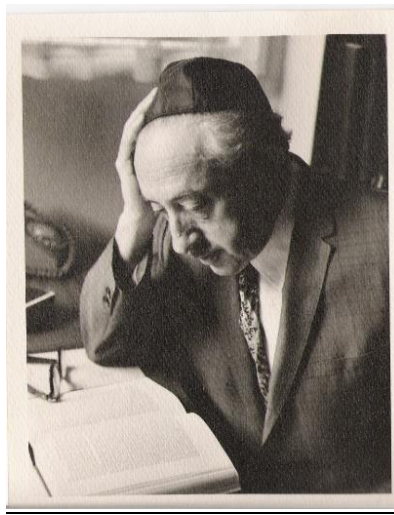


Not in Heaven — The Nature and Function of Halakha

I believe that we may say that Halakha is the wisdom of the application of the written word of the Torah to the life and history of the Jewish people. However, this wisdom and its implementation cannot be contained in any book. No written word can deal in advance with the innumerable situations, changes of circumstances, and new developments that normally occur in the history of men and nations. The eternal word of the Torah required a time-related teaching in order to become effective in the life of the Jewish people. This was the tradition passed on by the living word from generation to generation, the Torah she 'baal 'Peh, the Oral Torah, beside the Torah she 'be 'Ktav, the Written Torah. (p.71)



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I. Halakhic Judaism – “Through Halakha the Word from Sinai has become the way of life of the Jewish people through history.” (Not in Heaven p.84)

1) Not in Heaven: The Nature and Function of Halakha pp.1-2:

I use the term “Halakhic Judaism” on the basis of my understanding of the meaning and function of Halakha. Halakha is the bridge over which the Torah moves from the written word into the living deed. Normally, there is a confrontation between the text, which is set, and life, which is forever in motion.

How to face the confrontation between the text and the actual life situation, how to resolve the problems arising of this confrontation, is the task of the *Torah she’baal’Peh*, the Oral Law. This second Torah, ever since the days of Moses, handed down from generation to generation, accompanies the *Torah she’be’Ktav*, the Written Word, along its journey of realization in the innumerable concrete situations through which the Jewish people passes in the course of its history. It is the wisdom of Torah implementation in the daily life of the Jewish people. It renders Torah into *Torat Hayim*, living teaching and relevant law. The essence of the Oral Torah is the Halakha. As the root of the word indicates (*Halokh*, to walk, to go), Halakha teaches the way along which the Jew is required to walk in accordance with the Torah. Halakha is the application of the Torah to life. But since there is no such thing as life in general, since it is always a certain form of life at a specific time of history, in a specific situation, Torah application means application to a specific time in a specific situation. The result of this process I call Halakhic Judaism.

2) Not in Heaven: The Nature and Function of Halakha p. 3

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The Torah is all-inclusive. It comprehends the entire life of the Jewish people. Halakha, therefore, has to interpret the intention of the Torah for all the areas of Jewish existence, the spiritual, the ethical, the economic, the socio-practical. It also has to define the functions and powers of the teaching and implementing authority envisaged by the Torah.



II. S'bara: Logic- *“There are no codes for specific situations. Halakhah is the life of the Torah that renders decisions in the concrete situation in the spirit of principles and values that are the very heart of the Law.”* (Crisis and Faith p.85)

3) Not in Heaven: The Nature and Function of Halakha p. 6

We have seen then that:

- a. Principles from a *S'bara*, sound common sense, logical reasoning, have the validity of a biblical statement.
- b. The Torah itself makes reference to a ruling by a *S'bara*, assumes it to be known, and by comparison to it establishes its own ruling in a case which the *S'bara* on its own would not have been able to give the biblically required decision.
- c. A *S'bara* may be so convincing that it may compel one's conscience to suppress the plain meaning of a biblical injunction and force upon a verse in the Bible a meaning that it can hardly bear textually.
- d. A *S'bara* may show that in certain areas the consequences of a generally prevailing law would be unacceptable and, therefore, that those cases must be exempted from the authority of that law.

III. Wisdom of the Feasible- *“There is a Talmudic principle that says: Heikha de'efshar, efshar: heikha de'lo efshar, lo efshar- ‘Where it is possible, it is possible; where it is not possible, it is not possible’.”* (Not in Heaven pp. 9-10)

4) Not in Heaven: The Nature and Function of Halakha p.8

That the Torah was not given to the ministering angels of the Almighty is self-understood. A number of halakhic rulings were based on this insight. But if so, the Torah must pay attention to human nature, to the human condition, to human needs. That this is indeed so, the rabbis found confirmed in an important biblical injunction.



5) Not in Heaven: The Nature and Function of Halakha pp.12-13

A careful examination of the examples discussed will show that in the application of the principle of the possible, the impossible is not the objectively impossible, but that which is not reasonably feasible. The category of the *Efshar*, the possible, represents what in view of human nature and with proper attention to human needs is practically or morally feasible. Illustrations of pragmatic and moral feasibility are found in certain rules that were to be observed in the calculation of the annual calendar. Because of the difference between the solar and lunar years it is necessary—in a certain sequence of a cycle—to add an additional month, a second Adar, to the Jewish year. Apart from this, occasionally the second Adar was inserted for purely practical reasons which had nothing to do with the planetary order. And so it was taught: “One introduces the additional month because of the roads, because of the bridges, because of the ovens for the roasting of the paschal lamb, and because of Jews who left their homes in exile [with the intention of going to Jerusalem to celebrate Pesah there] but have not arrived yet.”²¹ Because of the winter rains the roads to Jerusalem were washed out, bridges were carried away by floods, the ovens were damaged. It was, of course, a practical necessity to postpone the celebration of Passover by one month, so that the necessary repairs might be made. Most significant, however, is the postponement in order not to disappoint travelers from Babylon who were on their way to celebrate the festival in Jerusalem but had been delayed, for whatever reason. The second Adar was added to the annual cycle of that year in order to enable them to arrive in time. The entire sequence of the year’s holy days was thus moved by one month because of consideration for their feelings. To do anything else would have been *Lo Efshar*, impossible, because it would have been morally not feasible. ↵



IV. *Torat Hayyim* - “The word of God has to be rendered meaningful for each contemporary generation. That is the secret of its eternal validity.” (Not in Heaven p. 75)

6) Crisis and Faith pp.91-92:

A specific word of God is controlled by a more comprehensive divine command. Therein lies the secret of the creative vitality of the *halakhah*. We might now formulate it more generally. When, in a given situation, a specific law is in conflict with another law, principle or concern of the Torah, the specific law may be limited in its application, re-interpreted, adapted, suspended or changed in this one situation, but not abolished, by the overruling concern of the total Torah.

We may now be in a better position to understand why the *Torah SheBikhetav*, the Written Torah, is not enough, why it needed to be completed by a *Torah SheBe'al Peh*, the Oral Torah and why the *halakhah* could not be anything else but oral teaching. Every written law is somewhat “in-human.” As a code laid down for generations it must ex-

press a general idea and an abstract principle of what is right, of what is desired by the lawgiver. But every human situation is specific and not general or abstract; in a sense, every human situation is unique. No general law speaks to the specific situation. The uniqueness of the situation will often call for additional attention by some other principle, which has its validity within the system. Two witnesses are necessary to establish a fact. That rule has general validity. But the woman whose husband has disappeared is in a specific situation. The law of the Torah itself calls for responsible care for her specific right. Resolution can be found only in the totality of the ethos of the law. But no written code can provide the resolution. Once you write it down as a code you have generalized it. Only the Oral Torah, alive in the conscience of the contemporary teachers and masters who can fully evaluate the significance of the confrontation between one word of God and another in a given situation, can resolve the conflict with the creative boldness of application of the comprehensive ethos of the Torah to the case. Thus, *Torah SheBe'al Peh*, as *halakhah*, redeems the *Torah SheBikhetav* from the prison of its generality and “humanizes” it. The written law longs for this, its redemption, by the Oral Torah.

7) Not in Heaven pp. 69-70

Summing up the three categories that we have discussed in this section, one would have to say:

1. Wherever there is some evil practice that has to be stopped, an immoral situation that has to be eliminated, one may suspend a specific law and institute measures needed to achieve the necessary improvement. This is the meaning of *l'migdar milta*, “to fence in a thing.”
2. When it is necessary to safeguard something of great national or social value, *it is time to act for God*, even by disregarding one law or another.
3. For moments or situations of unique significance in the history of the Jewish people, there can be no prescribed law. To acknowledge their meaning and to give them adequate expression, one has to create “the law of the hour,” *Hora'at Sha'ah*.

Our discussion brings to mind a saying of Resh Lakish: “At times, the abolition of the Torah is its founding.”⁵¹ He bases his idea on a midrashic interpretation. God’s reference to the shattering of the Two Tablets that Moses received from Sinai calls forth, by phonetic association of the Hebrew original, the suggestion that God actually approved of Moses’ bold deed. The daily life and the process of history of the people often confronts the teachers of Halakha with serious problems for whose solution there are no precedents. Such was the tragic experience of Moses our Teacher; while he was still communing with the Divine Presence on the mountain, in order to receive guidance for the people for all time, the unexpected happened. At a time when their Teacher and Master had ascended to the ultimate heights of human greatness for their sake, the people below lowered themselves to the degrading



worship of the Golden Calf. How to deal with such a people; how to lead them, in spite of everything, in the ways of Torah and God's commandments? There was no extant answer to such a single event in human history. The solution had to be found outside the received teaching. In that dark hour, Moses our Teacher was all alone. On him alone rested the responsibility of finding the right response to this frightening event. He shattered the Tablets that he had received from God before the very eyes of the fallen people in order to secure foundations for the Torah.

V: Human Partnership in Torat Hayyim- *“Judaism commits the Jew to the ever-enduring vital partnership with God. The result is Torat Hayyim, a living Torah.”* (Jewish Women in Time and Torah p. 33)

8) Not in Heaven: The Nature and Function of Halakha pp.81-82:

There is in the human share in the Torah, without which Halakha would be impossible, a high measure of independence granted to the teachers of the Torah, as well as a strong portion of relativism introduced into the interpretation of the word of God revealed at Sinai. However, both are integrated into the very essence of the Torah. That is the ultimate meaning of the statement, also revealed by a *Bat Kol*, that “these as well as those are the words of the living God.”³⁰ It is a matter of coordination between the revealed Word of God and the human world. The coordination is possible because the word of man in this case is a disciple of the revealed one. The teachers of Israel are people who are committed to the Torah from Sinai, who heard the Voice, who absorbed the tradition of Israel's effort through the ages to render the bequest of the Tablets life-guarding and life-forming. When they then speak their word in accordance with their understanding, they indeed teach one of the “forty-nine faces” of the Torah given to man at Sinai.

9) Crisis and Faith pp.92-93:

According to an opinion in the Talmud, God concluded His covenant with Israel only on account of the Oral Tradition.¹¹ A covenant is a relationship of mutuality. The covenantal relationship could find no expression in the revelation and acceptance of the Torah at Sinai. It was a case, as the Talmud puts it, of *kafah aleihem har kegigit*, a law given, imposed. Only in *halakhah* is the covenant, as mutuality of relationship, fully present.

The halakhist recognizes the will of God as expressed in the Torah; he is wholly committed to the law and the teaching of the Torah. But in the mutuality of the covenant the responsibility has fallen to him to take upon himself the risk of determining, in the light of the totality of Torah teaching and Torah living, the manner in which the will of the other party to the covenant is to be realized in a specific situation. Ultimately, he has to do that in the independence of his own Torah-imbued conscience. This is our share in the covenant, the existential component of our participation in it. Loyalty to the Torah, to the divine partner to the covenant, demands that we accept the responsibility, notwithstanding the risk involved in the subjective aspect of our participation. Only thus may the generality and abstractness of the written Torah be transformed into *Torat Hayyim*, its realization in whatever situation Jews may find themselves in the course of history.



10) Crisis and Faith p.87-88:

Where did

Hillel find the authority for his innovation? Where was it written in the Torah? It was, of course, not found in any text, in any code. He found it within himself. There was a clash between equally valid laws, principles and concerns of the Torah. He had to find a resolution to the conflict. There was no text, no *Torah SheBikhetav* to tell him which course to follow. He could find the solution to the problem within his own understanding of the comprehensive ethos of Judaism as he was able to gather it in his own heart and in his own conscience from the totality of the Torah-teaching and the Torah-way of life.

Let us consider another example. According to the written law of the Bible, two witnesses are required in order to establish a fact in court. Yet, in the case of a husband who has disappeared, the teachers of the Talmud accepted the testimony of one witness alone to prove the death of the husband in order to allow the wife to remarry. How could they rule in this manner against an explicit law of the Torah? There are all kinds of interpretations for this bold innovation.⁵ However the technicality of the ruling may be explained, the decisive motivation for the ruling was, as it is clearly stated in the Talmud:⁶ *mishum agunah akeelu boh rab-*

banan, meaning: in order to save the wife from the status of an *agunah*, i.e., from being a woman tied, to the end of her days, to a man who has disappeared, they applied the law leniently in her case. Once again, it is the authentic halakhic problem situation. There is the written law of the Bible, but this time it is in conflict with another obligation of the Torah-true Jew, the care and concern for a woman whose husband has disappeared. Once again, there was no written code to consult. On the basis of the rabbis' understanding of the overriding Torah-purpose formulated nowhere explicitly, but absorbed into their own consciousness as the result of a life of dedication and commitment to Torah and its living realization, they gave the answer, a halakhic solution to a halakhic problem.

VI: The Role of the Posek: Past and Present- “Orthodoxy is, in a sense, halakhah in a straitjacket. Having had to transform the Oral Torah into a new written one, we have become Karaites of this new Torah Shebikhetav...” (Crisis and Faith p.95)

11) Not in Heaven p.47

“NOT IN HEAVEN”

The Torah was given at Sinai. It was given to a whole nation as a way of life for all generations. However, in order to guide the daily life of an entire people through all its history, not only knowledge of the Torah is needed. A leadership is required to deal with the problems of the day as they arise—with questions of interpretation—and it must have the authority to make decisions. The seat of that leadership and authority was the Sanhedrin, the Supreme Court of seventy-one sages in Jerusalem. The institution continued to exist on the basis of voluntary acceptance by the Jewish people for several generations after the destruction of the Second Commonwealth. When it ceased to function, leadership and authority passed on to the scholars in the various communities in the countries of dispersion of the Jewish people. They interpreted the meaning of the Torah and Tradition and taught them in the talmudic academies. }



12) Not in Heaven: The Nature and Function of Halakha pp.91-92:

Unfortunately, on all these issues and other related ones, Halakha is silent today. For the time being, Halakha is in exile in the land of Israel as it was before in the lands of Jewish dispersion. It is still the Halakha of the *Shtetl*, not that of the State. As yet we have not become worthy of *Torat Erez Yisrael*. The reasons are to be found in what happened to Halakha during its *Galut*. Because of the lack of opportunity for halakhic application to real-life situations of national existence, the art and wisdom of such application dried up. Because of Halakha's exile into literature and codification, new authority barriers were erected that seem unsurmountable. The old principle of the acceptance of personal responsibility for halakhic decisions, which demanded that the *Dayan* rule according to what his eyes see,¹⁰ has received a new meaning that reads: according to what he sees in some authoritative text. It was against such an attitude that the warning of Rabbi Abraham the son of Maimonides was directed. Because of its importance we shall quote it again here:

The rule of the matter is—say I—that a *Dayan* who in his decisions follows

only what is written and clearly stated is weak and wanting. Such an attitude invalidates what they [i.e., our sages] said: “A *Dayan* has to be guided only by his own understanding.” [With him] it is not so. What is written are the roots. Every *Dayan* and everyone who gives decisions must weigh them according to each case that comes before him. Every decision [that he is considering] he should compare to something similar to it. He should develop branches from the roots. The numerous case histories in the Talmud, which incorporate only part of the laws, were not reported for nothing; neither were they recorded so that in those matters the law should always be as it is written there. But only so that the wise man, by hearing them often, should acquire efficiency in weighing up matters rationally as well as a good method in giving decisions.

It is remarkable that such words should come from the son of Maimonides. They imply an unintended criticism of his father's code, which was meant—as we have seen—to replace all other sources of Halakha. “Study this and know the law” was the gist of Maimonides' work. In essence, Rabbi Abraham was warning against a new form of Karaism, against becoming Karaites of the written-down Oral Torah. Our present-day halakhic authorities have largely succumbed to that danger.

13) Not in Heaven: The Nature and Function of Halakha pp.117-118:

The method that teachers and followers of Halakhic Judaism have to adopt today is that of persuasion. The task is a twofold one. First, one has to interpret the teaching and its meaning for the searching, questioning, doubting contemporary Jew. This has to be done from the classical sources of Judaism and its Halakha. The task requires talmudic scholars of a high order. But scholarship is not enough. The scholar has to be familiar with the spirit of the times, understanding its intellectual and emotional preoccupations. Only thus may he be able to meet the challenge of each new day significantly. Secondly, one has to restore Halakha to its original function. In struggling with the problems of the day, Halakha must once again reveal itself as the wisdom of the feasible, giving priority to the ethical. This requires that the halakhic teachers accept personal responsibility for their decisions as demanded in the Talmud itself. They ought to do so by following the advice of Rabbi Abraham the son of Maimonides, freeing themselves from all Karaite inclinations and treating the principles and cases of the *Torah she'baal'Peh* only as examples, to derive from them the ability to rule in each new case “as the *Dayan* sees it with his own eyes.”

Not only does the method of authority not work, it actually defeats the eternal validity of the Torah. The Torah is eternal because it has a Word for each generation. Every day the Torah should seem as new to you as if it had been given on that day, says the Midrash. One can find the Word that has been waiting for this hour to be revealed only if one faces the challenge of each new situation in the history of the generations of Israel and attempts to deal with it in intellectual and ethical honesty. Alas, those who have the authority to impose laws of the Torah do not care to understand the nature of the confrontation with the *Zeitgeist*. They take the easy way out. They do not search for the Word that was intended for this hour, for this generation. If they have the authority, they impose the Word meant for yesterday and thus miss hearing the Word that the eternal validity of the Torah was planning for today, for this generation, for this new hour in the history of the Jewish people.



VII: Faith and Belief – מפני שאני מאמין באל – "אני מאמין באמונה שלמה שיש פתרון מפני שאני מאמין. מפני שאני מאמין באל –
די ישראל ובתורתו אני מאמין" אך בכחו האיתן והנצחי של ההלכה לפתור את הבעיות העוברות את חיי עם
ישראל! (Private correspondence to the *Sredei Esh* c.1960's)

14) Crisis and Faith p.96:

We would then see that in this generation, we have been called upon, as it were, by another *bat kol* to accept the responsibility to make use of whatever is still left of the Oral Torah in its textual solidification. It would be the beginning that would lead us back to the original source and strength of *halakhah*. It would be the beginning of its restoration to its original vitality and dignity, for the sake of which God concluded this covenant of mutuality with Israel. What is needed is not less study of Torah, but better study of Torah. What is needed is at least one talmudical research institute that would be dedicated to this task of rediscovery of *halakhah* and—at first—its intellectual restoration. What is needed is not less dedication to *halakhah*, but more faith in *halakhah*. Where there is greater faith, greater boldness is justified.

15) Crisis and Faith p. 117:

but again one might ask, have all the explanations of what is possible within the Law already been given? One does not ask these questions because the Torah has become a burden and one wishes to break away from it; one asks because one believes in the eternal vitality of the divine revelation, because one is committed with one's whole existence to the proposition that the teaching is *Torat Hayim*, the way of life for the Jew.