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Authority and Criteria in Liberal Halakhah

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Authority and Criteria in Liberal *Halakhah*

Moshe Zemer

I. The Authority of Liberal *Halakhah*

In order to establish criteria for *pesikah*, we must first clarify our view of the authority of the *halakhah*. This question of *halakhic* authority is perhaps the major source of contention between Progressive and Orthodox decisors. The Orthodox view may well be represented by the Chief Rabbinate of Israel in its 1984 brief to the Supreme Court of Israel in the case of the Israel Movement for Progressive Judaism against the Rabbinate for the right to officiate at marriages and to register them.

The Chief Rabbinic Council contended that Jewish Law derives its divine authority from the absolute dominion of the Mosaic Law given in Sinai. According to their brief, a *halakhic* Jew is one "who considers himself bound by the Torah (*kavul alyedei hatorah* - literally 'chained' by the Torah) that was given to Moses in Sinai, and sees himself chained by the words of the sages of the generations and the decisors of *halakhah* during the entirety of Jewish history..."¹ In this view, any non-Orthodox Jew who does not see himself so chained by the Torah is disqualified as a *halakhic* Jew.

In reply, I filed, on behalf of our movement, a *halakhic* brief with the Supreme Court which noted that the Chief Rabbinate's position is based on a literalist interpretation of Biblical texts and rabbinical sources. These gentlemen cling to the doctrine of the early Mishnaic period which propounds that Scripture "teaches that the Torah, its laws and details and interpretations were all given through Moses on Sinai."²

Since everything was revealed on the Mount, the Talmudic

conclusion seems inevitable that "no prophet is permitted to innovate in any matter from this time forth."³ If this is true of the prophets, then *kal vahomer* it certainly applies to the rabbis, because "the pronouncement that a veteran student will make in the future before his teacher has already been given to Moses on Sinai."⁴

It is this fundamentalist position that leads most Orthodox thinkers to reject the historical and scientific view of the developmental character of Scripture and rabbinic literature held by Progressive Jewish scholars.

Among the innumerable sources which support the developmental approach, we might refer to the famous Talmudic *aggadah* of Moses visiting the Academy of Rabbi Akiba, where he fails to understand the second century Tanna's interpretations of Scripture. Only when a student asks Akiba for the source of his teaching and Akiba responds: *halakhah lemosheh misinai*, does Moses recognize in Akiba's *midrash halakhah* a continuation of his own teaching.⁵

Louis Jacobs interprets this passage as meaning that "the Torah that Akiba was teaching was so different from the Torah given to Moses-- because the social, economic, political and religious conditions were so different in Akiba's day that, at first, Moses could not recognize his Torah in the Torah taught by Akiba. But he was reassured when he realized that Akiba's Torah was implicit in his Torah, was, indeed an attempt to make his Torah relevant to the spiritual needs of Jews in the age of Akiba."⁶

By analyzing this and many other passages, liberal scholars have reached the conclusion "that long before the rise of modern criticism some of the Jewish teachers had a conception of revelation which leaves room for the idea of human cooperation with the divine."^{6a} How indeed is the divine will revealed in *halakhah*?

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Jacobs propounds that "revelation must be understood as a far more complicated and complex process of divine-human encounter and interaction and quite differently from the idea of direct divine communication of infallible laws and propositions, upon which the traditional theory of the *halakhah* depends."⁷

A progressive *halakhah* must therefore be founded on such a reinterpretation of revelation. Of course, this theological-*halakhic* position is unacceptable to the Orthodox rabbinate, because it has far reaching ramifications for the authority of the traditional *halakhah*. As Jacobs contends, for the non-Orthodox Jew, "the ultimate authority for determining which observances are binding upon the faithful Jew is the historical experience of the people of Israel, since, historically perceived, this is ultimately the sanction of the *halakhah* itself."⁸

We must therefore conclude that a serious Progressive Jew accepts or rejects the content of tradition, not out of convenience or caprice, but rather from a liberal theological *Weltanschauung* on revelation, history and *halakhah*.

If this be the source of Liberal Jewish authority, then what are the criteria and principles that enable the non-Orthodox Jew to choose *mitzvot* and *halakhot* that are valid and meaningful in the framework of Progressive *halakhah*?

II. Principles and Criteria of Liberal Halakhah

Our theological position on the authority of the *halakhah* together with sensitivity to the ethical, to inner spirituality and to social justice are determining factors in the application of a particular *mitzvah* to a specific case. Some of the foremost thinkers of this century have presented us with criteria of the observance of *mitzvot* by the non-fundamentalist Jew which are essential to the

liberal process of rendering *halakhic* decisions. Most Orthodox decisors would probably reject these criteria, because the very process of choosing commandments runs contrary to the traditional view of the absolute authority of the divinely derived and sanctioned *halakhah*.

The following principles and criteria for determining the applicable *halakhic* stance for a Progressive Jew were gleaned from a number of Jewish thinkers of this century. Some of them are identified as Progressive scholars, others as Orthodox or Conservative. Their approach to *halakhah* rather than movement affiliation determines their inclusion in this paper. Here is a brief outline of precepts and criteria for *pesikah*, (rendering decisions) and selecting viable *mitzvot* to be observed within a liberal *halakhic* framework:

1. The *halakhah* is a developmental and changing phenomenon

In the brief that I submitted to the Israel Supreme Court to counter the Chief Rabbinate's view of the immutability of Jewish law, I contended that "The *halakhah* has continually developed and changed in confronting changing reality in every generation." The history of Jewish law from the Biblical period to this day is replete with changes such as substituting study and prayer for sacrifices, to upgrading the status of women (no *kidushin* or divorce without feminine consent) to allowing conversion for the sake of marriage.⁹

These are but a few of a myriad developments within the *halakhah*, which, according to Robert Gordis, result from outward influences and inner ethical insights. Gordis points out that these two factors have contributed to growth and change in the *halakhah*: "The first was the necessity to respond to new external conditions--social, economic, political or cultural that posed a challenge or even a threat to accepted religious and ethical values. The second was the need to give recognition to new ethical insights and attitudes

and to embody them in the life of the people..."¹⁰ This concept of change and development may serve as a guideline for the modern Jew in judging those *mitzvot* that developed with the changing times and are therefore relevant to our day. This criterion would put aside commandments such as *halitzah* which might have had some relevancy in the distant past, but have no spiritual meaning, even if reinterpreted, for the modern Jew.

2. The *halakhah* is pluralistic

A corollary of the developmental aspect of the *halakhah* is its pluralist character. Historical research proves that Jewish law was diverse in character and certainly far from monolithic. In the controversy between Beit Hillel and Beit Shammai on forbidden marriages, the two Houses did not refrain from marrying one another, even though such marriages might be forbidden according to the *halakhic* decision of either.¹¹ Yitzhak Gilat, professor of Talmud at Bar Ilan University, points out that in spite of the great differences between the Houses, they came to the recognition that "both are the words of the living God,"¹² and that everyone could act according to either view: "Whoever wishes to conduct himself according to Beit Shammai- may do so, and according to Beit Hillel- may do so."¹³

This freedom of *halakhic* ruling was accepted in practice during the time of the Second Temple; Professor Gilat claims: "Every sage was permitted to render decisions in his town and home according to his own tradition and in consonance with his judgement arising from deliberations in the rabbinic sources." We may therefore conclude that we have here a firmly based principle for *pesikah*: Since pluralism has been an intrinsic characteristic of Jewish religious life, one can legitimately choose the practices of any accepted Jewish religious tradition, including those of the non-Orthodoxy.

3. The ethical is the priority of *halakhah*

Eliezer Berkovits proclaims: "The rabbis in the Talmud were guided by the insight: God forbid that there should be anything in the application of the Torah to the actual life situation that is contrary to the principles of ethics."¹⁴ If a ruling is *halakhic*, it must be ethical. If it is unethical, it cannot be *halakhic*.

Seymour Siegel applies this principle of priority to the practice of selecting, revising or abolishing particular laws. He proclaims: "The ethical values of our tradition should have the power to judge the particulars of Jewish law. If any law in our tradition does not fulfill our ethical values, then the law should be abolished or revised... Thus, if because of changing conditions, the specific laws no longer express the ethical values which Tradition teaches,... we have the responsibility to revise the laws, rather than allow them to fall into desuetude."¹⁵ Siegel would apply this principle to matters involving *mamzerut*, the marriage of a *kohen* to a divorcee or convert, the refusal to give a *get* and similar cases.

We should likewise apply this ethical principle to issues of social justice in our respective countries. For example, there should be a liberal *halakhic* approach to the moral issues of the *Intifada* and demolishing the family homes of suspected terrorists.¹⁶

4. Holiness is the reason for the commandments

Julius Guttman deals with general rationale of the *mitzvah* (*taam hamitzvah*) rather than with the reason for each individual commandment. He states that *kedushah* (holiness) is the reason for the commandment character of Judaism. The Torah bears witness to the general purpose of the *mitzvah*: "That you may remember and do all my commandments and be holy to your God...The origin of the commandments is in the idea of *kedushah*."¹⁷

The *mitzvah* is not an end unto itself but a means by which one may be sanctified and drawn closer to God. The possibility of attaining *kedushah* is one of the criteria of the observance of a commandment. *Mitzvot* such as prayer, study of Torah, *gemilut hasadim* and others should lead to sanctification. The litmus test of holiness should determine the value of every religious act for the daily life of the Jew of our generation.

5. Internalizing the *mitzvah*

How does a particular *mitzvah* become part and parcel of one's inner being? Franz Rosenzweig suggested a progression from "Ich muss" to "Ich kann" - from "I am obliged" to observe because of an outer demand to "I am able" to fulfill the *mitzvah* because of an inner calling. What I am not yet able to accept may, in time, become acceptable, and therefore a commandment for me. The criterion of the observance of a commandment is whether I may internalize and observe this *mitzvah bekavanah*, with inner devotion and intent. This requires a constant effort of selecting and trying *mitzvot*. This is undoubtedly what Rosenzweig meant in his reported reply to the query, Do you put on *tefilin*? When he responded: "Noch nicht" - Not yet. In the words of Franz Rosenzweig: "...the voice of commandment causes the spark to leap from 'I must' to 'I can.' The Law is built on such commandments and only on them."¹⁸

6. The critical approach to the *halakhah*

John Rayner clearly expounded the following infrequently expressed principle of Liberal *halakhah*: "There are whole vast areas of *halakhah*...predicated on assumptions unacceptable to us, for instance, regarding the inferior status of women, the hereditary privileges of the priesthood, the desirability of sacrificial worship, the importance of ritual purity, the defiling effect of menstruation and the legitimacy in principle of capital and corporal punishment...

We cannot accord to the classical literary sources of the *halakhah* more than a presumptive authority, and therefore what they legislate needs to be weighed against the individual conscience, the needs and consensus of the community, and still other considerations including historical and scientific knowledge as relevant."¹⁹ These are among the factors and considerations which a liberal Jew should critically weigh when deciding whether to observe a particular *mitzvah*.

7. Responsibility to the Covenant Community

Jakob J. Petuchowski claims that "Everything...which contributes to the survival and to the unity of the Covenant Community of Israel must be regarded as a religious commandment. Everything, on the other hand, which hurts the Covenant must be avoided. Bearing this perspective in mind, the Reform Jew will observe many a *mitzvah* toward which he might feel no personal obligation" because it is not "a matter of the individual only (but) also of the community as a whole."^{19a}

According to this principle, our *pesikah* must take into consideration more than our own synagogue, community and movement. We must be aware of the ramifications of our *halakhic* decisions on *kelal yisrael*. When dealing with issues relating to marriage and personal status, to the physical and spiritual welfare of Jews outside of our community and to the relationship between Jews of the diaspora and Israel, we must be mindful of our being one people. In spite of diversification and severe conflict, we are all of us bound by that divinely contractual *berit* which our ancestors and we made with the God of Israel.

There is, of course, the possibility that some of these seven criteria may be mutually contradictory when applied to a specific situation. For example, this last criterion of responsibility to *kelal yisrael* may conflict with the principle of pluralism discussed above.

We shall have to rely on the wisdom and judgement of rabbinic scholars to determine which criteria, if any, are valid in each individual case. *Poskim* must exercise their judicial discretion wherever appropriate in accordance with the rabbinic dictum: "Everything depends on the judgement of rabbinic decisors."²⁰

III. Progressive Principles in the Traditional *Halakhah*

The need for a framework of extra-halakic criteria to allow change has been questioned and even denied. Some scholars claim that all we have to do is to research the traditional halakhah where we can find a myriad of creative and even liberal principles which could enable progress in every generation. The following are but a few of the traditionally tested means of coping with changing reality.

When the sages of Alexandria decided to assign the status of *mamzerim* to children born of betrothed women (without a get) to other men, Hillel the Elder found a means of purifying these young people. He used the legal fiction of *doresh leshon hedyot*, giving a forced interpretation of a sentence in their *ketubot* (marriage contracts) claiming that these woman were not betrothed at all, so therefore their offspring were not *mamzerim*.²¹

In this context, almost every scholar makes note of Hillel's well known *prozbol*²² and of the precept: *et laasot ladonai heferu toratekha*, which may allow the abrogation of a part of the Torah to save the whole.²³ We should emphasize an often neglected principle allowing creativity found in the Beth Hillel "Decree for the Repentant" which enabled a repentant thief to make compensation for a stolen house column that he built into his own home rather than fulfilling the Scriptural requirement of destroying his own dwelling and returning the original stolen object, as demanded by Beth Shammai.²⁴

The universalist precept, *mipnei darkhei shalom* (for the sake of peace), was construed to include the obligation of visiting the sick of the gentiles, burying their dead and comforting their mourners.²⁵

Another example of progress through creative *halakhic* action is R. Yehudah Hanassi's downgrading the sabbatical year from a Scriptural to a rabbinic commandment (*midoraita lederabanan*) which enabled agricultural work during the seventh year and thereby saved many from starvation.²⁶

Proceeding to the Middle Ages, we might learn from Rabbi Moses Isserles (Ramah) who applied the Talmudic humanitarian principles of *kevod habriot* (human dignity)²⁷ and *shaat hadehak* (the necessity to act in an emergency situation)²⁸ to the problem of an orphan bride who was ready to enter the *hupah* in his Krakow synagogue on a Friday afternoon four hundred years ago. The families could not agree on the *nedunyah* (dowry) until after sunset and well into the Sabbath. Isserles was afraid that if he waited until after the Shabbat the *shiddukh* would irreparably fall apart and the orphaned bride would forever be shamed, so he married the couple in his synagogue on the Shabbat. The Rama explained that his action was prompted by this *shaat hadehak* - irreversible emergency situation - and the danger of injury to the human dignity of the unfortunate young lady.²⁹

Many orthodox and non-orthodox scholars have searched rabbinic literature for similar principles to show the viable and vital character of the *halakhah* which enables it to adjust to changing times and conditions.³⁰ Many poskim in the distant past and even in recent generations were able to resolve difficult problems by exercising the flexibility and dynamism of the *halakhah*.

Indeed, this was the situation in the past. Notwithstanding this *halakhic* flexibility, our generation is still confronted with the

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tragically unresolved problems of conversions made difficult or virtually impossible in many countries as well as the stumbling blocks of *halizah*, *mamzerim*, and other *menuai hitun* (unattached young Jews who are forbidden to marry their beloved) - all in the name of the halakhah! We have witnessed the obscurantism of some *poskim* in positions of political power who coerce non-Orthodox Jews in matters of personal status. They often seem to be acting in accordance with the view of the Hatam Sofer that "anything new is forbidden in the Torah" and "the old and antiquated is always better."³¹ Many have turned away from religious Judaism and from the synagogue believing that these phenomena represent the exclusive approach of the *halakhah*.

Therefore, it is incumbent upon us to make explicit the implicit principles of morality and humanism in Jewish law and apply them to the painful problems and tragic issues of our day and search for appropriate halakhic solutions. This is what I have attempted to do in exploring the above seven criteria of *pesikah*, which are but a few of many such essential principles.

Do these criteria constitute a radical departure from the spirit of our millennial tradition? On the contrary, I believe that these principles may indeed be the fulfillment of a significant trend in the philosophical and *halakhic* thought of our sages.

Joseph Albo, the great 15th century philosopher, asks in his *Sefer Haikarim*, why God did not spell out in his Torah the specific details of the *mitzvot* for all generations and in all circumstances. Should not the omniscient Creator have let us know in advance the solutions of all our *halakhic* problems from the religious status of women and men to medical transplants?

Albo proclaims: "On Sinai, Moses was given orally certain

general principles, only briefly alluded to in the Torah, by means of which the sages of each and every generation may work out the updated particulars applicable to their day.³²

This may well serve as a challenge to the sages of our day who are called to apply the creative principles of *halakhah* to assuaging the pain of this troubled generation.³³

1. Brief to the Supreme Court of Israel, High Court of Justice Case No. 47/82, 5784, Israel Movement for Progressive Judaism vs. Chief Rabbinate of Israel, *Chief Rabbinate Brief* p. 3, par. 8 and p. 5.
2. *Sifra* Behukotai, Leviticus 8:12.
3. Shabbat 104a
4. *J. Peah* 2:6
5. Menahot 29b
6. "Jewish Law: A Synthesis", *Conservative Judaism and Jewish Law*, ed. Seymour Siegel, New York, 1979, pp. 118-120.
7. Louis Jacobs, *A Tree of Life*, Oxford, 1984, pp. 239, 242.
8. *Ibid.*, p. 245
9. Brief on behalf of IMPJ in above mentioned case (footnote no. 1) and my article, "The *Halakhah* in the View of Progressive Judaism," (Hebrew) *Shalhevet*, September, 1987 No. 34, pp. 4ff.
10. "A Dynamic *Halakhah*", *Judaism*, Spring, 1967, pp. 267ff.

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11. *Tosefta Yevamot* 1:11 and parallels.
12. Eruvin 13b.
13. Ibid. 10b; Yitzhak D. Gilat, "The Formation of the *Halakhah*," *Hauma* 7:4, Iyyar, 5729, p. 455.
14. *Not in Heaven, The Nature and Function of Halakhah*, New York, 1983, p. 19.
15. "Ethics and the *Halakhah*," *Conservative Judaism and Jewish Law*, (note 6 above), pp. 125-126.
16. Cf. my articles "The *Halakhic* View of Destroying Homes" (Hebrew), *Haaretz*, 23 April, 1985; "Demolishing Homes in the West Bank and the *Halakhah*" in *Journal of Reform Judaism*, Spring 1986; "Halakhah and Occupation," *Jerusalem Post*, 20 May, 1988; and the chapter on "The Attitude to the Gentile Minority" in my forthcoming Hebrew book *The Sane Halakhah*.
17. *Dat Umada*, Jerusalem, 1955, pp. 272-275.
18. "The Builders," in *On Jewish Learning*, New York, 1965, pp. 72-92.
19. From an unpublished lecture delivered at the Leo Baeck College, London, 24 June, 1985.
- 19a. *Heirs of the Pharisees*, New York, 1970, pp. 177-179.
20. Joseph Karo, *Beit Yosef Yoreh Deah*. 268 end, based on *Tosafot* to *Yevamot* 24b. This is related to the Talmudic principle "Ein lo la-dayyan ella mah she-einav ro'ot (The judge must rely only on his own judgement) in *Sanhedrin* 6b Cf. Ben Zion Uziel, *Mishpatei Uziel*, Tel Aviv, 1935, part 1, *Yoreh Deah*, No. 14; Joel Roth, *The*

Halakhic Process, New York, 1986, pp. 83ff and Mark Washofsky's penetrating analysis in the following chapter.

21. Baba Matzia 104a, cf. *Tosefta* Ketubot 4:9 and J. Yevamot 15:3; see also Yitzhak D. Gilat, "The Interdependence of Halakhah and Reality" (Hebrew), *Studies in Cultural Educational and Social Problems*, Tel Aviv, vol. 4, 1972.
22. Gittin 26b
23. Berachot 63a; Rashi on Yoma 69a; Temurah 14b; See Eliezer Berkovits, *Halakhah, It's Power and Purpose* (Hebrew), Jerusalem, 1981, pp. 76ff.
24. Leviticus 5:23, Gittin 3:18.
25. Gittin 51a-51b, *Tosefta* Gittin 3:18.
26. Taanit 3:1, J. Sheviit 10:3; v. Y. Gilat, "The Influence of Reality on Halakhic Distinctions", *Molad*, 3, Sivan 5730, p. 285.
27. Berachot 19b
28. Shabbat 45a
29. *Responsa Haramah* (ed. A. Ziv), Jerusalem, 1971, No. 125, pp. 488-495. An English translation of this responsum is found in Solomon B. Freehof, *A Treasury of Responsa*, Philadelphia, 1962, pp. 113-117.
30. Among those who have developed this subject are Eliezer Berkovits, *op. cit.*, notes 14 and 23; Yitzhak Gilat, *Bar Ilan Annual* Ramat Gan 1970, pp. 117-132 and *op. cit.* notes 13 and 21; Louis Jacobs, *op. cit.* notes 6 and 7. This subject is further elaborated in my article in *Shalhevet*, *op. cit.* note 9 and in the chapter entitled:

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"The *Halakhah* as a Developmental and Moral Phenomenon" in my forthcoming book. *op.cit.* note 16.

31. Moses Sofer, *Responsa Hatam Sofer*, Jerusalem, 1970 Orah Hayyim nos. 28 and 101, 181 and Yoreh Deah no. 9.

32. *Sefer Haikarim*, Philadelphia, 1930. ed. Isaac Husik, 3:23.

33. This chapter is based in part on my article "Halakhah Developmental and Pluralistic," *The Jewish Law Annual*, Boston, vol. VIII, 1989.

The following book is a translation of the book by the author, *Authority and Scope of Deeds in Israeli Law*, published by the Hebrew University Press, Jerusalem, 1972.

22. See also *Authority and Scope of Deeds in Israeli Law*, published by the Hebrew University Press, Jerusalem, 1972.

23. This chapter is based in part on my article, "Developmental and Pluralistic: The Jewish Law Annual, Boston, vol. 1, No. 1, pp. 1-10, 1970; and my article, "Developmental and Pluralistic: The Jewish Law Annual, Boston, vol. 1, No. 1, pp. 1-10, 1970." (Jerusalem, 1970).

24. See also, *Sifra*, Parashat Vayikra 3:16.

25. *Sifra*, Parashat Vayikra 3:18.

26. See also, *J. S. S. 10:3; v. Y. Gilat, "The Influence of Reality on Halakhic Decision"*, *Alpeh*, 3, Sivan 5730, p. 285.

27. *Sifra*, 19b.

28. *Sifra*, 45a.

29. *Responsa Avram* (ed. A. Ziv), Jerusalem, 1971, No. 125, pp. 488-495. An English translation of the responsa is found in Solomon H. Eggert, *A Treasury of Responsa*, Philadelphia, 1962, pp. 113-117.

30. Among those who have developed this subject are Eliezer Ben-Navi, op. cit. notes 14 and 23; Yitzhak Gilat, *Bar Han Annual*, Ramat Gan 1970, pp. 117-132 and op. cit. notes 13 and 21; Louis Jacobs, op. cit. notes 6 and 7. This subject is further elaborated in my article in *Sifra*, op. cit. note 9 and in the chapter entitled: