Halakha and Diversity

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Anyone who is even partially involved in the life of a traditional synagogue becomes aware, sooner or later, that there is diversity within halakha. This becomes even more obvious after one has occasion to participate in activities at several synagogues: it would be rare to find two congregations that follow identical praxis. Traveling abroad, the differences seem all the more salient. Yet most people I know seem to live comfortably with such diversity. Isn't this strange? After all, if there is one God who gave us one Torah, shouldn't there be one norm for all observant Jews?

Some people I know would answer that we should differentiate between *minhag* (custom) and *halakha* ("law"): variety in *minhag* is OK – indeed, meritorious: a person should follow the custom of his family (or *community*; or *place*; but obviously these may be in tension …). The diversity noted above, in synagogue praxis, falls into this rubric of *minhag*. But, these people would continue, the same is NOT true regarding *halakha* – all Jews should follow the same halakha.

Now, as a matter of fact, quite a few differences between synagogues go beyond 'mere' custom. Issues such as: what is the height and transparency of the divide between the women's and the men's section? Can a non-observant man be called up to the Torah? Is *Yom ha-'Atzmauth* (Israeli Independence Day) celebrated (and: how)? – All these are issues of halakha. So, things probably do not boil down to a demarcation between *minhag* (variety is OK) and *halakha* (variety nix).

1. My impression is, that what tends to trouble quite a few Orthodox people is not so much **variety** within halakha (=synchronic diversity), as much as **change** within halakha (=diachronic diversity). Let me try to articulate the viewpoint such persons may hold; a viewpoint that when held in a more relaxed version might be called 'conservative (with a small c) and in a more intense version might be called 'fundamentalist':

God is eternal and transcendent. He does not change, and He is above the vicissitudes of this transient, shifting world.

God is holy, and is thus radically different from this secular, mundane existence.

God is the source of the true and the good.

Because of all this, human beings recognize God as worthy of worship, and seek to lead their life in tune with His being.

But, how can we know how to worship God, and how can we know what actions and behaviors are in tune with His being?

To our great joy, God in His grace and love has revealed to us, through His prophet Moshe, His Torah. If we allow our lives to be guided by Torah, we will be living as God wills.

God's Torah is primordial and primeval. Its existence pre-dates the creation of the world. As the Talmud teaches (*Zevahim* 116a): "He had in His archive a hidden treasure, nine-hundred-and-seventy-four generations before the creation of the world – and He chose to bestow it upon His children".

We, the Jewish people, have been granted the unique opportunity to live under God's grace, attuned to His eternal will by virtue of the eternal Torah He bequeathed to us. By following this eternal, God-given Way, we can raise our lives above the transient, mundane and arbitrary aspects of human existence, and imbue them with the truth, good and holiness that derive from closeness to God.

It is thus clear why – on this view – change can be regarded as antithetical to Torah Judaism: when the initial state of affairs is flawed and lacking, movement towards a better condition is good, but when the initial state of affairs is perfect, any movement is a movement away from that condition. True, "Torah has seventy facets" and thus the halakhic ways of Yemenite Jews may be equally valid and primordial as those of Polish Jews. But since Torah is perfect, any **change** in either of these halakhic worlds can only be for the worse.

It is not difficult to understand the appeal of such a view regarding the unchanging, stable nature of Torah and of *halakha*.

But, there is one small problem: such a position is not consonant with what actually happened in the past. Any examination of the actual practice of Torah reveals that dramatic changes in *halakha* took place over the course of Jewish history. The implication of this is that however seductive it may be, an "eternalist" 'take' on Judaism is a misrepresentation. And, as Maimonides wrote in his *Guide for the Perplexed*, religion based on misrepresentation is a false religion.
Obviously, it would require many volumes to survey the entire range of diversity within *halakha* over the millennia. But, I cannot expect the reader to just take my word for such a general claim. So as not to seize upon trivial or marginal examples, I propose to cite instances of changes and alterations that actually occurred in one of the most basic elements of Jewish life: marriage and divorce. However, it is important to bear in mind that my thesis relates not only to this realm, but to *halakha* in general.

Jewish Marriage

What human framework is more basic than marriage? Undoubtedly, Torah is in favor of marriage. But what *kind* of marriage does Torah advocate? Abraham had only one wife – but several concubines. Isaac had one wife and no concubines. Jacob had two wives, and two concubines. King David had eighteen wives, and Solomon had a thousand. According to *halakha*, as interpreted by Maimonides in 12th century Egypt, a Jewish man may have several wives – but no concubines. At that time in northern Europe, however, Jews were forbidden by the "Edict of Rabbenu Gershom" to have more than one wife. In 18th century Germany, the prominent halakhist rabbi Jacob Emden wrote a passionately argued halakhic treatise advocating non-marital sexual partnerships for unmarried Jewish men and women, and extra-marital sexual partnerships for Jewish married men only, explaining that this was simply what had always been permitted under the halakhic framework of *pilegesh* (concubinage). Quoting many source-texts, he explained that this was perfectly fine according to Torah, and that any children born out of such relationships would be of absolutely kosher halakhic status.

This concise example from the realm of marriage suffices to illustrate that whatever certain ideologues may claim today, diversity in very basic Jewish norms over time and place (AKA change) is an innate feature of *halakha*. The rabbis who themselves instituted or justified these changes did not see themselves as operating against or outside of Torah. Rather, they thought that such changes expressed authentic commitment to Torah. What were the modes and processes of halakhic change that these (and other) rabbis followed? To illustrate, let us consider the "mirror image" of marriage – divorce. As we shall see, change can derive from interpretation, legislation or custom.

Changes in Jewish Divorce Laws: Change Via Interpretation

> The Torah (see Deut. 24:1) describes a divorce occurring through a "writ of [marriage] termination" (*sefer keritut*) given by the husband. The Talmud explains that such a document is valid only if given with free will. Thus, there seems to be no way in which a woman can receive a divorce if her husband is recalcitrant.
>
> Maimonides rules, however, that a woman cannot be forced to remain in a relationship when she feels her husband to be sexually repulsive: "she is not a captive of war, who must have sex with a man she despises" (*Hilkhot Ishut*, 14:8). Therefore, when a woman declares that her husband is sexually repulsive to her, the court "immediately forces him to divorce her." But … Maimonides not only recognized Torah as eternal, but also included belief in the eternality of Torah as one of his "Thirteen Principles of Faith"; how could he validate a divorce to which the husband was coerced? Is not such compulsion contrary to the requirement that a divorce be given willingly?

Maimonides himself raised this question and provided the answer:

> Since he was compelled, why is this divorce not invalid? … Because a person who was overcome by his evil inclination to desist from performing a positive *mitzvah* or to commit a transgression, and who was then beaten [by the authorities] until he did what he ought to do or desisted from what he was forbidden to do, is not considered to be acting under compulsion … with regard to this man who refused to divorce [his wife]: since he does want to be a Jew, he *ipso facto* wants to fulfill the commandments and to refrain from sin, but his evil inclination overcame him. When he was beaten, his evil inclination weakened, and so when he says "I want [to divorce]" – the divorce is in accordance with his will. (*Laws of Divorce*, 2:20)

Maimonides' move is an interpretive one: "will" here means not a subjective feeling but an objective mental position, which is assessed according to the overall context of a person's life choices. A person who consents to being a Jew thereby consents to what is entailed by being a Jew, and the court is merely enabling him to overcome a powerful urge that conflicts with his own deeper and more serious

will.

The important point for us to note is, that acknowledging Torah as eternal does **not** mean acknowledging our (or anyone's!) *understanding* of Torah as eternal. Our understanding of Torah can change, and when that happens, we will begin to permit actions our ancestors understood that Torah forbade, or we will begin to forbid what they understood Torah to permit. And we will be right in doing so; for *we should do no more (and no less) than follow the best interpretation of Torah available to us*. Sincere commitment to Torah does not always lead, then, to "adherence to the holy ways of life that characterized Jewish existence in the past."

Let us consider the grounds of Maimonides' interpretation. Three assumptions stand out. One relates to human psychology: Maimonides has a theory of human personality that recognizes several "levels" of will that can be in simultaneous conflict. While he did not arrive at this view by studying Torah, he is nevertheless confident that since the theory is correct, Torah must be in consonance with it. In other words, he assumes that Torah is a rational enterprise, and his reading of Torah is informed by his general understanding of reality. If so, it seems plausible that if his understanding of rationality or of reality were to change, his understanding of Torah would change, too.

Maimonides' second and third assumptions are not about reality, but about values. He holds that the status of a married woman is not like that of a captive, and that she is under no obligation to submit to the sexual advances of a man she finds repulsive – even if that man is her lawful husband. He also clearly assumes that sex is an essential component of marriage, that a woman cannot be expected to be bound in a sexless marriage, and that divorce is therefore an absolute necessity in such situations. Now, Torah never explicates these things about marriage. While some biblical passages might seem to support such views of marriage, others might be cited against them, as in Psalms 45:11 where the bride is enjoined "he is thy lord, and do homage to him." In any case, Maimonides' decision that Torah here requires an immediate, forced divorce is dependent upon his value-laden understanding of what marriage is all about – an understanding that informs his reading of Torah no less than it derives from such reading.

At the very same time that Maimonides was composing these passages, his contemporary, Rabbi Jacob ben Meir (known as Rabbenu Jacob Tam), was teaching a radically different doctrine. The grandson of Rashi and considered the greatest rabbi in 12th century France, Rabbenu Tam held that if a man could be forced to divorce his wife when she declared that he repelled her, any married woman who was attracted to another man would claim that her husband disgusted her, receive a forced writ of divorce, and go off to her new sexual partner against her husband's will!

It seemed self-evident to Rabbenu Tam that this was deeply antithetical to Torah values, and he therefore argued that the possibility of forced divorce in such cases simply could not and did not exist in Torah law.[1] But, if the husband is not forced to divorce her, and she remains married to him against her will – what of Maimonides' value-judgment that a woman may not be compelled to have sex with a man repulsive to her?

Rabbi Asher ben Yehiel (Ashkenaz and Spain, 13-14th centuries) responded:

> Is this a reason to force a husband to divorce, and thereby permit a married woman [to other men]? Let her not have sex with him, and remain a straw widow to the end of her days! In any case, a woman is not commanded to have children. Can it be, that because she wants to follow her headstrong desires, and has fastened her eyes on another man and desires him more than the champion of her youth, that we should fulfill her lust and force the man, who still loves the woman of his youth, to divorce her?! God forbid that any rabbi should rule thus! [...] In this generation, the daughters of Israel are cheeky, and if a wife will be able to extricate herself from under her husband by saying "he repulses me," not a single daughter of Abraham will remain with her husband, [rather] they will fasten their eyes on another and rebel against their husbands![2]

According to this view, women are not interested in marital stability but in following their lust and desire. Indeed, if given the choice, *not a single woman would remain married to her present husband!* One might argue that if that is truly what women want, perhaps they should be freed from their current unwanted state? But this is not the view of Rabbi Asher. His analysis is grounded in a deeply-held understanding of the purpose of marriage. Marriage is a bulwark against socio-sexual chaos. Such chaos will occur if women will be able to follow their desires for men other than their husbands by forcing him to divorce against his will. Therefore, it is only by absolutely closing such options that social stability can be ensured.

This does not mean that Rabbi Asher is in favor of forced sex. He too holds that if a wife claims that her husband disgusts her sexually, she need not have sex with him. But that does not entitle her to a divorce. Better that she remain without sex for the rest of her life, he argues, than that her husband be forced to capitulate and give her up, against his will! Unlike Maimonides, who holds that a sexless marriage is a moral oxymoron and must be terminated by divorce, Rabbi Asher holds that if such a divorce will enable a woman to seek sexual satisfaction with another man, it is absolutely *morally* preferable that she remain married against her will – and if she will not have sex with her husband, let her not have sex at all.

However much some contemporary readers may be turned off by this view, it is very important to note that this is not a formalist positivistic presentation of *halakha;* rather, Rabbi Asher clearly bases his position on what he holds to be central Torah values: the sanctity and stability of marriage, the suppression of social chaos, the preference for marriage without female sexuality over an alternative of lust and licentiousness.

Change By Legislation

Since the values he set forth are seemingly eternal, why did Rabbi Asher explicitly contextualize his ruling by noting that: "*in this generation* the daughters of Israel are cheeky"? The answer is that he himself was aware of a very different legal tradition, one that had prevailed in Jewish law for many centuries. This tradition began in the year 650/651 C.E., when a dramatic legal enactment was instituted by the halakhic leaders of Babylonian Jewry, immediately following the Muslim conquest of that area in 637-650:

> When our masters in the times of the Sevora'im saw that Jewish women were going to the gentiles and with their assistance were obtaining forced divorces from their husbands, and the husbands were writing bills of divorce under compulsion and these were illegally forced divorces – and this resulted in disaster – they enacted, with regard to a woman who rebels against her husband and demands a divorce, that … we compel her husband to divorce her immediately.[3]

> In contrast to the policy of the Sassanid Persian kingdom that previously ruled in Babylonia, Muslim legal authorities provided succor to Jewish women seeking divorce, and forced their husbands to acquiesce and issue a writ of divorce. However, as we saw above, if a husband is unlawfully forced to write a bill of divorce, it is invalid. Therefore, the Muslim coercion resulted in divorces that were halakhically invalid. However, it was impossible for the rabbis to prevent the women from re-marrying, because doing so would enrage the Muslim authorities who had validated the divorce procedure. The result was a disaster, because according to *halakha*, the women's second marriages were adulterous, and children born from such unions were *mamzerim* who would never be able to marry other Jews. Since the rabbis could not change the political-legal reality of Muslim rule, they decided to institute a change in *halakha*.

From then on, any Jewish woman demanding a divorce (not only on the grounds of sexual repulsiveness) would get it immediately – no questions asked – from a Jewish court! And since a writ of divorce lawfully imposed upon the husband by a **Jewish** court **was** valid, any subsequent marriage and children would be fully "kosher" according to *halakha*.

Here, we have a change in *halakha* that is not interpretive, but legislative. The rabbis in the year 650 did not claim that they had reached a new understanding of what Torah had always meant. They agreed that Torah strictly limited the cases in which husbands could be forced to issue a divorce. But they held that within the realm of values and norms recognized by Torah, it was possible for rational human beings to recognize a hierarchy. Torah upheld the husband's prerogative not to grant a divorce against his will, but it also regarded the prevention of adultery as a major value – and it was crystal-clear to the rabbis at that time that if historical conditions prevented the realization of both values, then prevention of adultery should be given preference over retaining the husbands' unilateral prerogative in matters of divorce. They canonized this recognition by legislation and for hundreds of years (from 650 until c. 1150, and in certain localities until after 1400) this legislation was recognized as valid and binding by *halakhic* authorities not only in the Middle East and North Africa but also in Ashkenaz (Northern Europe).

Legislative change in *halakha* does not see itself as undermining the eternality of Torah. Rather, it is grounded in the recognition that while Torah is eternal and perfect, human beings are imperfect, and historical reality is fickle. It is therefore possible that under certain conditions, implementation of (what we understand to be) the eternal norms of Torah will entail results that are destructive to (what we understand are) the eternal values of Torah. In some cases, such as the one above, this calls for abrogation of certain norms of Torah. In other cases, it calls for adding on limits or stringencies not required by Torah. However, all legislation under the aegis of Torah is by definition focused on the alleviation of such contextual conflicts, and is therefore – in principle – limited in duration: when the context changes – after a year, a century or a millennium – the enactment may no longer be applicable.

Change by Custom

A third source of change recognized within *halakha* is custom. If we return once again from divorce to marriage, we see that a lot of what happens in the course of a Jewish wedding is grounded in custom: the melodies, the dances and the breaking of the cup, for example. But most people are unaware of how much more of the ceremony is merely customary: The *huppah* is a custom; the participation and role of the rabbi is a custom; even the wedding ring is a custom, not required by *halakha*. When we think of custom, we usually think of it as preservation of the past, not as innovation. But when did today's customs begin? If people living in Western countries consider the melodies they use at weddings, they will recognize them to be European in character, which means that they cannot be from rabbinic times, because the Talmudic rabbis were Middle-Eastern. And for each custom that we follow, medieval texts report customs that were then in vogue, which have since fallen into desuetude. In other words: the things we know as customs began, in some historical context that we usually don't think about, as innovation. And in other cases, what was once custom is now no longer followed even by the most religious among us. In other words: custom reflects change.

While interpretation and legislation are grounded in the authority of rabbinic and communal leaders, why do we attribute authority to custom? There are two schools of thought within *halakha* with regard to this question. One holds that since what is now

customary began as innovation, it must have been validated originally by the rabbis of that time. The authority of customs we follow today derives, then, from the presumption that they reflect rabbinic decisions in the past. The other view holds that custom – as opposed to interpretation – begins not with rabbis, but with the people. The Jewish people, the Jewish community, possess creative powers that do not derive from texts, but from life and praxis. *Halakha* recognizes and validates these powers.

These two schools of thought differ most of all in regards to what should be done if custom and *halakha* seem to conflict. The first view argues that if a custom conflicts with *halakha*, that must mean that the custom was not originally validated by rabbis. Therefore, the custom should be tweaked so as to bring it into line with our understanding of *halakha*. According to the second view, since the custom was created by the people, rabbis should try to re-interpret or re-formulate their understanding of Torah, so as to provide halakhic justification for the custom. A more general formulation of this principle is that rabbis should cultivate within themselves an orientation that seeks to view the actual religious praxis of the Jewish people in the most positive possible light, rather than an orientation that tends to focus on where the community is "getting it wrong."

Interpretation, Legislation, Custom – and the Eternality of Torah

After presenting the religious outlook that opposes change and dynamism in *halakha*, we noted that for some seriously committed Jews it seems especially imperative today to advocate a totally non-dynamic view, and to unequivocally espouse adherence to the original holy ways of life that characterized Jewish existence in the past. However, our brief survey of laws and customs relating to marriage and divorce reveals that there were many *different* "holy ways of life" that Jews followed in the past, and that these ways of life were themselves characterized by a dynamic of change. The adoption of a non-dynamic view of Torah is therefore itself contrary to the reality of Torah, as revealed by study of our holy texts.

Study thus frees us from the chains of anti-dynamic rhetoric and empowers us to realize that Torah changed not because Jews got tired of Torah, but because they were enamored of Torah and deeply committed to *halakha.* This love motivated them to interpret Torah in the best possible light, as understood by the most outstanding moral and religious minds of their time.

Halakha changed because Jews wanted to celebrate Torah with the most beautiful and moving melodies, dances and ritual objects they were aware of or that they could create. And it changed because of legislation in response to shifts in the wider world of which Jews were a part.

Clearly, at any one point in time, religiously committed Jews around the world were implementing only a small segment of the diverse norms and practices that were recognized and practiced by observant Jews during the thousands of years that have passed since the People of Israel received the Torah. And, while an observer will detect much similarity between the *halakhic* rulings and praxes of the various communities of observant Jews at any one point in time, s/he will also not fail to note the significant diversity that exists between them.

Not to recognize and validate the diachronic and the synchronic diversity of halakha is to deny not only empiric reality but also religious *normative* reality: as Rabbi Haim David haLevi, late Sephardic Chief Rabbi of Tel Aviv, wrote in 1989:

> There is nothing so flexible as the flexibility of Halakha...it is only by virtue of that flexibility that the People of Israel, through the many novel and useful rulings innovated by Israel's sages over the

generations, could follow the path of Torah and its commandments for thousands of years.[4]

But change is not *the* most central value of Torah. Living a Jewish life characterized by a sincere sense of organic continuity with the ways Jews lived in the past and with the ways they understood God and Torah is arguably more important and spiritually satisfying than incessantly seeking to re-create Judaism in consonance with current trends and mores.

A religious life in the spirit of Torah should grant the *presumption* of authenticity and validity to the living traditions and interpretations we have received from our great cultural and religious past – but never allow that presumption to override our critical commitment to interpret, to legislate and to live Torah in the light of our own sincere rational, moral and religious recognitions. It is by achieving the best possible balance between a deep commitment to organic Jewish continuity and a no-less-deep commitment to a critical vision of what Judaism can and should become that we will really be in step with the rhythm of Torah itself. And there is no way we can do that without empowering ourselves through study of Torah.

[1] Cf. *Tosafot to tractate Ketubot 63b s.v. Aval Amrah Mais Alai; Rabbenu* Tam in *Sefer Hayashar*; and see Rabbenu Tam's position as quoted in *Novellae of RITBA to Ketubot, ad.loc.*

[2] *Responsa of Rabbi Asher ben Yehiel* section 43:8

[3] Responsum of Rav Sherira Gaon, *Otsar HaGeonim* to tractate Ketubot, no. 478.

[4] From his article 'On the Flexibility of Halakha', published in *Shana b'Shana*, 1989.