



Engaging Israel: Foundations for a New Relationship

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Lecture 8: Background Reading 20

Moshe Halbertal, "Human Rights and Membership Rights in the Jewish Tradition"
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Protecting the rights enjoyed by human beings simply by reason of their humanity has been a central endeavour of the modern political and moral consciousness. Every person is entitled, as a person, to protection of life, liberty and property—as long as he accords the same rights to others. These rights are distinct from the 'membership rights' accorded to individuals by virtue of being members of a particular community. The right to stand for public office and the right to vote, for example, are not extended to all persons by reason of their humanity; they are limited to citizens, members of a particular political community. We thus distinguish between human rights and membership rights, and a society that fails to recognize the human rights of non-members is clearly a perverse and discriminatory society. The rights to life, to dignity, to economic opportunity and to liberty, among others, are granted to us not because we are members of a particular religious or ethnic group but because we are human beings. Turning them into membership rights confined to a particular group constitutes a form of discrimination that runs counter to our basic intuitions regarding human equality; and maintaining a broad array of rights and obligations enjoyed by and owed to others simply because of their humanity represents an important element of basic humanism.

Within the Jewish tradition, the domain of human rights unrelated to membership in a particular group is grounded in the Creation narrative and in the duties owed to others because they are created in the image of God. The human being who figures in the Creation story—and with regard to whom we are instructed that 'Whoever sheds man's blood, by man shall his blood be shed; for in the image of God made he man' (Gen. 9.6)—does not belong to any specific ethnic, racial, or religious group. Our absolute duties toward that human being—whom each and every one of us resembles—predate his becoming a particular family, tribe or religion and have bound us since before the emergence of any political or ethnic community. The deep roots in the Creation story of this concept of inherent human worth is expressed in the Jewish tradition through the admonitory formula, mandated by the Mishnah in Tractate Sanhedrin, which is to be used in interrogating accusatory witnesses in capital cases. At the very moment

when the sovereign may be about to take a human life, the halakhah emphasizes that life's absolute worth:

Accordingly, one man alone was created, to teach you that one who destroys a single soul is 'considered by Scripture to have destroyed an entire world; and one who sustains a single soul is considered by Scripture to have sustained the entire world. And [the creation of but one man was] for the sake of peace among [God's] creations, so that no man may say to his fellow, 'my father was greater than your father' and to demonstrate the greatness of the Holy One, Blessed-be-He, for if a human being mints several coins from a single mould they all resemble one another, yet the King, the King of kings, the Holy One, Blessed-be-He, mints every human being on the mould of primal Adam, yet none resembles his fellow. Accordingly, each person is obligated to say 'on my account the world was created'.¹

Through its account of the creation of a single human being, this Mishnah, redacted toward the end of the second century, offers one of the earliest and clearest formulations we have of the idea of the individual. It describes three components of the idea of the individual human being per se. First, a single human life has absolute value. God created only one man in order to emphasize that he is as important as the entire world and his value does not lend itself to quantitative measurement. Second, human beings are fundamentally equal. Any future claim to racial superiority is ruled out in advance by a Creation story in which all humanity is traced back to one human couple. Finally, human beings are as varied as they are numerous; the descendants of the one created man differ from one another quite clearly. The Mishnaic development of the Creation story crystallizes the idea of humanity by establishing the infinite value of individuals, their equality and their diversity.

But the duties owed to human beings per se by reason of having been created in God's image do not exhaust the picture. Along with those duties, the Torah uses membership terminology in formulating moral obligations. The prohibition on taking excess profit (or otherwise deceiving in various ways) is worded as 'You shall not wrong one another [or: 'one's fellow'] (Lev. 25. 17). The obligation to pay monetary damages similarly relates not to man in the abstract but to one's neighbour: 'If a man's ox injures his neighbour's ox' (Exod. 21.35). And the obligation to return lost property is described in the Bible in terms of 'anything lost by your brother' (Deut. 22.3). These verses, which speak of one's 'fellow' (*amit*), 'neighbour' (*rei'a*) or 'brother' (*ah*), might be taken simply to reflect the reality that situations of the sort they consider arise most often between persons living in proximity to one another; in that event, the use of membership terminology would not be meant to limit the duty to persons within the group. Nevertheless, the Midrash, Mishnah, and halakhah contain opinions that read these membership terms as exclusive. For example, in view of the biblical term 'his neighbour', the Mishnah determines that no liability attaches when a Jew's ox injures a Gentile's, even though a Gentile whose ox injures a Jew's ox must pay full damages.² Similar discrimination can be found in connection with the prohibition of excess profit and the obligation to return lost property. These laws

contravene our basic intuition regarding equality among people with respect to fundamental rights.

The very use of membership language and the distinction between neighbours and others with regard to fundamental duties, give rise to profound moral unease; for when all is said and done, these duties should be owed to the other simply because he or she is human. But even if we read the terms at issue—'neighbour', 'brother' and 'fellow'—as limiting terms, it remains necessary to define the membership group within which the obligations are owed. Who is a 'brother', a 'neighbour' or a 'fellow'? If brotherhood and fellowship are defined with reference to ethnic association, so that the scope of the prohibition on profiteering is defined by ties of blood, the resulting discrimination seems to be unequivocally racist. And while we can accept the justifiable preferences generated by ties of blood and family—one is properly obligated to invest more in one's own children than in others'—that is a far cry from discrimination regarding tort liability.

Alternatively, one might define the membership group, as the Talmud itself does, on the basis not of ethnicity but of way of life. The neighbour, the brother, the fellow are those who accept the yoke of the Torah and its commandments. In that case, the distinction is not between Jews and non-Jews but between those who observe the Torah's commandments and those who do not, even if they are members of the Jewish ethnic group. That sort of distinction seems less problematic than one based on ethnicity, but it is still unsettling. Why should a person's rights be dependent on adherence to a particular way of life? The rights should be granted without regard to ethnicity, and they should similarly be granted without regard to any particular way of life.

It may also be possible to broaden the affinity group by drawing the line not between Jew and non-Jew or between one who observes the commandments and one who does not, but between monotheist and pagan. The 'neighbour' is one who renounces idolatry, a group that encompasses Muslims and Christians. The sources lend themselves to such a reading because, among other things, the Mishnah and the halakhic Midrashim, dating from the first and second centuries, do not know of any non-Jewish community that is not pagan. But even this expansion of the membership group beyond the bounds of ethnic identity and of adherence to a particular way of life does not resolve the problem. As important as the distinction between monotheism and paganism may be, it does not seem to warrant, as a matter of morality, discrimination in the allocation of rights and duties.

One must not underestimate, of course, the profound importance of socialization into a particular community, through which a person establishes his or her identity and instills meaning into his or her life through adoption of the community's culture. A life of universal cosmopolitanism, lived without a particular identity, is an impoverished life—if it is possible at all. But turning a particular affinity into a basis for granting privileges with regard to rights and duties seems to cross the fine line that divides particularism from exclusivism. The halakhic voices that call for this sort of discrimination developed at a time when the Jewish community was a persecuted, afflicted minority within the empire of the Roman 'other', which dominated

and oppressed it. When such voices enter the authoritative canon, however, they afford legitimacy to discrimination even when the balance of power is reversed. One occasionally hears such voices in the religious discourse of the extreme right in the State of Israel, offered as justification for discriminating against non-Jews. Adopting the rhetoric of the weak in a position of strength is a serious distortion, an offensive tradition that Judaism and Zionism must combat with renewed force. What internal resources can be brought to bear in confronting this question?

One might want to attribute our discomfort with membership language to our adoption of the moral concepts of modern humanism. It seems, however, that the discomfort is intrinsic to the tradition itself, which is multi-vocal on the question. The following story, recounted in the Jerusalem Talmud, sharply criticizes the use of membership language as a basis for discriminating with regard to rights:

Simeon ben Shetah dealt in flax. His students said to him: let us ease your burden; we will buy you a donkey and you will not have to labour as hard. They went and bought him a donkey from a desert nomad, and a pearl was suspended on it. They came before him and said: Rabbi, henceforth you will not have to labour much. He said to them: Why? They said: We bought you a donkey from a desert nomad and a pearl was suspended from it. He said: Did its owner know about it? They said: No. He said to them: Return it. They said: ...even one who forbids deriving benefit from property stolen from a Gentile [acknowledges] the universal opinion that a Gentile's lost property may be used. He said to them: What do you think? Is Simeon ben Shetah a barbarian? Simeon ben Shetah wants him to say, 'Blessed is the God of the Jews.'¹³

Simeon ben Shetah regards it as barbaric to distinguish between Jew and Gentile with regard to returning lost property, even if the distinction is grounded in one text or another. His students importune him to rely on the distinction to turn a profit, but he replies sharply and directly: he does not wish to become a barbarian. Distinguishing between Jew and non-Jew on the basis of membership language is thus subjected to criticism from within the tradition itself, a criticism powerfully and clearly voiced by Simeon ben Shetah. Relying not only on the direct moral qualms that appear in the argument against barbarism but also on other voices within the tradition, the critique sees this sort of distinction as entailing actual desecration of God's name.

The appeal to broader values as a basis for this internal critique can be found as well in other sources that deal with the Jew's attitude to the non-Jew. The principle of 'ways of peace' (*darkhei shalom*), for example, is used to establish a common expanse of rights and duties for Jews and Gentiles:

In a city that contains Jews and Gentiles, the communal officials collect [charitable funds] from Jews and Gentiles for the sake of the ways of peace. Gentile poor are supported along with Jewish poor for the sake of the ways of

peace; Gentile dead are buried and mourned for the sake of the ways of peace;
Gentile mourners are comforted for the sake of the ways of peace.⁴

The 'ways of peace' as a meta-halakhic principle thus require not only the granting of basic rights but the elimination of all distinctions between 'friend' and 'other' with respect to all communal welfare and relief institutions—charity, burial, and comforting of mourners.

At the conclusion of his *Laws of Slaves*, Maimonides resorts to a value-based meta-halakhic concept to mount an internal critique of a formal halakhic distinction. On the face of it, the halakhah permits working a Canaanite slave with rigour, something forbidden with respect to a Hebrew slave. Maimonides, however, writes as follows:

It is permitted to work a heathen [i.e. Canaanite] slave with rigour. Though such is the rule, it is the quality of piety and the way of wisdom that a man be merciful and pursue justice and not make his yoke heavy upon the slave or distress him, but give him to eat and to drink of all foods and drinks... Nor should he heap upon the slave oral abuse and anger, but should rather speak to him softly and listen to his claims. So it is also explained in the good paths of Job, in which he prided himself: 'If I did despise the cause of my manservant, or of my maidservant, when they contended with me... Did not he that made me in the womb make him? And did not one fashion us in the womb?' (Job 31.13, 15). Cruelty and effrontery are not frequent except with heathen who worship idols. The children of our father Abraham, however, i.e. the Israelites, upon whom the Holy One, Blessed-be-He, bestowed the favour of the Law and laid upon them statutes and judgments, are merciful people who have mercy upon all. Thus also it is declared by the attributes of the Holy One, Blessed-be-He, which we are enjoined to imitate: 'And his mercies are over all His works.'⁵

After acknowledging the formal enforceability of discrimination between the Canaanite and the Hebrew slave, Maimonides goes on to reject it as a matter of practice, portraying such discrimination as contrary to Judaism's fundamental stance. Subjugation of a Canaanite slave is at odds with the common origin of all humanity and runs counter to the ways of God, Creator of the universe, who does not distinguish among people and extends his mercies to all. Amplifying a mode of thinking already found in Talmudic sources, Maimonides here counters the formal authorization to discriminate with an elaborate statement of critical meta-values that rest on the fundamental Jewish religious ethos.

But the halakhic sources offer something more than this appeal to broader values for a sharp internal critique of membership rhetoric. Beyond that appeal, we can find sources that present a distinctive and profound reinterpretation of the concept of the 'other' and draw the membership group's boundary only at the point needed to protect morality and halakhah. The position, articulated by Rabbi Menahem ha-Me'iri in the second half of the thirteenth century, may be a ground-breaking step in the history of tolerance within the West as a whole. The Me'iri determined that wherever distinctions appear to be drawn between Israel and the other

nations with regard to rights and obligations, the distinctions pertain only to the ancient nations that existed without religion, that is, without any system of moral discipline: 'Here, too, one must assess, as we have already discussed, what kind of Gentile is under consideration. What I mean is that of idolaters it is said that they were not disciplined through the ways of religion; on the contrary, every sin and everything repulsive is fit in their eyes.'⁶ The Me'iri formulates a comprehensive rule related to the obligation to return a Gentile's lost property and the prohibition of theft: 'Thus, all people who are of the nations that are disciplined through the ways of religion and worship the divinity in any way, even if their faith is far from ours, are excluded from this principle [of the inequality of Gentiles]; rather, they are like full-fledged Jews with respect to these matters, even with respect to lost property and error (*ta'ut*) and all the other matters, with no distinction whatsoever.'⁷ In the Me'iri's view, the halakhic dividing line is drawn not between Jews and Gentiles on the basis of ethnicity or of a particular shared way of life; it is drawn between nations bound by law and those not so bound—between barbarism and civilization. The Me'iri systematically deploys this principle with respect to compensation for property damage:

If the ox of a Jew gores the ox of a Gentile, [the Jew] is exempt from [the damages that would have to be paid pursuant to the law applicable when one's ox gores the ox of] one's fellow... But according to what the gemara says, this pertains specifically to nations not disciplined through the ways of religion and proper conduct... Accordingly, all those who adhere to the seven [Noahidic] commandments are treated in our [courts] as we are treated in theirs, and we do not accord ourselves favourable treatment. And it therefore goes without saying that the same thing applies to nations disciplined through the ways of religion and proper conduct.⁸

The distinctions that are drawn with regard to moral rights and obligations are justified solely on the basis of whether the 'other' accepts corresponding rights and obligations; they cannot be justified on ethnic or way-of-life grounds. Particularly important is the Me'iri's equal treatment of Jew and Gentile with respect to the obligations to return lost property and assist in adjusting a beast of burden's load, the prohibition on excess profit, the payment of compensation for property damage, and the penalty for homicide. In all of these areas, discriminatory treatment had been justified by reference to Scripture's use of narrow, familial terminology—'your neighbour', 'your brother', 'your fellow'. The Me'iri includes the entire moral community within the circle of affinity and brotherhood:

Anyone disciplined by religious practices is within [the protection of the ban on] excessive profit; but idolaters are not within the scope of brotherhood for purposes of being included within the law against excessive profit in a commercial transaction. The rabbis established the principle as 'Do not wrong one another (*lo tonu ish et amito* (Lev. 25.17)—one who is with (*'im*) you in Torah and commandments you shall not wrong.'⁹

According to the Me'iri, those who are bound by the ways of religion are encompassed within the expression 'your fellow', interpreted in the Talmud to mean 'your fellow in Torah and commandments'.¹⁰

The Me'iri classifies all people possessed of religion as Israel's partners in Torah and commandments and brings them into the circle of brotherhood with respect to legal standing. By taking this remarkable step, he does away with the juridical distinction between Jew and Gentile and replaces it with a distinction between persons having religion and those lacking it. For these purposes, religion encompasses the fundamental layer of beliefs that underlies the existence of an ordered community—something shared by all believers in a divine Creator who exercises oversight and holds people to account. The Me'iri's religious tolerance stems from his recognition of the religious realm common to Jews, Christians and Muslims, and from the fact that the value of this shared religious realm is grounded in its necessary contribution to the establishment of a properly ordered society.

Establishing a moral stratum shared by all religiously bound communities requires a mindset quite different from one that distinguishes between true religion and false religion—a distinction that lies at the heart of intolerant attitudes. One must be able to set aside distinctions between true and false religions and forge a generic concept of religion encompassing all the specific religions, including Judaism, free of any inquiry into truth or falsehood. The Me'iri establishes the following rule: wherever a membership-based distinction is drawn between 'brother' and 'other' with respect to basic rights and obligations, the only pertinent component of the distinction is between lawful and lawless societies. He consistently translates the distinction between 'brother' and 'other' into these terms, thereby constructing the category of the moral community—the relevant fraternity.

Judah Halevi's *Book of the Kuzari*¹¹ recounts the efforts of a Jewish sage to persuade the Kuzari king of the truth and correctness of Judaism. In a particularly interesting passage, the king suggests to the sage that if power relationships between Jews and Gentiles had been other than they were, Jews might have treated gentiles as the Gentiles have treated them: '...that might indeed be so had your suffering been something you had chosen. It was, however, something imposed on you; and when you have the opportunity you, too, will kill your enemies.'¹²

This issue, raised clearly—even caustically—in the twelfth century, has today become an existential question bearing on the very future of Judaism and its standing as a religion. The Jewish tradition, as we have seen, offers a variety of attitudes toward the non-Jew. It encompasses a basic recognition of humanity's intrinsic status as a being created in God's image, and it includes sharp internal criticisms of the voices within it that emphasize membership. It includes as well a halakhic definition that brings all human beings who live in accord with the moral law within a common juridical fraternity. At a time when the Jewish people have attained political sovereignty and find non-Jewish citizens and residents within their domain, the fate and character of the State of Israel will depend in no small part on which voice within the Jewish tradition emerges as the dominant one. In this area, as in so many

others, the way in which the tradition is interpreted cannot be dissociated from the values and moral sensibilities of the interpreter, who transforms the tradition from written text to living practice.

NOTES

¹ Mishnah Sanhedrin 4.5.

² Mishnah Bava Qamma 4.3.

³ JT Bava Metzia 2.5 (8c).

⁴ Tosefta Gittin 3.13-14.

⁵ Maimonides, *Mishneh Torah, Hilkhhot Avadim* 9.8, translated from I. Twersky (ed.), *A Maimonides Reader* (New York, Behrman House, 1972).

⁶ BT Avodah Zarah p. 59.

⁷ BT Baba Qamma p. 330.

⁸ Ibid., p. 122.

⁹ BT Bava Mezia p. 219.

¹⁰ BT Bava Mezia 59a.

¹¹ J. Ha-Levi (trans. N. D. Korobkin), *The Book of the Kuzari* (Northvale, Jason Aronson, 1988).

¹² Ibid., I.114.