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DOES 'IT'S NEVER BEEN DONE' IMPLY 'IT SHOULDN'T BE DONE'?

Rabbi Aryeh Klapper, Dean

Halakhic society, like all societies, properly has its radicals and its conservatives. There are halakhic Avrams, ever willing to leave family and culture behind in pursuit of utopia, and halakhic Yitzchaks, who want nothing more than to keep drinking from ancestral wellsprings.

Halakhic radicals focus on the uniqueness of every moment, and seek the Divine Will as if the Torah were first given in that moment. Halakhic conservatives focus on continuity and stability, and seek the Divine Will that emerges organically from past applications of Torah to life.

Halakhic society, like all constitutional societies, moderates the clash between radicals and conservatives by binding them to a set of procedural principles. These principles themselves are understood and applied differently by each side. Nonetheless, they provide sufficient common ground to enable decisionmaking, and they enable each side to accept defeat without admitting error. At least, that is the hope; civil wars happen.

My goal in this essay, the first of an intended series, is to begin tracing the history of a phrase that lies on the fault line between halakhic radicals and halakhic conservatives. That phrase is "לא ראינו" = "we have not seen" (alternatively "לא ראיתי" = "I have not seen"), meaning the attempt to prove halakhah via negative evidence. It's never been done that way, so it must be wrong to do it that way. Does that argument have force in Halakhah?

It should be clear that properly answering this question has significant implications for contemporary conversations about women and Orthodoxy, and I expect to draw those morals explicitly in the course of this series.

Our starting point is Mishnah Zevachim 12:4 (cited partially in Eduyot 2:2). I will make the conservative move of translating it loosely in accordance with Talmud Zevachim 104a.

All animal sacrifices that are discovered to be invalid before their skinning—their skins do not go to the kohanim; after their skinning—their skins go to the kohanim.

*Said Rabbi Chanina the Executive Vice Kohen:
In all my days, I never saw a skin go out to the incinerator*

[and therefore it must be that the skin goes to the kohanim even if the sacrifice is discovered to be invalid before skinning].

Said Rabbi Akiva:

From his words we have learned that if one skins a firstborn animal

(whether as a sacrifice in the Temple, or, if it was declared physically blemished by a qualified scholar, for the sake of food outside the Temple) —

that the kohanim may derive benefit from its skin.

But the Sages say:

"We have not seen" is not a proof, [1]

and the skin goes out to the incinerator. [1]

Rabbi Chanina is conservative, and the Sages are radical. The Halakhah follows the Sages. This suggests that halakhists should not hesitate to argue for the necessity of unprecedented actions.

However, Talmud Pesachim 51a significantly qualifies that suggestion.

Things which are permitted, but others have practiced that they are prohibited —

you may not permit them in their presence.

Rav Chisda said:

The "others" referred to here are Cutim.

Is this not true regarding everyone?! But a beraita teaches:

Two brothers may bathe together

(without concern for the appearance of sexual impropriety) — but not in Kabul;

A story regarding Yebudah and Hillel, sons of Rabban Gamliel, who bathed together in Kabul,

and the whole country gossiped about them, saying: "In all our days we have never seen such";

so Hillel left and went to the outer room,

not wishing to say to them "You are permitted to do this".

One may go out on Shabbat wearing loose sandals

(without concern that they will fall off, and end up being carried) — but not in Beirut.

A story regarding Yebudah and Hillel, sons of Rabban Gamliel, who went out in Beirut on Shabbat wearing loose sandals,

and the whole country gossiped about them, saying: "In all our days

*we have never seen such”,
so they took them off and gave them to their servants,
not wishing to say to them “You are permitted to do this”.*

*One may sit on “Gentile” benches on Shabbat
(without concern for the appearance of engaging in commerce),
but not in Akko.*

*A story regarding Rabban Shimon ben Gamliel,
who sat on “Gentile” benches on Shabbat,
and the whole country gossiped about them, saying: “In all our days
we have never seen such”,
so he got off and sat on the ground,
not wishing to say to them “You are permitted to do this”.
?!*

*The people in those foreign places are like Kutim, since they have
little exposure to rabbis. [2]*

This passage suggests that halakhic radicalism is an option only in communities with a great deal of halakhic sophistication. The rationale for this distinction is articulated clearly by Rabbeinu Chananel:

*What is the reason (for the distinction between Cutim and others)?
Because they will go astray –
they will say*

*“We used to treat that matter as forbidden, but it was permitted; so
too this thing is permitted”,
and they will end up permitting the truly forbidden. [3]*

According to this passage, even if “We have not seen” is not sufficient *evidence* for prohibition, it may be sufficient *cause* for prohibition – but only in some communities.

Which communities? The Talmud distinguishes between communities that are regularly exposed to rabbis, and those that are not. It seems reasonable to take rabbinic exposure as a proxy for halakhic sophistication. In a halakhically sophisticated community, the acknowledgement of past error does not destabilize the authority of the system. Perhaps this is because everyone sees the system as functioning through human reason and intuition, and therefore fallible. In a halakhically unsophisticated community, the acknowledgement of one error may undo everything. Perhaps this is because loyalty to the system is based on the belief that it is derived through some form of infallible direct access to the Divine. [ii]

Whether Modern Orthodoxy is a safe haven for halakhic radicalism, then, should depend on whether our community is halakhically sophisticated. I think that by historical standards it surely is. Do you agree?

But I also think that this is too easy a statement of the issue. A community’s halakhic loyalty can be vulnerable

for other reasons, such as attenuated belief in Torah min HaShomayim, or pressure from compelling external value systems, or serious ethical lapses on the part of its religious leadership. All of these apply to Modern Orthodoxy, in spades.

Perhaps the more important question is whether these other causes of instability as well are best dealt with by halakhic conservatism, by reactionarily digging in and reinforcing our commitment to halakhic practice as-is. Or are there times when one can only fight fire with fire? Do we live in such times?

Shabbat shalom

Notes:

[i] Literally “we have not seen” is not a seeing

[ii] which may be termed ruach hakodesh, or daas Torah, etc.

Hebrew Texts:

[1] כל הקדשים שאירע בהם פסול קודם להפשתן – אין עורותיהם לכהנים;
לאחר הפשתן - עורותיהם לכהנים.
אמר רבי חנינא סגן הכהנים:
מימי לא ראיתי עור יצא לבית השריפה.
אמר ר' עקיבא:
מדבריו למדנו שהמפשיט את הבכור ונמצא טריפה - שיאותו הכהנים בעורו.
וחכמים אומרים:
אין "לא ראינו" ראייה, אלא יוצא לבית השריפה:

[2] דברים המותרין ואחרים נהגו בהן איסור –
אי אתה רשאי להתירן בפניהן.
אמר רב חסדא:
בכותאי עסקינן.
וכולי' עלמא לא?! והתניא:
רוחצין שני אחין כאחד, ואין רוחצין שני אחין בכבול.
מעשה ביהודה והלל בנו של רבן גמליאל שרחצו שניהם כאחד בכבול –
ולעזה עליהן כל המדינה, אמרו: "מימינו לא ראינו כך",
ונשמט הלל ויצא לבית החיצון, ולא רצה לומר להן "מותרין אתם";
ויצאים בקורדקיסון בשבת, ואין יוצאין בקורדקיסון בשבת בבירי.
ומעשה ביהודה והלל בנו של רבן גמליאל שיצאו בקורדקיסון בשבת בבירי,
ולעזה עליהן המדינה, ואמרו: "מימינו לא ראינו כך",
ושמטום ונתנום לעבדיהן, ולא רצו לומר להן "מותרין אתם";
ויושבין על ספסלי נכרים בשבת, ואין יושבין על ספסלי נכרים בשבת בעכו.
ומעשה ברבן שמעון בן גמליאל שישב על ספסלי נכרים בשבת בעכו,
ולעזה עליו כל המדינה, אמרו: "מימינו לא ראינו כך",
נשמט על גבי קרקע, ולא רצה לומר להן "מותרין אתם".
?!

בני מדינת הים נמי, כיון דלא שכיחי רבנן גבייהו - ככותים דמו.

[3] מאי טעמא?

משום דסרכי –

אומרין 'הלא דבר פלוני היינו נוהגין בו איסור, והיה מותר; כן גם דבר זה מותר
הוא',
ויבואו להתיר האיסור