכם אצל רבי אליעזר, שהלכה כמותו בכל מקום. עמד רבי יהושע על רגליו ואמר, לא בשמים היא! (דברים ל, יב). מאי "לא בשמים היא"? אמר רבי ירמיה: שכבר נתנה תורה מהר סיני, אין אנו משגיחין בבת קול, שכבר כתבת בהר סיני בתורה (שמות כג, ב) "אחרי רבים להטות." (בבא מציעא נט).¹²

⁸ Women are not obligated in many commandments (which, in turn, makes them unable to fulfill the commandment for others) because of the social standards at the time when Halacha was being developed, in which the average woman couldn't read, write, learn Torah, or express her opinion—which is obviously not the case today.

⁹ The Hebrew word for "dispute" - literally means "division."

¹⁰ "It is not in the heavens, that you should say, 'which of us will go up to the heavens and take it for us and impart it to us, that we may observe it?'" (Devarim 30:12).

¹¹ The Rabbis here are arguing whether or not an oven made of distinct pieces of ceramics (bricks) laid vertically in an overlapping fashion with sand in between them (to bind them together) can acquire a state of impurity (since it's one vessel—according to the Rabbis, the majority) or stays pure (since it's considered a broken vessel - according to Rabbi Eliezer, the minority).

¹² He (Rabbi Eliezer) told them, **if the Halacha is like me, the heavens will prove it. A heavenly voice came out and said, 'why are you disputing with Rabbi Eliezer, as the Halacha is like him in every place** (that he disputes).' Rabbi Yehoshua stood up and said, **"it is not in the heavens!"** (Devarim 30:12). **What is 'it is not in**

The Rabbis assert their ownership over the Torah as well as their dominance over the heavenly voice—and proceed to rule like the majority. The Gemara continues on to say that when Rabbi Natan asked Eliyahu the Prophet what Hashem’s reaction to this blunt disregard of a divine authority was, he reported back that Hashem smiled and replied with ¹³בני נצחוני, בני נצחוני—clearly excusing the “disobedient” stance taken on by the Rabbis; once the תורה was handed to us, heaven has no business with it anymore.

As mentioned before, it is hard to decide whether or not we actually believe the moral of this story. It seems as though the Rabbis invented proof for their infallibility by authoring this story into the Gemara, but as Orthodox Jews, that infallibility is ultimately part of our core beliefs.

Another step in the Rabbis’ attempt towards infallibility was securing a divine status for their sources. It appears that they derive this using the one of the thirteen Talmud hermeneutic rules of Rabbi Ishmael, called ¹⁴דבר הלמד מענינו.

The first Pasukim of Parshat Behar¹⁵ highlight the fact that God told Moses the laws of Shmita on Mount Sinai. The Sifra rushes to bridge this gap in logic, hereby establishing one of the most prominent religious concepts—one that currently keeps Orthodoxy in a headlock and prevents it from modernizing:

”מה עניין שמיטה אצל הר סיני? והלא כל המצוות נאמרו מסיני! אלא, מה שמיטה נאמרו כללותיה ודקדוקיה מסיני, אף כולם נאמרו כללותיהם ודקדוקיהם מסיני” (ספרא בהר פרשה ¹⁶א’).

What are these general and minute inferences that the Sifra is talking about? But of course — they refer to the inferences of the oral Torah! The Mishna is now no longer simply a rabbinical text, but a divine one that we’re unable to refute if we want to stay true to the values of Orthodoxy.

If everything we’ve said up until now is true, if the Halachot really have a sort of divine nature, then how can we bring about change when it comes to Halachot that clash with modern feminist values?

the heavens?’ Rabbi Yirmeya said, ‘since the Torah had already been given on Mount Sinai, we don’t regard any heavenly voices — as you already wrote on Mount Sinai in the Torah, “incline after the majority” (Bava Metzria 59b).

¹³ “My children have triumphed over me, my children have triumphed over me” (Bava Metzria 59b).

¹⁴ “A matter learned from its context.” According to Rabbi Ishmael (as mentioned in the opening of the Sifra - a book of Halakhic Midrashim on Vayikra) there are thirteen ways to logically derive things from the words, placement, or context of the text, which permits us to compose new Halachot.

¹⁵ One of the 55 portions that the Torah is split into. Found in the Book of Vayikra (Leviticus).

¹⁶ “What does the matter of Shmita have to do with Mount Sinai? Weren’t all the commandments given on Sinai? Rather, just like in the matter of Shmita its general and minute inferences were given on Sinai, **so, too, for all of them, their general and minute inferences were given on Sinai**” (Sifra Behar Parasha 1).

Other than establishing the Rabbis' infallibility, the story of "the oven of Akhnai" also reinforces the rabbinical tradition of going by the majority, which is found in the book of Shemot under synonymous wording:

¹⁷"לא תהיה אחרי רבים לרעות ולא תענה על רב לנטות אחרי רבים להטות" (שמות כג:ב).

This notion is extremely important in the discussion of newer Halachic rulings and the way the Sanhedrin¹⁸ and the smaller courts operated in the time when the Halachic dynasty was still intact. Diving deeper into the Halachot of the courts could help us determine whether or not we can revoke their rulings in Halachic matters.

As per the Rabbinic tradition, we return to a pillar concept: going after the majority. In a place with many courts (the Sanhedrin only served as the supreme one, but many local courts were established by them as well), there arose a need to establish a clear hierarchy, since the sentencing of such courts had real, concrete implications on people's lives.

The Mishna in Eduyot addresses a previous ambiguity—why we mention the individual opinion in addition to the majority one—and introduces what might be the key to solving our essential question:

"ולמה מזכירין דברי היחיד בין המרובין, הואיל ואין הלכה אלא כדברי המרובין? שאם יראה בית דין את דברי היחיד ויסמוך עליו, שאין בית דין יכול לבטל דברי בית דין חברו עד שיהיה גדול ממנו בחכמה ובמנין. היה גדול ממנו בחכמה אבל לא במנין, במנין אבל לא בחכמה, אינו יכול לבטל דבריו, עד שיהיה גדול ממנו בחכמה ובמנין" (עדויות א:ה).

This Mishna establishes the standard for overturning Halachot established previously by different courts.

In Judaism, the word "חוק" refers to a law that we don't understand the meaning of. However, this law is most relevant when talking about big, conceptual Mitzvot; we might not know why we keep Shabbat or eat food that is kosher, but we still have to do these things because we believe Hashem said so.

Nevertheless, when considering all the minute laws enacted by the Rabbis over the years, there are some whose reasoning might've made sense back in their time—such as observing an extra day during a holiday due to potential inaccuracies when calculating the new month—but are no

¹⁷ "You shall not side with the majority for the bad, and you should not falsely testify against the case of the majority; **you shall rule by the majority**" (Shemot 23:2).

¹⁸ The supreme court of the Jewish people in Jerusalem before the destruction of the second Beit Hamikdash.

¹⁹ "Why do we mention the minority opinion along with the majority, when clearly the Halacha goes by the majority? This is in a case where a court sees the minority opinion and rules like it. (We want to avoid this situation because) **a court cannot cancel another court's ruling until it is bigger than it in wisdom and number**. If it was bigger in wisdom but not in number, in number but not in wisdom, it cannot cancel the other's ruling, **until it will rise above it in wisdom and number**" (Eduyot 1:5).

longer vital in ours. And yet, the Rambam steps in to distinguish any hope we may have regarding the nullification of such laws:

”אפילו בטל הטעם שבגללו גזרו הראשונים או התקינו, אין האחרונים יכולין לבטל עד שיהו גדולים מהם.” (ממרים ב: ב).²⁰

In today’s world, no Rabbi would ever step forward and claim himself to be as great as the Rabbis of the Sanhedrin, let alone 71.²¹ The reality is that we are at a much lower level of Torah study today than 2000 years ago, struggling to uphold the same Jewish lifestyle as back then despite modern distractions. The Rambam comes through yet again and provides another possible answer to our dilemma:

”גזרו ודימו שפשטה בכל ישראל ועמד הדבר כן שנים רבות ולאחר זמן מרובה עמד בית דין אחר ובדק בכל ישראל וראה שאין אותה הגזרה פושטת בכל ישראל יש לו רשות לבטל ואפילו היה פחות מבית דין הראשון בחכמה ובמנין” (ממרים ב: ז).²²

The Rambam seems to uncover the true intention of the original lawmakers: they weren’t cruel people who wanted to keep the future generations tied to the past. Rather, they were aware of the fact that things might change and that the Jewish religion will need to adapt if it wants to keep its following.

This statement accredits power to the public. If a Halacha is so outdated and dysfunctional that the majority don’t follow it at all, there is no sense in keeping it and making those who breach it sin. This is an example of a circumstance in which we favor the Jewish people as a whole over what might be ancient, somewhat irrelevant notions of Halacha.

For instance, I would venture to say that the majority of Jews (myself included) don’t exactly obey the traditional rules of tzniut—covering one’s elbows and knees—all the time.²³ Because the societal perspective and standard changed as a whole regarding this issue, the religion also, in turn, has made its guidelines more flexible. Ultimately, and true to the original halachic concept, it’s the majority—the public—who determines the standard of the religion.

Lastly, a more concrete answer, one that—spoiler—has already been taken advantage of, can also be found in the Rambam, which deals with a Machloket in a time *without* a Sanhedrin:

²⁰ “Even if the reason for which the first (court) ruled on an issue is not relevant anymore, the later courts can’t cancel it until they will be greater” (Mishneh Torah, Rebels, 2:2).

²¹ 71 was the number of judges that sat on the Sanhedrin in Jerusalem. The standard one had to achieve to qualify to be a judge is very high (they had to be smart, with a great lineage, and know 70 languages, among others).

²² “They ruled and saw that it spread throughout Israel and the ruling stood (was followed) for many years and after a long time, a different court stood and checked throughout the land and saw that the same ruling was not as widespread (as followed) throughout Israel, (the latter court) **has permission to cancel the ruling even if it was less from the first court in wisdom and number**” (Mishneh Torah Rebels 2:7).

²³ “Tzniut” literally means modesty, but when the law was made, the standard prevalent at the time was to cover one’s knees and elbows.

שני חכמים או שני בתי דינים שנחלקו **שלא בזמן הסנהדרין**...אחד מטהר ואחד מטמא, אחד " אוסר ואחד מתיר, אם אינך יודע להיכן הדין נוטה, **בשל תורה - הלך אחר המחמיר, בשל סופרים - הלך אחר המיקל.**" (ממרים א:ה).

When we have differing opinions and are able to prove each side, we are able to negate a previous ruling— by ruling more leniently when it comes to a Rabbis' law. As times progress, Rabbis find proofs in the past that apply to the more liberal opinions of today. This opens a potential window of opportunity regarding the old, limiting Halachot.

Through this clause, another notion has arisen that has already permitted Rabbis to change Halacha for the more lenient opinion. Initially referring to the phrasing of a Machloket in a way that centralizes and exposes the more lenient ruling over the stricter one, the concept ²⁵"דהיתרא עדיף כוחא" has been adapted by many modern Rabbis, such as Rabbi Moshe Feinstein and Rav Ovadia Tosef, and used in current issues. Perhaps, if we can bring forth the issue of female inclusion and prove that it is an unnecessary strictness that does not apply anymore, we might be able to change the ancient guidelines.

Nowhere in the Torah does it say that women can't go up to the Torah, participate and count in a Minyan or a Zimun, or even wear Tefillin. These restrictions were established and solidified by the Rabbis when they considered the state and position of women in the society they lived in— and, if times change and the old reality no longer applies, then these restrictions can be negated and changed.

Ultimately, I believe that feminism is about the ability to make a conscious, informed choice— one that takes into account all the possibilities. As of right now, the world can account for both my standard of feminism, OR my standard of Orthodoxy. Granted, the lines can be blurred— communities can fluctuate in observance and in receptivity—but what matters is where your own priorities lie and what choices you make when acting on them.

As someone who identifies as and strives to be an Orthodox Jew, I am repeatedly committing myself to a community that upholds a certain standard of Halacha—one that might clash with other modern ideals I have. I have a right to leave my community and join a more liberal one, but right now, that change will most likely be accompanied by a decrease in the community's level of the observance of and its adherence to Halacha—something I am not willing to compromise on.

²⁴ "Two sages or two courts that disputed **during a time with no Sanhedrin** ...if one rules as "pure" and the other as "impure," or if one prohibits and the other allows, if you don't know which way to rule, **when it comes to a Torah law - go with the stricter opinion; when it comes to a Rabbis' law - go after the more lenient**" (Mishneh Torah Rebels 1:5).

²⁵ "The might (strength) of the lenient opinion is stronger."

It's naive to think that we can find the perfect environment suited for ALL our ideals—especially if we're trying to preserve what is left from an ancient, glorious Jewish tradition in the 21st century, but until then, we can try to work with what we've got.

For Orthodox feminists like me, an array of options have popped up throughout the Modern Orthodox world both, in America and in Israel. From women's tefillah groups to Shira Chadasha Minyans²⁶ and women undergoing Smicha²⁷ at Yeshivat Maharat, even the Orthodox world is starting to consider more possibilities for greater female religious inclusion. For a long time, the Jewish world has been catering to a large assortment of people with widely different beliefs. Judaism is not binary; there is no single definition of a Jew. Modern Orthodoxy, too, has begun to contemplate some possibilities that will make it a more open and welcoming denomination of Judaism.

²⁶ Inclusive minyanim that incorporate women into roles in the davening that do not require a minyan.

²⁷ The process (involving several years of study and tests) that earns one the title of Rabbi/Rabbah/Rabbanit.

Bibliography

תולדות ההלכה והופעת 'ההלכה 3

תמורה יד :

דברים ל:יב

בבא מציעא נט :

ספרא בהר פרשה א'

שמות כג:ב

עדויות א:ה

ממרים ב:ב

ממרים ב:ז

ממרים א:ה