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**

**Shiur #43:**

**Pursuit of the Ethical Life (14):**

**Living with *Tzedaka U-Mishpat***

**Part II: Halakhic and Communal Policy**

This *shiur* continues our discussion of roles for moral intuition in Jewish life. It addresses two further areas in which the values of *tzedaka u-mishpat* can be relevant: in complementing halakhic analysis of ethically-laden subjects with deep moral reflection; and in formulating policies for communal governance, at both the local and national levels.

**Morality in Halakhic Thinking**

Sometimes we encounter phenomena which a halakhic radar clearly senses and captures, but which have additional ethical dimensions that do not easily translate into legal concepts or arguments. Thus, a halakhic treatment may not address them at all.

The result can be discourse that feels incomplete; it is faithful to *berit Sinai* but silent about *berit Avot*. It hits all the benchmarks with regard to sound and rigorous legal analysis, but by comparison feels lightweight with regard to considerations of *tzedaka* *u-mishpat*.

In an essay entitled, “[What Makes Halakhic Thinking Moral?](https://www.jewishideas.org/article/what-makes-halakhic-thinking-moral)” R. Dr. Eugene Korn cites a few examples, in his opinion, of this type of imbalanced halakhic conclusion:

1. A policy towards organ transplantation following brain death that discourages donation but allows receiving of an organ;
2. Nonconcern for civilian casualties during a just war;[[1]](#footnote-1)
3. Encouragement of conversion therapy for lesbian, gay, bisexual, and transgender (LGBT) individuals.

In each case, R. Korn argues that the conclusions reached are ethically shallow. Without debating the specifics of each, I think we can easily intuit the moral gravity and complexity latent in each of these domains and the yearning for deliberation which does equal justice to *berit Sinai* and *berit Avot* concerns. Thus, R. Korn would advocate for halakhic literature that is broader and more ambitious in its thinking.

Other examples, in my opinion, of subjects that would benefit from more comprehensive analysis include:

1. Buying and selling of organs;
2. Payment for surrogacy;
3. Equity in access to health care;
4. Arms sales to foreign militaries;
5. Foie gras;
6. Treatment of immigrants, refugees, and asylum-seekers.

Each of these topics invites serious halakhic analysis, and, as a devoted student of *havayot de-Abbayei ve-Rava* (traditional *Torah She-be’al Peh* study; see *Sukka* 28a), I strongly believe that such investigation needs to form the cornerstone of so-called Jewish thinking on any given subject. The content of *berit Sinai* is “our lives and the length of our days,” and any posture that even indirectly diminishes its centrality or its binding force upon us is invalid from the outset. Nevertheless, where the law leaves some facets unaddressed, halakhic argumentation ought to be complemented with equally thoughtful ethical reflection. At the very least, a halakhic ruling, I think, ought to be explicitly self-aware of its own ethical dimensions and implications, even if it finds no room for maneuvering or knowingly declines to tackle the issues completely.[[2]](#footnote-2)

Conveniently, R. Korn proposes “justice” and “compassion” as the two main guiding principles for ethical judgment, which just happen to correspond to the twin values of *mishpat* and *tzedaka*. In other words, before reaching a conclusion or deciding upon a course of action, we ought to ask ourselves two questions:

1. Is it fair?

2. Is it empathetic?

When the law is explicitly not egalitarian (e.g., non-priests’ inability to partake in the Temple service), or when its demands run counter to compassionate instinct (e.g., execution of a criminal in the face of incontrovertible evidence[[3]](#footnote-3)), we surrender to its authority. However, when the law allows, we may probe: How do the values of *tzedaka* *u-mishpat* translate in these circumstances? More to the point, what kind of decision might Avraham have made?

***Tzedaka U-mishpat* as Guiding Values in Communal and National Policy**

The need for guiding ethical values also arises in the context of communal governance, whether at the local or national level. To the extent that we find halakhic sanction of non-rabbinic, non-halakhic (though not anti-halakhic) policymaking, we still need to ask what principles should motivate, direct, and limit ethically-laden decisions. The values of *berit Avot*, I think, can be part of that.

There are two primary bases for lay authority in the halakhic tradition: 1) the institution of monarchy, and 2) the right of communities to self-govern through enactments known as “*takkanot ha-kahal*.”[[4]](#footnote-4) Additionally, some scholars actually merge the two, suggesting that the latter phenomenon is, in fact, a variant manifestation of the authority bestowed upon the former.[[5]](#footnote-5)

Both concepts have been used to justify, within the framework of Halakha, the authority of the Israeli government and its policies. A number of different scholars argue, based on passages from medieval commentators, that the authority invested in Jewish monarchy is not exclusive to a king but can be assumed by any national leader or governing body, such as the Knesset. This point is implicit in R. Chaim Ozer Grodzinski’s invocation of *Derashot Ha-Ran* regarding legislation in a future state (see *Shiur* #38) and explicit in a celebrated 1915 letter by Chief Rabbi Avraham Yitzchak Ha-Kohen Kook (*Responsa Mishpat Kohen* 144:15), quoted by Chief Rabbi Yitzchak Isaac Ha-Levi Herzog and many others.[[6]](#footnote-6)

However, even if the government of Israel is recognized as a substitute for monarchy, its authority as such will only be as wide as that of ideal Jewish monarchy itself, which returns us to our previous analysis of a king’s involvement in justice and law. Briefly, while the Rambam seems to consolidate legislative and judicial authority in the hands of the Sages and authorizes the king to intervene only in exceptional cases, the Ran grants the king broad legislative powers for the sake of maintaining a functioning society.

For the Ran in particular, then, a king, or substitute body, needs strong guiding ethical principles for formulating policy. Where better to look than to the Davidic tradition of *mishpat u-tzdaka*? In other words, when a sovereign Jewish power, such as the State of Israel, is considering policy for which narrow Halakha will not be decisive, I believe that it should look for guidance and inspiration to the ethical values of *berit Avot* as the overarching vision for Jewish conduct.

Furthermore, the need for Jewish guiding principles in the governance of Israel transcends, in practice, the disagreement between the Rambam and the Ran. Those who reject the Ran’s thesis as a basis for broad, non-halakhic governmental authority — most vociferously R. Herzog — do not propose rule by pure Torah law but prop up the Knesset and its legislative functions by other means. This point is most evident regarding criminal law. R. Herzog reports that when the subject of law and justice in a future state arose at a rabbinic convention that he chaired, there was no interest in having rabbinic courts participate in criminal prosecution and punishment. Rather, there was near-unanimous agreement to defer to a secular court system in this regard (*Techuka Le-Yisrael*, Vol. 1, 55, 173).

Its authority, R. Herzog argues, would come from the principle of punishing “not according to Torah,” either by the king or by the rabbinic courts, according to the “needs of the hour.” Early sources we examined in *Shiur* #37 only speak about discrete, exceptional situations that threaten the public order. However, with the disappearance of criminal prosecution by a rabbinic court system, later authorities empower substitute public institutions to maintain order through prosecution and punishment, according to their own standards.

For example, the Rashba is asked about the authority of officials appointed by the community to maintain law and order. Repeatedly, he affirms their ability to deviate from Torah protocol with regard to adjudication, based on the principle of “the needs of the hour,” for otherwise “the world would be destroyed.”[[7]](#footnote-7) He quotes the numerous precedents in the literature of *Chazal* and then summarizes, “And so do we do in each generation and in every place, when we see that ‘the hour requires it,’ and to discipline the wild and immature ‘who turn towards crookedness’ (*Tehillim* 125:5)” (*Responsa*, 3:393).[[8]](#footnote-8)

Reflecting upon the practices of medieval communities, R. Herzog writes:

The general impression we get is that they did not judge on an ad hoc basis, but regularly. Thus, [the justification of] maintaining order does not mean only for the moment, but as long as there is such a need, even if it continues for generations. (*Techuka Le-Yisrael*, Vol. 1, 52)[[9]](#footnote-9)

R. Herzog further notes that in the post-Talmudic era, these functions were not carried out by rabbinic courts but were delegated to lay leadership. As to the reason, R. Herzog speculates that:

The rabbis did not want to assume for themselves the mantle of authority to punish, and they left it for the community leaders, **as if they were adjudicating royal justice — meaning, by the authority of communal leadership that took the place of monarchy in Israel.** (55)

In other words, in the absence of a functioning monarchy or an assertive rabbinate, other forms of communal leadership assume some of their roles, including legislation and punishment “not according to Torah.” In effect, then, R. Herzog, erases the gap between the Rambam and the Ran regarding lay control of criminal law, making the need for guiding principles indispensable for all.[[10]](#footnote-10)

Regarding monetary law, R. Herzog fights to maintain it in the hands of the rabbinic courts and by halakhic procedure. Still, in that domain as well, R. Herzog and others explore and endorse different mechanisms that allow the State and the rabbinic courts to overcome certain halakhic restrictions, such as the invalidation of women and non-Jews as witnesses and the general exclusion of women from inheritance. The end-goal is to achieve a measure of equality that Halakha does not legislate; the question is how to get there.[[11]](#footnote-11) And while *berit Avot* may not have been the explicit motivation for these efforts, they certainly echo the values of *tzedaka u-mishpat*.

***Takkanot Ha-kahal***

An alternative halakhic basis for governmental authority in Israel is the historical precedent of *takkanot ha-kahal*, legislation by a lay governing council for the Jewish community.[[12]](#footnote-12) As many have observed, the phenomenon has roots in the Talmudic period (see *Bava Batra* 8b) but expanded greatly in the medieval era.[[13]](#footnote-13) Halakhists consistently respect this lay authority and its non-halakhic ordinances, even though they offer different rationales for its basis.[[14]](#footnote-14)

At the same time, rabbinic leaders provide a level of oversight, including a check that the ordinances are fair and ethical. Prof. Menachem Elon writes that the rabbis maintained the authority

to review such enactments in order to ensure that they would not — as current Israeli terminology would express it — violate the general principles of justice [*tzedek*] and equity [*yosher*] embodied in Jewish law.

Prof. Elon continues:

It is true, as we have seen, that a communal enactment may conflict with the substance of a particular halakhic rule, and the halakhic authorities accepted the result. However, communal enactments could not violate the basic principles underlying the entire Jewish legal system, e.g., equality before the law, the protection of minority rights and the rights of the disadvantaged, and the aspiration to improve social discipline and the social order. (*Jewish Law*, Vol. 2, 760)

In other words, lay, non-halakhic legislation was also held up to the bar of Jewish ethical values. It was not enough for enactments not to contradict or undermine Jewish law; they also had to reflect its ethos, even when there was no direct tension.

I believe that we can maintain similar expectations for our own communal policies, whether those of a local synagogue board or of the Israeli Knesset. Specifically, I propose that fairness and beneficence were not introduced to the world by Enlightenment-era politics but are fundamentally Jewish priorities, on the basis of *berit Avot* and as encapsulated by the law. Admittedly, the examples that Prof. Elon cites (pp. 760-777) do not contain references to *berit Avot*. Still, in our own spheres, I believe that appeal to *tzedaka u-mishpat* and the legacy of Avraham can sometimes give voice to a moral impulse that we otherwise struggle to articulate or annotate.

Communal enactments (*takanot ha-kahal*) may not be restricted by Halakha (as long as they do not contradict it), but they still have to embody and conform to a Jewish ethos whose hallmarks are equity and generosity. Similarly, even if the State of Israel can find its way around some of the formal restrictions of *berit Sinai*, it should always seek to reflect the spirit of *berit Avot*, which is essential to its Jewish character. Just as in the private domain, anyone involved in Jewish public life and policy — whether as a participant in a local Jewish Federation chapter or as a member of the Israeli Knesset; whether strictly observant or completely unaffiliated; whether identifying with the full glory of *berit Sinai* or with nothing more than Jewish ancestry — must consistently ask himself or herself: What would Avraham do?

**Questions or Comments?**

Please email me directly with your feedback at judahlgoldberg@gmail.com!

1. On this issue, see *mori ve-rabbi* HaRav Aharon Lichtenstein and others in *Techumin*, Vol. 4, 180-192. [↑](#footnote-ref-1)
2. For some salient examples from the writings of *mori ve-rabbi*, see “The Ideology of Hesder” in *Leaves of Faith*, Vol. 1, 135-158; and “Brother Daniel and the Jewish Fraternity” (57-83) and “Abortion: A Halakhic Perspective” (241-253) in *Leaves of Faith*, Vol. 2. Conversely, HaRav Lichtenstein could be sharply critical of halakhic analysis that he found to be unselfconsciously narrow. Also see R. Asher Weiss’s statement on vaccination, cited in the “For Further Thought” section of the previous *shiur*. [↑](#footnote-ref-2)
3. See Rambam, *Commentary on the Mishna*, *Makkot* 1:11; and *Hilkhot Sanhedrin* 14:10. [↑](#footnote-ref-3)
4. For an overview, see Prof. Menachem Elon, *Jewish Law: History, Sources, Principles*, Vol. 2, 679-779. [↑](#footnote-ref-4)
5. See, for example, R. Nahum Eliezer Rabinovitch, “The Way of Torah,” *The Edah Journal* 3:1 (Tevet, 5763 [2003]), 28-29; Prof. Elon, *Jewish Law*, Vol. 2, p. 714, n. 145; and Prof. Gerald Blidstein, “Halakha and Democracy,” *Tradition*, 32:1 (Fall 1997), 12-13. Also compare the various formulations in *Teshuvot Ha-Rashba* 1:769, 3:411, 417, 5:126, and 7:490; and *Sefer Ha-Tashbetz* 1:123, 133. [↑](#footnote-ref-5)
6. See *Techuka Le-Yisrael al pi Ha-Torah*, Vol. 1, 129-130; Chief Rabbi Ben-Zion Uziel, ibid., 248; R. Reuven Katz, ibid., 271; R. Shaul Yisraeli, *Amud Ha-Yemini*, 7; R. Eliezer Waldenberg, *Responsa Tzitz Eliezer* 10:1; and Chief Rabbi Ovadya Yosef, *Responsa Yabia Omer*, 10, *CM*, 6:23. Also see HaRav Lichtenstein, “Religion and State,” in *Contemporary Jewish Religious Thought* (Arthur Cohen and Paul Mendes-Flohr, eds.), available [here](https://www.etzion.org.il/en/religion-and-state), along with the clarification in Prof. Blidstein, “Halakha and Democracy,” 34, n. 7; and R. Rabinovitch, “The Way of Torah,” 31-32. [↑](#footnote-ref-6)
7. In this context, the Rashba quotes *Chazal*’s comment that the Second Temple was destroyed because “they based their judgments solely on Torah law” (*Bava Metzia* 30b). [↑](#footnote-ref-7)
8. The Rashba adds that the authority of the community officials pertains “all the more so when there is royal sanction” (see *Bava Metzia* 83b), but this does not seem essential; see R. Ido Reichnitz, *Medina Ka-Halakha*, 105. Also see 4:311 and responsa attributed to the Ramban #279. [↑](#footnote-ref-8)
9. Also see pp. 80-82. [↑](#footnote-ref-9)
10. Also see pp. 75, 208-209, 224, 230. There may still be a subtle difference between the Ran and the Rambam’s respective positions. According to the Ran, a king or his substitute has full independence in playing a legislative role. The legislation should reflect Torah influence, but there is no absolute indication for rabbinic consultation. If, on the other hand, we believe that the Israeli government is assuming a function of the rabbinic courts to punish “not according to Torah,” then perhaps more rabbinic input would be ideal. This seems to be R. Herzog’s own orientation, as he encourages active cooperation with rabbinic scholars (p. 208). Also see R. Katz, ibid., 271 and Judge Gershon German, *Melekh Yisrael: Ribbonut Le-dorot Bi-re’i Ha-Halakha U-ma’amadam shel Chukei Ha-Knesset Be-olamah shel Ha-Halakha*, 702, n. 173. [↑](#footnote-ref-10)
11. For more on these issues, see Judge German, *Melekh Yisrael*, 667-738. [↑](#footnote-ref-11)
12. See R. Herzog, Vol. 2. p. 58; R. Uziel, ibid., Vol. 1, 249; R. Reichnitz, *Medina Ka-Halakha*, 255-257; and Judge German, *Melekh Yisrael*, 687-691, 735-738. [↑](#footnote-ref-12)
13. Also see HaRav Lichtenstein, “Communal Governance,” 84-87. [↑](#footnote-ref-13)
14. See, for example, Prof. Menachem Elon, “On Power and Authority: Halachic Stance of the Traditional Community and Its Contemporary Implications;” and Prof. Gerald Blidstein, “Individual and Community in the Middle Ages: Halakhic Theory” in *Kinship and Consent: The Jewish Political Tradition and Its Contemporary Uses* (ed. Daniel Elazar) (Ramat Gan: 1981), 183-258. [↑](#footnote-ref-14)