YESHIVAT HAR ETZION

ISRAEL KOSCHITZKY VIRTUAL BEIT MIDRASH (VBM)

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**Before Sinai: Jewish Values and Jewish Law**

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**Shiur #05: Distinctive Features of *Berit Avot***

The central point of the last *shiur* was that ***berit Avot* defines values, whereas *berit Sinai* imposes laws**. This *shiur* will explore the practical ramifications of this key distinction.

1. **Laws are rigid. Values are flexible.**

*Halakha* establishes a legal system that provides the basic framework for all Jewish living. To this day, it is fairly unique among religious systems in its genuinely legal posture, evidenced in its mode of discussion and argumentation, its objectivity and independence from subjective religious experience and its elaborate hierarchies. It is meant to be dependable, predictable, interpretable and readily applicable, relatively independent of time and context.

*Halakha* only takes local factors into account when they have been predefined as legally relevant—such as significant monetary loss, threat to human dignity or extensive physical or emotional suffering—and thus already incorporated into the halakhic system. Even then, these factors are carefully circumscribed as they are fit into the clear halakhic hierarchy, along with all other purely legal considerations. This is exactly what allows *halakha* to be the backbone of Jewish society, with regard to both its civil and ritual functioning, and why it has proven to be so resilient over centuries and millennia. Especially in the modern era, its intransigence and its anachronisms, a source of scorn for more liberal religious strains, are almost a point of pride for its devoted adherents.

The values of *berit Avot* stand in contrast to the *halakhot* from Sinai. Values are characteristically context dependent. They express themselves through our actions, but they can be malleable in practice in the face of competing factors or extenuating circumstances. Laws are grounded in a concrete world and thus by definition must be inviolate; otherwise, they lose their meaning as “law.” Values, though, belong first and foremost to the theoretical realm of priorities and beliefs, only secondarily guiding and informing specific choices. Therefore, a value can tolerate being temporarily trumped, as the value has not been trounced, only its application in this particular instance.

***Halakha* as Law after Sinai**

A wonderful demonstration of the distinction between the attitude of the *Avot* towards precepts and our own relation to the commandments of Sinai can be found in R. Chayyim of Volozhin’s *Nefesh Ha-chayyim*. Historically, R. Chayyim was responding to a certain, albeit limited, antinomian sentiment in the Hasidism of his day, which prioritized intention and devotion over meticulousness in performance of *mitzvot*,particularly with regard to their timing (Preamble to Section 4, ch. 4-8). Antinomians found support in the Talmudic concept of “*aveira li-shma*,” a transgression for Heaven’s sake, which receives approbation from *Chazal* (*Nazir* 23b) and which apparently legitimizes violating a law for the right spiritual goal.

R. Chayyim’s solution is to concede halfway to the *Chassidim*. He readily acknowledges that pure intention is both desirable and spiritually consequential in the transcendent realms (ch. 6) and that the rigidity of Mosaic law can sometimes hamper lofty spiritual aspirations. However, he sees no flexibility once *berit Sinai* has been established:

But ever since Moshe came and brought [the Torah] down to earth, “it is no longer in Heaven” (*Devarim* 30:12). Lest a great man whose intellectual reach is vast rationalize and say, “I, who perceives secrets and the reasons for the *mitzvot* in the transcendent forces and realms, see that it is fitting for me according to the nature of my soul, or for so-and-so according to his nature, to violate,” God forbid, “a certain mitzva or to neglect any detail of behavior and perform defectively even one fine detail of the Rabbinic ordinances, or change the time of its performance,” God forbid.

And for this did the Torah close, “No other prophet like Moshe has arisen” (*Devarim* 34:10); and as *Chazal* derived, “‘These are the *mitzvot* [that Hashem commanded through Moshe to *Benei Yisrael* at Mount Sinai]’ (*Vayikra* 27:34), that from that point on, no prophet may introduce innovations” (*Shabbat* 104a). (1:22)

R. Chayyim is defending the absolute inviolability of *berit Sinai*—in other words, its nature as law. Without regard for spiritual aims or metaphysical repercussions, the Jew is commanded to unquestioningly abide by God’s word. Thus, when King Chizkiyahu foresaw that his offspring was destined for evil and he therefore abstained from propagating, the prophet Yeshayahu admonished him, saying, “What have you to do with God’s secrets? What you are commanded you should have done, and what is fitting before the Holy One, blessed be He, He will do” (*Berakhot* 10a).

R. Chayyim does not directly challenge the Hasidic claim, echoed by contemporary critics of Orthodoxy, that meticulous halakhic practice can seem stifling, constraining or distracting. Rather, he contends that all other spiritual or teleological aims are subordinate to the primacy of *halakha*, which prioritizes “*ma’aseh*” (action) over “*machshava*” (thought).

**“*Aveira Li-shma*”**

Where, then, does R. Chayyim see room for “*aveira li-shma”* and other such constructs? In the world of the *Avot*, before the establishment of *berit Sinai*, “all of their actions, speech, thoughts and matters in the world were with complete devotion and purity of intention for the sake of Heaven, and they directed themselves Heavenward towards the restoration, elevation and unification of the higher spiritual worlds and forces.” However, adds R. Chayyim, they did so “**with whatever action was appropriate, and in the manner and at the time that was appropriate, not with set, rigid performances and *mitzvot* that constituted inviolable law**” (Preamble to Section 4, ch. 7).

According to R. Chayyim, the *Avot* had latitude to pursue their spiritual agendas as they saw fit, even deviating at times from what they knew would ultimately be Torah law. For even though the *Avot* generally practiced the future *mitzvot*,

not that they performed [them] out of obligation and that this was a halakhic requirement for them. Rather… they observed the Torah because they perceived with their superior intellect the restoration of the spiritual worlds and the order of the transcendental forces that they could repair with each and every mitzva. However, they also had permission to worship Him by other actions or means, besides for *mitzvot*, or even to transgress a mitzva, not in accordance with the Torah, when they understood that this certain action was necessary then for the restoration of the higher worlds.

With this thesis, R. Chayyim also resolves another difficulty raised by the Ramban. *Chazal* claim that the *Avot* observed all of the *mitzvot* prior to their formal commandment. But how then, asks the Ramban, “did Ya’akov erect a ritual monument[[1]](#footnote-1) and marry two sisters, and according to the Sages [actually] four, and Amram marry his aunt, and our Teacher Moshe erect twelve ritual monuments?” (commentary on *Bereishit* 26:5). The Ramban’s solutions are to either narrow the range of precepts that the *Avot* actually adhered to or to differentiate between their time in the Land of Israel, during which they observed all the commandments, and their time elsewhere.

R. Chayyim proposes a novel answer. The *Avot* observed all the *mitzvot*, except when they intuited that some higher spiritual purpose would be better achieved by other means—in other words, an “*aveira li-shma*.” Thus Ya’akov, for instance, discerned that “according to the nature of his soul, he could effect great repairs to the transcendent forces and worlds if he married these two sisters, Rachel and Leah.” Furthermore, “this is also one of the reasons why the Torah was not given to Noach or the holy *Avot*” (1:21). God specifically desired for His worship in its pre-Sinaitic phase to be unlegislated and flexible, in contrast to the more rigid form of worship that followed.

**Values After Sinai**

R. Chayyim, for his own purposes, relegates flexibility in God’s worship to a bygone era and does not reserve any place for it in a post-Sinai world. As he reiterates, “The truth is clear… that this kind of Divine service applied only before the Giving of the Torah. But ever since Moshe came and brought it down to earth, ‘it is no longer in Heaven’ (*Devarim* 30:12)” (Preamble to Section 4, ch. 7).[[2]](#footnote-2) However, based on his thesis, we can pose our own question: What happens to an aspect of the *Avot*’s worship—*berit Avot*—that is not later subsumed under *berit Sinai*? Though the legal force of Mosaic law overwhelms the more fluid values that preceded it, what about domains that *halakha* does not directly address?

Here we can claim that the post-Sinaitic Jew is bound by two different covenants, the covenantal *berit Avot* and the contractual *berit Sinai,* but that in non-overlapping areas, each retains its original form. Regarding obligations that stem for us primarily, if not exclusively, from *berit Avot*, perhaps their non-legal nature as values allows for a certain amount of flexibility and discretion. In a vacuum these values dominate, and we do not easily or flippantly override them. However, in the context of other spiritual pressures, perhaps the values of *berit Avot* can accommodate.

**Living in Israel: Law or Value?**

To use an example from contemporary Jewish life, let us consider *aliya*—moving from the Diaspora to Israel. Many native Israelis intuitively identify with the Ramban’s position that living in the land of Israel is subsumed under one of the 248 positive commandments given at Sinai.[[3]](#footnote-3) Therefore, they are mystified by their brethren in the Diaspora who may be exceedingly scrupulous regarding all other *halakhot*, yet seemingly ignore this particular mitzva. How could they regularly recite *Shema* at the appropriate times, adorn themselves with beautifully crafted *tefillin* and blow 100 shofar blasts on *Rosh Ha-shana*, but at the same time overlook “and you shall dwell in it” (*Bamidbar* 33:53)?

As for Diaspora Jewry, segments of it likely accept the Rambam’s omission of living in the land of Israel from his *Sefer Ha-mitzvot*, believing, if only subconsciously, that residing in Israel belongs more to the values of *berit Avot* than to the laws of *berit Sinai*. They do not discount the supreme importance, on both national and personal levels, of living in Israel and strengthening its Jewish presence. Rather, they see it as a value among values, deserving of serious consideration but also counterbalanced by competing concerns, such as wanting to stay close to family or to service and educate Jewish communities abroad. Still, many of these Diaspora Jews will decide to make *aliya* nonetheless (as did my family and I), not because they are persuaded by the Ramban’s arguments but because their allegiance to the legacy of Avraham and God’s vision for Jewish destiny ultimately outweighs other factors.[[4]](#footnote-4)

1. **Laws are hierarchical. Values are pluralistic.**

One of the hallmarks of *halakha*, among other legal systems, is its intricate hierarchy that brings order to the multitude of rules and obligations that comprise the law and helps adjudicate internal conflicts between them. The study of *halakha* seems to be almost preoccupied with the act of classification for its own sake, even before conflicting demands have been considered. Assessing a law as Biblical or rabbinic in origin, as a positive or negative commandment, as a “light” or “weighty” mitzva (see *Yoma* 85b) or as a ritual or interpersonal obligation is part of the basic investigation that almost any foray into *Torah she-be’al peh* entails.

These classifications, however, take on even greater significance when circumstances do not allow for the satisfaction of all halakhic demands, in which case a slew of rules for prioritization kicks in. For example: a positive commandment can override a negative commandment, but not one that carries a severe penalty (*Yevamot* 3b) or is itself coupled to a positive commandment (*Beitza* 8b); a frequent mitzva takes precedence over a less frequent mitzva (*Zevachim* 89a); a rabbinic law can demand inaction regarding a Biblical command (*Yevamot* 90b); and a transgressor receives the more severe of multiple punishments he faces (*Sanhedrin* 81a; *Ketubot* 36b). These are all rules that maintain a clear hierarchy of responsibilities in any given scenario. Indeed, in order to be relevant, it is the job of law to “make sense of itself” by negotiating multiple, competing interests into a concrete plan for action.

Values, in contrast, live comfortably side by side and do not easily line up by rank or severity. Furthermore, because values deeply inform judgment and action but do not directly impose specific duty upon the individual or community, there is nothing inherent in their nature that demands a clear solution to competing claims. The values remain fundamentally true in their original, pure form and, in a sense, are above frontal clashes, even as their devotee may feel pulled in different directions. For the very same reason that values can tolerate temporary, practical suspension, they also do not flinch when particular circumstances pit them against each other.

The hierarchical structure of *halakha* allows for easy formulae that dictate which rule will take precedence over another. Weighing different values, by comparison, is often a matter of comparing apples and oranges, which greatly complicates any effort to systematically decide which should prevail when. Regarding Jewish ethics, for instance, R. Walter Wurzburger writes that its “pluralistic nature… does not allow us to rely on a single criterion for the resolution of competing claims between various norms and values” (*Ethics of Responsibility*, 35). By their very nature, values defy simple, generalizable solutions to situations of conflict.

1. **Legal duties are objective. Responsibilities imposed by values are subjective.**

This conclusion follows from the first two assertions. Law determines clear obligations that are objective, universal and static. The classic symbol of this aspect of *halakha* is *shi’urim*, the objective measures that set the parameters of *mitzvot* (a *lulav* must be four handbreadths tall; one must consume an olive-sized quantity of *matza* at the *seder*; a woman is married through a monetary gift worth a *peruta*; etc.). Temperament, sensibility and circumstance cannot alter the size of an opening that disqualifies an *eiruv* or the volume of water necessary for a *mikveh*. Similarly, formal rules determine the objective criteria for exemption from a particular duty or for suspension or deferral of a law.

Of course, application of *halakha* relies upon human judgment (e.g., “Is this medical situation on Shabbat conceivably life-threatening?” “Is the *sukka* too hot for comfort?”), as with all systems of law. However, these judgments relate to predefined clauses in the law, rather than to a particular agenda. No matter how pressing the concern, the halakhic decisor must operate within recognized categories. Circumventing formal reasoning through direct apprehension of “God’s will” is incompatible with *halakha* as law.

Notably, even when the Torah speaks in the broad, sweeping language of values, as in “you shall love your neighbor as yourself” (*Vayikra* 19:18), “on the seventh day shall you rest” (*Shemot* 23:12) and “you shall do the right and the good” (*Devarim* 6:18), our Sages were quick to delineate specific duties that emerge from each of these commandments (see Rambam *Hilkhot Aveilut* 14:1; *Hilkhot Shabbat* 21:1; and *Hilkhot Shekheinim* 12:5 and *Hilkhot Malveh Ve-loveh* 22:16, respectively). This is not to suggest that our Sages thereby gutted the overarching nature of these commandments or that *halakha* never embraces broad, open-ended values. Rather, the point is that *halakha*’s strong tendency is to objectify wherever possible.

Values, on the other hand, resist constraining definition. They belong to the list of “things that have no measure” (*Pei’a* 1:1) at either end of the spectrum. They do not establish an absolute, minimal duty, nor is there any point at which one can say that he or she has definitively satisfied personal obligation. Regarding values, the individual can never escape exercising personal discretion in deciding when, how and to what degree.

Furthermore, because values are both flexible and pluralistic, they similarly call upon the individual to employ subjective reasoning in juggling multiple concerns and resolving arising conflicts. Regarding ethics, R. Wurzburger writes:

Since there is no hierarchy of values or principles that can provide definitive guidance in situations of ethical ambiguity, we have no choice but to rely on intuition to determine which of the conflicting *prima facie* obligations takes precedence. (*Ethics of Responsibility*, 35)

What R. Wurzburger writes of ethics is equally true for the other values of *berit Avot*. To return to our previous example: Who should make *aliya* and under which circumstances? Which conflicting values can reasonably take precedence over living in Israel, and which should be cast aside without too much thought? For those who view living in Israel as a law of *berit Sinai*, responsibility lies with halakhic authorities to articulate generalizable answers to these questions. If, however, we classify living in Israel as a value of *berit Avot*, we might purposely turn the issue over to individuals to process—with careful analysis and reflection, as well as with the input and guidance of scholars—for themselves.[[5]](#footnote-5)

Finally, it is important to note that flexibility and discretion in values is, to turn *Chazal*’s phrase on its head, a “leniency that leads to a stringency.” The same properties that lend flexibility to the values of *berit Avot* also make the possibilities for their implementation limitless. Because there is no concrete duty to be fulfilled, one can never walk away satisfied that all obligation has been dispensed with.

Thus, while values may appear “soft” relative to rigid, objective *halakhot*, they can also be much more demanding. Of the relationship between *halakha* and covenantal values, R. Wurzburger writes:

It should be borne in mind that meticulous observance of halakhic norms does not exhaust the meaning of Jewish piety. Halakhah merely provides the foundation; it is a necessary but not sufficient condition for the attainment of religious ideals. As Rabbi [Joseph B.] Soloveitchik put it, “Halakhah is not a ceiling but a floor.” (*Ethics of Responsibility*, 31-32)

In stressing *halakha* as a foundation, R. Wurzburger and R. Soloveitchik also highlight a further dimension of complementarity between *berit Avot* and *berit Sinai.* *Halakha* establishes universal minimal requirements while values raise the bar further, in context-dependent and subjective ways.

Moreover, it is here, perhaps, that personal, intuitive thinking becomes most important—not in determining where to pull up short, but in pushing each of us to reach further, try harder and aspire for more. Halakhic observance, first and foremost, demands obedience. The weight of its yoke has us constantly asking ourselves, “Have we met all of our obligations? Have we complied with all of its prohibitions?” The covenantal experience, on the other hand, calls for ambition, imagination, sensitivity and personal creativity. It challenges the Jew to constantly reflect, “What do the nuances of this situation call for? What can I contribute in this particular context?” Here, we are ever haunted by the words of the *midrash*:

Therefore each and every one should be saying, “When will my actions approach the actions of Avraham, Yitzchak and Ya’akov?”(*Tanna De-bei Eliyahu Rabba* 23)

**Questions or Comments?**

Please email me directly with your feedback at [judahlgoldberg@gmail.com](mailto:judahlgoldberg@gmail.com)!

1. Outlawed in *Devarim* 16:22. [↑](#footnote-ref-1)
2. Also see R. Norman Lamm, *Torah Lishma—Torah for Torah’s Sake: In the Works of Rabbi Hayyim of Volozhin and his Contemporaries* (New York, 1989), 14-18, where he speculates that R. Chayyim was responding to Hasidic claims that *tzaddikim* retain something of the primordial pre-Sinaitic existence. Also see p. 44, n. 85. [↑](#footnote-ref-2)
3. Glosses to Rambam’s *Sefer Ha-mitzvot*, Omitted Positive Commandment #4. I deliberately say “subsumed” because the Ramban believes that the primary mitzva is collective conquest and settlement of the Land of Israel. [↑](#footnote-ref-3)
4. On a personal note, this last point crystallized in my mind when one of my non-Jewish colleagues asked me why we are moving to Israel. “Is it for religious reasons?” he probed. I hesitated, not sure of how to answer. By “religious” I knew he meant “halakhic,” wondering if I was moving to Israel for the same reason I pray three times a day and return home before sundown on Friday. I knew this was facetious, but at the same time I did not possess a language that could capture in what sense my identification with Jewish destiny is “religious.” *Berit Avot* fills this void. [↑](#footnote-ref-4)
5. The need for intuition, notes R. Wurzburger, is not unique to his theory of ethics but is shared by contemporary interpretations of *da’at Torah*. Both presume that “there are religiously significant issues that cannot be decided on the basis of purely formal halakhic reasoning” (Ethics of Responsibility, 31). In another context, he adds:

   What differentiates our approach to covenantal imperatives from the doctrine of *Da’at Torah* is the emphasis on the personal responsibility of the individual to make his own decisions in areas not subject to halakhic legislation or authority. One cannot abdicate one’s religious responsibility by claiming that halakhic authorities provide authoritative guidance in areas which ultimately have to be reserved for the individual’s exercise of his personal freedom. (“Covenantal Imperatives” in *Covenantal Imperatives: Essays By Walter S. Wurzburger on Jewish Law, Thought, and Community* [Jerusalem, 2008], 53) [↑](#footnote-ref-5)