YESHIVAT HAR ETZION

ISRAEL KOSCHITZKY VIRTUAL BEIT MIDRASH (VBM)

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

**By Rav Dr. Judah Goldberg**

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Dedicated by the Etshalom and Wise families in memory of

Mrs. Miriam Wise z"l, Miriam bat Yitzhak veRivkah, 9 Tevet.

Yehi Zikhra Barukh

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**Shiur #35: Pursuit of the Ethical Life (6):**

**Moral Intuition (1) — Judicial Conscience**

In the previous two *shiurim*, we explored the dual concepts of *lifnim mi-shurat ha-din* — as understood by *mori ve-rabbi* HaRav Aharon Lichtenstein — and an ethical imperative of *berit Avot* to pursue *tzedaka u-mishpat* as two alternatives to halakhic positivism. As much as we emphasized the unique ethical force of *berit Avot*, we also consistently returned to what it shares with *lifnim mi-shurat ha­-din*: the recognition of ethical judgment and responsibility that lie beyond the boundaries of formal Jewish law.

**Revisiting Halakhic Positivism and Halakhic Formalism**

These two elements, judgment and responsibility, stand in contrast to positivism and formalism, respectively. Strict halakhic formalism will not concede to a subjective, ethical responsibility outside of the obligations of the law. Regardless of one’s gut feelings about a given scenario, if the law is silent, then there is absolutely nothing that can demand a particular response from a Jew in that context. Halakhic positivism makes an even farther-reaching claim. It looks to the law as the sole legitimate source of values. That which the law does not compel is not only optional, but by definition value-neutral. According to halakhic positivism, in the absence of law, one has no basis, within Judaism, of making any kind of moral argument at all!

To be sure, halakhic formalism and positivism are not looking to let a Jew off easy. Even their proponents imagine Jewish life to be one of incessant duty, for the law itself is both expansive and detailed, invading almost every aspect of life and perpetually investing it with moral consequence. If anything, proponents of formalism or positivism might be particularly aggressive in invoking the law in every situation that they can, as they have no other recourse for making value judgments (though the very impulse to search the law exhaustively would arguably belie an a priori moral intuition that a given situation is morally laden and calls for guidance[[1]](#footnote-2)).

In any case, when HaRav Lichtenstein and R. Walter Wurzburger assert an ethical realm beyond the details of the law, they necessarily refute both claims. First, they maintain that areas of *reshut —* of personal discretion where the law does not obligate — can be morally laden. Just because the law does not make a specific demand doesn’t mean that a decision is completely arbitrary and devoid of moral meaning. Similarly, one should be able to make an argument about justice and fairness, even when formal “*din*” does not.[[2]](#footnote-3)

Second, because there is moral content and consequence in areas of *reshut*, there is also responsibility. Judaism demands, through either *lifnim mi-shurat ha-din* or *berit Avot*, that the individual stay tuned in with his or her moral antennae, apply his or her moral compass, and exercise his or her own moral judgment — itself hopefully refined through a deep and sophisticated engagement with the corpus of Halakha — even when the law has nothing specific to say.

**Jewish Law Recognizes Values Outside of Itself**

Through the next few *shiurim*, I would like to pursue the argument against halakhic positivism further and demonstrate that Judaism recognizes moral judgment outside of the dictates of the law. But what kind of proof can we offer? I suggest that, again, we turn to the corpus of Jewish law itself. I believe that there are multiple examples where the law encourages an authority to pursue justice specifically outside of the formal judicial processes that the law stipulates!

In other words, Halakha is telling us directly that there are values beyond its rules; that we are not totally bereft of any kind of compass when we have stepped outside of the boundaries of “*din;*” and that certain authorities, in particular circumstances, are not only authorized but are prodded to be proactive, and even audacious, in applying their own judgments and intuitions. In short, we find the law presuming values that lie beyond its details and asking us, yet again, to transcend its own boundaries.

**Judicial Conscience**

In the 24th chapter of *Hilkhot Sanhedrin*, the Rambam grants wide latitude to the judges of monetary cases to use personal discretion. On the one hand, the Rambam allows them to rely on non-traditional witnesses or circumstantial evidence if the judges find them sufficiently compelling. On the flipside, following *Shevuot* 30b, the Rambam warns the judges that they cannot hide behind mere procedure:

From where do we learn that a judge who knows that a case is corrupt should not say, “I will adjudicate, and the yoke will hang from the necks of the witnesses”? Thus it says, “Distance yourself from any false matter” (*Shemot* 23:7).

Rather, the judge must interrogate the witnesses aggressively until he has dispelled any hint of corruption (see *Sanhedrin* 32b).

What if, despite his best efforts, a nagging concern remains? R. Yeshaya b. Eliyahu di Trani (Riaz) rules that at this point, the judge must concede defeat. One can attempt to disqualify witnesses, but not simply ignore them. As the authority of corroborated testimony is a cornerstone of halakhic jurisprudence, the judge has no choice but to carry out his judicial duties faithfully, in accordance with the law (*Piskei Riaz*, *Sanhedrin*, 1:1:19).

The Rambam, however, along with most other halakhic authorities, disagrees. If, ultimately, the judges feel unsettled by any part of the proceedings, they must recuse themselves and leave the case for one “whose heart is satisfied with the matter” to adjudicate.

For the positivist purist, the Riaz’s opinion is validating, but the Rambam’s appeal to conscience poses something of a problem. Halakha dictates not only the content of the law, but also proper procedure for its adjudication. If the judge adhered to all the guidelines, pursued the witnesses aggressively, investigated the litigants to the best of his ability, and exhausted all efforts to shed further light on the case, has he not executed “*din*”?

The novelty in the Rambam’s position is further evident if we compare this application of “Distance yourself from any false matter” to others. *Shevuot* 30b-31a derives no less than thirteen rules regarding the legal process from this verse. Many are procedural rules, directed at the judges and their clerks, that protect the fairness and truthfulness of the proceedings, while others are warnings to the litigants and their witnesses not to abuse halakhic procedure to their advantage. Buried in the middle of this list, though, is an instruction to just dismiss the legal process if it does not seem to be serving the higher purpose of truth! In other words, while “Distance yourself from any false matter” mostly directs legal procedure, in this case the verse’s concern for truth simply overrides procedure. But according to positivism, where is there room for conscience outside of the law?

In response, perhaps we could argue that it is not personal conscience at stake, but the conscience of the law itself, so to speak. That is, beyond a duty to follow protocol, the judge also has a mandate to maintain the integrity and mission of the justice system. He is not invoking his private moral conscience but carrying out a halakhic obligation to protect the standards of justice that he discerns and intuits from the halakhic system itself. Halakha, then, remains the sole source and arbiter of justice. Only if the judge feels that the system and its aspiration have somehow been undermined is he authorized, by the law itself, to step in and say so (or at least step away).

Still, it seems to me that the moral conscience of the judge, or of the judges of Israel collectively, cannot be completely denied. Formalism may be salvageable here, but positivism is in peril. For isn’t moral conscience a prerequisite for sensing that something has gone awry? Furthermore, even if the standard applied here is not a personal one but one that emerges from Halakha, doesn’t it take moral imagination to discover it? Bereft of any moral bearings, how would one even know how to read the details of the law sensitively, broadly, and insightfully, to glean from them not just a rulebook but an ethos?

Reasonably, an extremely narrow and morally bunted judge could approach the laws of witnesses the same way he approaches the laws of the red heifer. Strictly following procedure, he would not be alert to anomalies that do not violate any rules. More fundamentally, even if he accepts a mandate to protect the Torah’s mission of justice, he lacks any tools by which to formulate it or to assess its ongoing success! By contrast, doesn’t one have to possess some external barometer — perhaps the same one with which Avraham challenges God regarding the judgment of Sedom (*Bereishit* 18:25) — to brazenly suggest that the halakhic system has somehow failed itself?

In effect, the Rambam is granting judges regarding justice that which R. Chayim of Volozhin denied Chasidim regarding prayer (see *shiur* #5). When *Chassidut* argued that a rigid schedule of prayer undermines its entire purpose, R. Chayim of Volozhin staunchly defended the formality and rigidity of the law and disqualified any extra-halakhic teleological thinking post-Sinai.[[3]](#footnote-4) When it comes to justice, though, the law itself is telling us not to be overly bound by its rules.[[4]](#footnote-5) It seems to me that some vision broader than just the meticulous implementation of the law must be involved to know when the law is not achieving its own results. And even if that vision is itself dictated by broad directives such as “Distance yourself from any false matter” and “Justice, justice pursue” (*Devarim* 16:20), it still takes a rich moral spirit to apply them in practice.

**Conclusion**

In this *shiur* we examined one brief, though significant, example in which Halakha validates judgment outside of the law. In the next *shiur*, we will take up the broader topic of arbitration (*peshara*) and analyze both its roots and its implications for moral intuition.

1. Similarly, positivist assumptions would need to be tested against the entire domain of rabbinic ordinance and innovation. Is it indeed all “practical,” with no hint of ethical sensibility? [↑](#footnote-ref-2)
2. Also see HaRav Lichtenstein, “*Halakha Ve-halakhim Ke-oshiyut Mussar: Hirhurim Machshavtiyyim Ve-chinukhiyyim*,” *Mussar Aviv* (Maggid, 2016), 41-46, as well as the emphatic rejection of halakhic positivism that follows:

Experience demonstrates that the myth of applying the principle of “leaf through and leaf through [the Halakha], for everything can be found in it” (*Avot* 5:22), in its narrow sense, to this arena [=ethics] does not fade quickly. Felt, then, is the need to confront it; but it nevertheless remains a myth. (48) [↑](#footnote-ref-3)
3. However, see R. Yitzchak Blau, “*Ta’amei Ha-Mitzvot*, Halakhic Analysis, and Brisker Conceptualization” in *That Goodly Mountain* (Yeshivat Har Etzion, 2012), 97-108, who argues that some degree of teleological reflection is often employed with regard to the law’s internal parameters. [↑](#footnote-ref-4)
4. Importantly, the Rambam only allows a judge to recuse himself; regarding the shady testimony, the Rambam agrees with the Riaz that it may not be arbitrarily invalidated. The formal, objective authority of two witnesses (see *Hilkhot Yesodei Ha-Torah* 7:7) may be sidestepped, but not overridden.

Regarding judicial process more generally, modern scholars have observed that Jewish law is less formalist in its orientation than many secular court systems. See the Introduction to Prof. Eliav Shochetman’s *Civil Procedure in Rabbinical Courts* (Heb.), Vol. 1, (Jerusalem: 2011), 4-10. [↑](#footnote-ref-5)