

29th January 2011

כד שבט תשע"א



משפטים
Mishpatim

G-d's Nudge

G-d From the very start of the human story, the G-d of freedom sought the free worship of free human beings, but one after the other people abused that freedom:

**first Adam and Eve,
then Cain,
then the generation of the Flood,
then the builders of Babel.**

pierce his ear with an awl. Then he will be his servant for life.
(Ex. 21: 2-6)

There is an obvious question. Why begin here? There are 613 commandments in the Torah. Why does Mishpatim, the first law code, begin where it does?

The answer is equally obvious. The Israelites have just endured slavery in Egypt. There must be a reason why this happened, for G-d knew it was going to happen. Evidently he intended it to happen. Centuries before He had already told Abraham it would happen:

As the sun was setting, Abram fell into a deep sleep, and a thick and dreadful darkness came over him. Then the Lord said to him, "Know for certain that for four hundred years your descendants will be strangers in a country not their own and that they will be enslaved and mistreated there. (Gen 15: 12-13)

It seems that this was the necessary first experience of the Israelites as a nation. From the very start of the human story, the G-d of freedom sought the free worship of free human beings, but one after the other people abused that freedom: first Adam and Eve, then Cain, then the generation of the Flood, then the builders of Babel.

First in Yitro there were the aseret hadibrot, the "ten utterances" or general principles. Now in Mishpatim come the details. Here is how they begin:

If you buy a Hebrew servant, he is to serve you for six years. But in the seventh year, he shall go free, without paying anything . . . But if the servant declares, 'I love my master and my wife and children and do not want to go free,' then his master must take him before the judges. He shall take him to the door or the doorpost and

It took the collective experience of the Israelites, their deep, intimate, personal, backbreaking, bitter experience of slavery to turn them into a people

- **who would no longer turn their brothers and sisters into slaves,**
- **a people capable of constructing a free society,**
- **the hardest of all achievements in the human realm.**

experience of slavery – a memory they were commanded never to forget – to turn them into a people who would no longer turn their brothers and sisters into slaves, a people capable of constructing a free society, the hardest of all achievements in the human realm.

So it is no surprise that the first laws they were commanded after Sinai related to slavery. It would have been a surprise had they been about anything else. But now comes the real question. If G-d does not want slavery, if he regards it as an affront to the human condition, why did he not abolish it immediately? Why did he allow it to continue, albeit in a restricted and regulated way? Is it conceivable that G-d, who can produce water from a rock, manna from heaven, and turn sea into dry land, cannot change human behaviour? Are there areas where the All-powerful is, so to speak, powerless?

In 2008 economist Richard Thaler and law professor Cass Sunstein published a fascinating book called *Nudge*. In it they addressed a fundamental problem in the logic of freedom. On the one hand freedom depends on not over-legislating. It means creating space within which people have the right to choose for themselves.

On the other hand, we know that people will not always make the right choices. The old model on which classical economics was based, that left to themselves people will make rational choices, turns out not to be true. We are deeply irrational, a discovery to which several Jewish academics made major contributions. The psychologists Solomon Asch and Stanley Milgram showed how much we are influenced by the desire to conform, even when we know that other people have got it wrong. The Israeli economists, Daniel Kahneman and Amos Tversky, showed how even when making economic decisions we frequently miscalculate their effects and fail to recognise our motivations, a finding for which Kahneman won the Nobel Prize.

How then do you stop people doing harmful things without taking away their freedom? Thaler and Sunstein's answer is that there are oblique ways in which you can influence people. In a cafeteria, for example, you can put healthy food at eye level and junk food in a more inaccessible and less noticeable place. You can subtly adjust what they call people's "choice architecture."

G-d began again, this time not with all humanity, but with one man, one woman, one family, who would become pioneers of freedom. But freedom is difficult. We each seek it for ourselves, but we deny it to others when their freedom conflicts with ours. So deeply is this true that within three generations of Abraham's children, Joseph's brothers were willing to sell him into slavery: a tragedy that did not end until Judah was prepared to forfeit his own freedom that his brother Benjamin could go free.

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That is exactly what G-d does in the case of slavery. He does not abolish it, but he so circumscribes it that he sets in motion a process that will foreseeably, even if only after many centuries, lead people to abandon it of their own accord.

He could not abolish slavery overnight, but He could change our choice architecture, or in plain words, give us a Nudge, signalling that slavery is wrong but that we must be the ones to abolish it, in our own time, through our own understanding.

A Hebrew slave is to go free after six years. If the slave has grown so used to his condition that he wishes not to go free, then he is forced to undergo a stigmatising ceremony, having his ear pierced, which thereafter remains as a visible sign of shame. Every Shabbat, slaves cannot be forced to

work. All these stipulations have the effect of turning slavery from a lifelong fate into a temporary condition, and one that is perceived to be a humiliation rather than something written indelibly into the human script.

Why choose this way of doing things? Because people must freely choose to abolish slavery if they are to be free at all. It took the reign of terror after the French Revolution to show how wrong Rousseau was when he wrote in *The Social Contract* that if necessary people have to be forced to be free. That is a contradiction in terms, and it led, in the title of J. L. Talmon's great book on the thinking behind the French revolution, to totalitarian democracy.

G-d can change nature, said Maimonides, but He cannot, or chooses not to, change human nature, precisely because Judaism is built on the principle of human freedom. So he could not abolish slavery overnight, but he could change our choice architecture, or in plain words, give us a Nudge, signalling that slavery is wrong but that we must be the ones to abolish it, in our own time, through our own understanding. It took a very long time indeed, and in America, not without a civil war, but it happened.

There are some issues on which G-d gives us a nudge. The rest is up to us.

Organ donation in Jewish Law

Jewish Chronicle - January 2011

The controversy over organ donations in Jewish law may have left some people confused, so I want to set out the position as clearly as possible.

First, are organ donations a good thing, and does Judaism approve of them? The answer in general is yes to both questions. Saving a life is a fundamental imperative in Judaism and, if we can do so without endangering our own lives, we should.

There are two kinds of organ donations that do not pose problems in Jewish law. There are organs — a kidney for example — that can be taken from a living donor, who is taking little risk and remains healthy. Currently, 53 per cent of all donors come under this category. We commend such donations and would encourage them wherever possible. At the other extreme, there are organs that can be taken when the heart of the donor has ceased to function, for example corneas and, again, kidneys. Currently 35 per cent of kidney transplants fall into this category. Here, too, Judaism commends such donations.

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להבטל
ממנה

These two categories combined cover approximately 70 per cent of all current UK organ donors. Jewish law permits us to be donors in these situations, and if we can, we should. To do so is a mitzvah of the highest kind, saving a life.

A good society is one in which organs are available according to need, and donated according to conscience. That applies to Jew and non-Jew, religious and secular.

What, then, is the controversy about? It has to do with the definition of death in Jewish law. Today, doctors use brain-stem death as one way to define death. Some halachic authorities accept this in Jewish law. But some do not. Instead, they argue that, in Jewish law, death is determined by cessation of cardio-respiratory activity. Thus, if a patient is brain-stem dead but his or her heart continues to beat, they believe we cannot say clearly and unequivocally that the person is dead.

This makes a difference in some organ donation situations, when the question is: may we remove the vital organs of a person who is brain-stem dead but who — if life is measured by cardio-respiratory activity — is still alive. Everyone would agree that you may not remove the vital organs of someone who is still alive to save someone else's life. That would be committing murder. In such cases, the criterion by which death is diagnosed is all-important to the halachic permissibility of removing a vital organ.

To repeat, however, this is involved only in a minority of cases of organ donation.

So what is the halacha? Since the earliest days of transplant surgery, halachic opinion has been divided. As I have outlined, there are significant voices on both sides. While not impugning the integrity of those who accept brain-stem death as well as cardio-respiratory to define death, those who accept only the latter have major concerns about the use of brain-stem death as definitive. And they say: if we are in genuine doubt, would it not be better not to risk that we might be killing someone who is still alive?

Precisely because of the seriousness of the concerns of those who require cessation of cardio-respiratory activity as the only criterion of death, the London Beth Din refuses to dismiss them, while encouraging organ donations in all other circumstances. Nor is this a concern of Jews alone. It is shared by members of other faiths and by some secular ethicists.

Does this mean that religious Jews should not register as organ donors? We will be speaking to the UK transplant authority to urge it to make provision within its procedures to accommodate these issues, so that within our community, registering with the UK transplant authority can be extended. This would be of help to members of all faiths, and it would be in line with current medical practice generally, which takes cognisance of people's religious, cultural and ethical differences, allowing all faith communities to support organ donation.

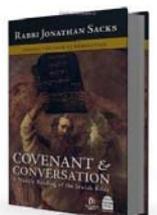
Does the current situation open Jews to the charge that they are willing to receive organs but not donate them? We encourage Jews to donate organs wherever possible. A good society is one in which organs are available according to need, and donated according to conscience. That applies to Jew and non-Jew, religious and secular. Even those who do not accept brain-stem death would still be able to donate organs in 70 per cent of cases, and a small addition to the procedure will allow all Jews to register. I will myself, and will encourage others to do so.

For the future, plans are already under way to establish a Jewish bioethics-forum where rabbis and doctors can meet regularly to discuss how new biomedical developments can be taken into account in our rulings in Jewish law. Whatever our view on the criterion of death, we should all do our share in saving and honouring life.

Shabbat Shalom



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***Covenant and Conversation: Genesis: The Book of Beginnings* and**
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