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בס"ט

Parashat Ki Teṣe Part II On Torah Advances for Human Rights

1. Introduction

The Torah introduced many extraordinary advances in thought and law as regards the rights of all members of society and on behalf of the many classes of special concern. In a number of areas, albeit often indirectly, Torah innovations continue to move matters forward today. Aspects of such advances are found throughout the Torah but the four and a half chapters of this week's *parasha* in particular contain many laws that greatly benefited and significantly improved the status of women, slaves, the indigent, aliens, laborers, transgressors and animals. In this study we will briefly discuss a number of them, touching on most of the aforementioned categories. See our study *Parashat Mishpatim Part I, Innovations in Law*, for another discussion on this general topic.

Virtually all the Torah laws here cited were precedent setting in one way or another. Since in the course of the centuries many have become widely accepted norms, to gain a fuller picture of this subject we must take the ancient Near Eastern backdrop into consideration. Clearly, the philosophy and values underpinning the Torah's innovations, and the forward trajectory established thereby, may be recognized as being of enduring importance. The reader cannot help but wonder at the remarkable spirit of broad-based and consistent enlightenment that informs this legislation and differentiates it from its predecessors and contemporary codes.

Before continuing, we will briefly discuss some of the Torah guidelines regarding the national leaders that set a new direction of enlightened thought on governmental structure and advancement in society and social justice. In the introduction to the Deuteronomic section of *mishpatim* (Deut. 16:18–

18:22), Moses transmitted rules and regulations that concern the four official leadership groups in Israelite society – the judges, king, priests and prophet. The judges (with their administrators) appear to be given a great deal of autonomy, providing for a significant degree of personal conscience as well as checks and balances on the other governmental branches. The kingship is recognized as having come into being as a result of the people insisting “I shall place a king over me like all the nations around me,” clearly an ignoble motivation. Kingship was a concession G-d made to the people, as elaborated in 1 Samuel 8 (following R. Nehorai [*b. Sanh.* 20b]). In *peshat*, it appears that ultimately some form of representative government was indicated. The priesthood was excluded from holding land. The segue to the discussion of the prophet was the prohibition against augury, soothsaying, divination, sorcery, consulting ghosts and familiar spirits and inquiring of the dead, laws that promoted monotheism and rationality in life.

2. Concerning Women

1) In the ancient world (and, unfortunately, in some present-day societies), soldiers invariably considered sexual violation of an enemy's wives and daughters their prerogative. Indeed, the military commonly employed such practices as a tactic to foster demoralization of the adversary while providing satisfaction to its soldiers. Victorious soldiers often subjected the enemy's women to long-term sexual exploitation. Torah law sweeps all this away. It insists וְהָיָה מַחֲנֵיךָ קֹדֶשׁ (“Your military camp shall be holy” [Deut. 23:15]), to the extent that G-d should “not see in your midst a matter of nakedness,” a euphemism for unseemly sexual behavior. This refers to the whole gamut of licentious behavior then common in the military forces of other nations.

In addition, when one sees in the captivity “a beautiful woman” and desires her, considering her for a wife, sexual relations with her are only permitted after a one-month waiting period. (This waiting period has often been interpreted as referring to the second instance of sexual relations, but the *peshat* of the Torah appears to refer to the first.) If after the waiting period the Israelite chooses not to marry her he must free her and may not sell her, since he had subjected her to “affliction” (Deut. 21:10-14).

2) Men who had children from more than one wife might favor the children from the “loved” wife over those from another. A “loved” wife often manipulated her husband’s will to her children’s benefit at the expense of the others. The Torah mandates that a man’s firstborn son, even if from a “hated” wife, must receive his patrimony, the extra portion of inheritance due a firstborn son (Deut. 21:15-17); it thus sets the tone for fairness as concerns the rights of the “hated” wife herself and all her children.

3) Despite being generally understood today as detrimental to women’s standing, polygamy was permitted in the Torah. It was too deeply rooted in ancient society and served too important a societal function to have been banned at that time. However, there is no question that the Torah manifests a negative attitude toward it and sets in motion a movement away from it. First, there is the resounding proclamation attached to the creation of woman, “Therefore shall a man leave father and mother and cling to his wife and they shall become one flesh” (Gen. 2:24), a major paradigm forevermore promoting monogamy as ideal. Second, the covenantal relationship between G-d and Israel is drawn in marriage-like terms (Deut. 26:16-19; see our study on that passage), a matter that leads to imagery often employed by the prophets. This requires mutual loyalty from both parties and bespeaks a monogamous relationship (see Prov. 5:15-23). Third, the vivid biblical depictions of the nearly disastrous results that ensued from the children of multiple wives speak volumes.

4) In the case of the wayward and rebellious son, the mother is explicitly equated with the father throughout the passage (Deut. 21:18-21). She speaks together with her husband to the elders, contrary to the general policy of the ancient Near East. This serves as official

recognition that she is equally responsible for her children, for their upbringing and discipline, and possesses equal authority. Similarly, in the case of refuting the false accusation leveled against their daughter, father and mother are mentioned together (22:15).

5) The Torah substantially raised the position and dignity of a wife in the case of a husband who, after their first encounter of intimacy, accused her of not having been a virgin and was subsequently refuted. (Since consummation of a marriage was generally separated from betrothal – which legally established the foundation of a marriage – by a period of time, had she been unfaithful there was the possibility that it had occurred after betrothal and could incur the death penalty.) In the law codes of the ancient Near East a man who made such an accusation did not stand to suffer any penalty even when adequately refuted; a wife was simply in an inconsequential position vis-à-vis her husband. The Torah placed a triple penalty upon a husband who made such a false accusation: flogging, payment of the significant sum of one hundred *sheqalim* to her father (had it been paid to her the husband would subsequently take it back), and loss of his right to ever divorce her (Deut. 22:13-21).

Concerning the latter stipulation, it must be understood in the context of ancient society, in which personal compatibility and a romantic relationship were not widely deemed to be significant elements in marriage. Economic security, social stability and having children and family life were the priorities, all of which the retained wife would be expected to have.

It is also notable that the wife’s guilt or innocence was not to be decided by a dangerous ordeal, such as being forced to swim to safety in a current. Such an approach to judgment, popular in the judicial codes of the ancient Near East, is totally nonexistent in Torah law. The case of the suspected adulteress (Num. 5:11 ff.) who is given a potion to drink and whose guilt or innocence would be decided thereby, is not a true ordeal. She is not subject to any dangerous trial or tribulation. The possibility of physical harm befalling her through her drinking the potion is only through G-d’s miraculous intervention and if He chooses to intervene that is His prerogative. No human being raises a hand against her.

6) When caught in an adulterous liaison, even when satisfactorily proven to the extent that the male paramour is put to death, the woman is presumed to have been forced and exonerated until proven consenting (Deut. 22:25-27). This is contrary to the mindset prevalent in the ancient world that in the presence of suspicion and circumstantial evidence the woman is deemed guilty. (See our discussion on this topic in *Parashat Ki Teṣe Part III*.)

7) For the first year of marriage every husband is officially exempt from military and other public service in order to be available to his new wife and dedicate himself to making her happy (Deut. 24:5).

8) A major step forward concerns the woman whose husband died childless, upon which occurrence she “falls” to his brothers, one of whom is supposed to enter into levirate marriage with her (*yibum*). The Tamar narrative (Gen. 38) illustrates how problematic the pre-Torah situation could be. Because Judah did not want his son, the *yabam*, to marry Tamar, and intended to never allow it, Tamar was relegated to an *aguna* (forlorn) status – she was legally bound to her deceased husband’s family without a possibility of freedom to marry someone else. In this *parasha*, Moses introduces *ḥalisa*, an option of a legal release (Deut. 25:5-10). With *ḥalisa*, Deuteronomy “sealed the breach in the law and insisted on a decision: a brother of the deceased must either marry the childless widow, relieving her plight or would have to free her ... allowing her to marry whom she may” (*Olam HaTanakh*).

9) Without prescribing much of specific procedural regulations concerning divorce, our *parasha* mentions the subject in an involved casuistic case. If after a man divorces his wife she marries another man and that second man divorces her or dies, the first husband is prohibited from remarrying her (Deut. 24:1-4). If she did not get married to another after her divorce the couple may get remarried. As Ramban suggests, that proscription may have been intended to prevent legal, but immoral, trifling with the matrimonial relationship, a foundation of domestic and national sanctity. Couples might divorce, engage in short-term marriages with others with the intention to divorce and return to their original spouses. Others suggest that the law may have viewed remarriage of the first couple (even when there was no intention at the time of divorce to eventually get remarried) as indicative

that their original bond was never fully severed. Thus, it would reflect upon the wife’s marriage to the second husband as slightly adulterous. The prohibition to remarry after the wife’s subsequent marriage and divorce adds a dimension of definitiveness to the first divorce. Others opine that the law was intended to discourage taking marriage and divorce lightly.

But the passage speaks of divorce as the husband initiating the severance at his sole discretion: “If she doesn’t find favor in his eyes, for he found in her something base, he writes her a bill of divorce, places it in her hand and sends her out of his home” (24:1), regardless of his wife’s consent. This has been taken to be the way divorce works according to the Torah, that a husband divorces a wife. Of course if a wife could divorce a husband at her discretion, the dynamics of marriage would be radically altered; she might be tempted to seek another mate while still married and it might lead to adultery, a most serious problem with the direst consequences. Nevertheless, in light of present-day problems resulting from the husband’s exclusive power to grant the divorce, this law has often been deemed to be to women’s great disadvantage.

However, divorce laws are not spelled out here or anywhere else in the Torah. The husband’s right to grant a divorce is brought up incidentally, to establish the details of a case that the law was to address. Clearly, this category of law was left for the Oral Law to explicate. Divorce law must be understood in association with the mutual rights and responsibilities of husband and wife as well as in conjunction with a properly empowered court system. The law surely affords the wife protection from abuse, from extortion and from being left forsaken; it also surely provides her the possibility of initiating severance of the marriage through the court when indicated. The present-day potential for abuse of divorce law in certain circles of Jewry derives from a lack of Torah law being applied in its fullness. The sages recognized the power of the court to annul a marriage when necessary and utilized it on occasion (see *m. Ketub. 4:1*), but this is a topic beyond the scope of this study.

3. Concerning Slaves

An Israelite is forbidden to turn over to his erstwhile master an escaped slave who sought refuge with him.

On the contrary, the escaped slave is to be allowed and even supported to live where he chooses and is not to be exploited (Deut. 23:16-17). The widespread law of the time governing such a case was aligned with the following statutes of the Code of Hammurabi (excerpted from ANET):

§15. If a seignior has helped either a male slave ... or a female slave ... to escape ... he shall be put to death.

§16. If [he] harbored [the slave] in his house, [he] shall be put to death.

Some assume that the Torah laws regarding an escaped slave must have been restricted to slaves who escaped from outside the region, for otherwise every slave could run to a neighbor and request asylum. It would have been the end of involuntary slavery. Even if it turns out that the Torah was speaking of an escapee from outside the region (a qualification not mentioned in the text), it remains a major innovation. It should be noted that extradition treaties covering escaped slaves had then been in force among a number of states in the region.

For historical perspective it should be recalled that the United States of America passed the Fugitive Slave Act in 1850, which mandated the return of escaped slaves even from the free states. This law also provided for drafting citizens into a posse to capture escapees. It was an act anomalous with the forward movement of American law but it does provide perspective.

The Torah's legislation regarding an escaped slave teaches that a slave is ultimately not the master's property, but belongs to himself. The same may be said for the laws that prescribe death to a master who killed his slave (Exod. 21:20) and freedom for a slave whose master damaged one of his organs (vv. 26-27). This, despite the fact that the regulations governing slavery provided for sale and inheritance of slaves. With the Sabbath law requiring the master to provide a day of rest for his slaves and festival law requiring him to share his joyousness with his family and slaves before Hashem, etc., the Torah prompts every slaveholder to view his relationship with his slave as with a fellow human being. Job's scintillating words come to mind (Job 31:13-15): "Did ever I spurn the just cause of my manservant or my maidservant when

they contended with me? What then would I do when G-d arises, when He calls me to account what would I answer Him? Is not He who made me in the stomach made him, did not One form us both in the womb?" (For further discussion see our study on *Parashat Mishpatim: Concerning Slavery.*)

4. Concerning the Poor

1) Lending for interest to one's countryman is prohibited (Deut. 23:20-21). Previously, Deuteronomy 15 had exhorted all who possessed the necessary means to be forthcoming in extending loans to the needy. In addition, the Torah had provided the seventh year release to debtors who were unable to repay by the deadline (15:1-6).

2) When a debtor defaulted on repayment of a loan, a creditor was prohibited from taking his handmill or upper millstone as collateral, as these were critical to the poor family for preparing their food. (24:6). When the collateral is the needy man's night-garment, it must be returned to him by nightfall (vv. 12-13). A widow's garment (understood as any possession of hers) may not be taken by a creditor as a pledge (v. 17).

3) When a creditor comes to his defaulted debtor to take a collateral to compel eventual repayment of the loan, he may not enter the debtor's home (to choose the item he prefers) but must wait outside. The debtor possesses the right to his dignity and the privacy of his domicile (24:10-11).

4) Wages due a poor laborer must be paid on the day due (vv. 14-15). In Leviticus, the law is stated for all laborers, regardless of status (Lev. 19:13), perhaps to preclude an employer's rationalization that his laborers were not truly needy.

5) When a stranger, orphan or widow is involved in a legal proceeding, there is a specific requirement that the court (or leadership) ensure that they are not victims of unfair treatment (Deut. 24:17).

6) In harvesting one's produce, "gleanings" were required to be left for the stranger, orphan and widow, understood as meaning "the poor" (vv. 19-22). These commands are stated expansively, with separate

verses for the harvesting of grains, olives and the vine, increasing the overall impact of the law.

7) All laws involving Israelite poor must be placed in the perspective of the Jubilee year law, namely, that land reverts back to its original owner (or heirs) every fiftieth year (Lev. 25).

5. Values Manifest in Judicial Procedure

1) An individual guilty of a capital crime, put to death and hung, must be buried by that night. The dignity inherent in a human body applies even to such a violator of the law (21:23).

2) An individual is assumed innocent until proven guilty, as manifested in the cases of suspected adultery (22:23-27). See our discussion in *Parashat Ki Teṣe Part III*.

3) Vicarious punishment, a widespread feature of pre-Torah law codes, is here prohibited: “Fathers shall not be put to death for sons and sons shall not be put to death for fathers” (24:16). Although the law is recorded as concerns fathers and sons and the death penalty, it is likely that these circumstances were chosen because they best illustrate the principle that in a court of law each individual is responsible for his own actions and nobody “owns” another, who may be substituted for the perpetrator. Note the following contrasting example from the Hammurabi Code:

§§229-230: If a builder constructed a house for a signior but did not make [it] strong, with the result that [it] collapsed ... If it has caused the death of the son of the owner of the house, they shall put the son of that builder to death.

Of course, according to the Torah, even the builder could not be put to death in such a case since he did not kill intentionally.

4) In punishing transgressors with flogging (then a common form of punishment), proportionality is mandated (כְּדֵי רִשְׁעוֹתָו, “in accordance with his wrongdoing”). An upper limit of forty was established (which the sages interpreted as “up to the number,” meaning thirty-nine.) The previous Near Eastern codes do not contain an upper limit restricting the court’s discretion to decree the number of lashes. In

another innovation, Moses exhorts the court to have compassion for the party being punished and be concerned for his dignity, “Do not exceed lest ... your brother be disgraced before your eyes” (25:2-3).

5) Throughout the *parasha*, as throughout the Torah, the law never decrees that life is to be taken for theft, damages or any monetary or property violations. This makes the point that human life is to be cherished beyond material considerations. Note the Hammurabi Code’s regulations concerning such matters:

§8: If a signior stole either an ox or sheep ... If the thief does not have sufficient to make restitution, he shall be put to death.

§§9-10-11: When a signior has found his lost property in the possession of another signior ... [if] the seller was the thief, he shall be put to death ... If the (professed) owner of the lost property has not produced witnesses attesting to his lost property, since he was a cheat and started a false report, he shall be put to death.

6) The law is applied in an egalitarian manner, without consideration for wealth, family or social status, reflecting the concept that all human beings are equally G-d’s creations.

6. Concern for Animals

1) When one is interested in taking the eggs or young from a bird’s nest, he must first send away the mother (22:6-7). In explanation, the Rambam writes:

For a mother’s love and tenderness for her child is not consequent upon reason, but upon the activity of the imaginative faculty, which is found in most animals just as it is found in man. In most cases this will lead to people leaving everything alone, for what may be taken is in most cases not fit to be eaten. If the law takes into consideration these pains of the soul in the case of beasts [the Rambam had previously explained the Lev. 22:28 law of “it and its child do not slaughter on the same day” as a precaution to avoid slaughtering the young in front of its mother] and birds, what will be the case with regards to the individuals of the human species as a whole? You must not allege as an objection against me the dictum of the

sages, may their memory be blessed: He who says: Thy mercies extendeth to young birds (עַל קֵן צִפּוֹר (יְגִיעוּ רְחֻמֶיךָ) [is silenced]*. For this is ... the opinion of those who think that there is no reason for the law except only the will [of God] – but as for us we follow only the second opinion. (*Guide of the Perplexed* 3:48, based on Pines translation, pp. 599-600)

Others understand the law concerning the bird's nest as based on the Torah's call for people to be sensitive to the plight of a family, even that of birds, and not destroy mother together with her young. This is comparable to the law [according to their interpretation] that prohibits the slaughter of an ox or sheep on the same day that its young is slaughtered (Lev. 22:28).

2) It is prohibited to plow with an ox and a donkey together (Deut. 22:10). Although this law appears in the midst of a cluster of prohibited mixtures (agricultural and clothing) it probably was intended for the weaker animal's benefit. Ibn Ezra: "Because Hashem has compassion on all His creatures, for the strength of a donkey is not like the strength of an ox." Besides exhausting the weaker animal, the pressure might cause it to stumble and become injured.

3) One may not muzzle an ox while it is threshing (25:4). Although the animal may be consuming valuable grain or is wasting time concern for its feelings must overcome such considerations.

4) Torah principles had great influence on rabbinic exegesis. The following illustrates the point. The law commands not to see "the donkey of your brother or his ox fallen by the road and hide yourself from them; help him lift them up" (Deut. 22:4). A school of rabbinic thought, obviously noting the plural "from them," interpreted the law as also designed for the benefit of the fallen animal. A corresponding verse appears in Exodus 23:5. (Both verses immediately follow the law that requires the return of lost animals to their owners.) There it commands that when you see "the donkey of one who hates you lying [crushed] under its burden" you must help him. Of course use of "brother" in Deuteronomy and "one who hates you"

(or "enemy") in Exodus for essentially the same law calls for interpretation and prompted rabbinic expansion.

The Exodus verse is viewed as primarily focused on helping the other person unload his donkey, while the Deuteronomy verse requires helping the other raise his animal and loading it. As the animal's welfare is in the calculation, the Talmud posits that if one is presented with two situations, one to help load and one to help unload, the unloading takes precedence because of צָעַר בְּעַלֵי הַיָּם ("the pain of a living creature"), to sooner relieve the animal from its suffering. However, אוֹהֵב לְפָרוֹק וְשׂוֹנֵא לְטַעוֹן מִצְנָה בְּשׂוֹנֵא, when the unloading is to help a friendly party and the loading is to help your enemy, the law requires precedence for the enemy, "to control one's instinct." How enormous the social benefits brought about by this interpretation! (*b. B. Mesi'a*. 32b, following the Mekhilta).

Endnote

* The Mishnah (*m. Ber.* 5:3) rules that one who says עַל קֵן צִפּוֹר יְגִיעוּ רְחֻמֶיךָ ("Your mercies extend to the bird's nest") in his supplications "is silenced." After questioning this, the Talmud (*b. Ber.* 33b) cites two explanations. Contrary to his later view in the Guide, in Mishneh Torah *Hilkhot Tefilla* 9:7, the Rambam seems to have followed the second explanation of the Talmud and included the law as stated in the Mishnah. He explained that had the prohibition of taking the young in front of its mother been a result of G-d's mercies He would have prohibited slaughtering (and partaking of animal and fowl flesh) altogether. For a further discussion on this topic and concerning the Rambam's change of view, see our study *Maimonides on Sacrifices Part II*.

Rabbi S. D. Sassoon conjectured that עַל קֵן צִפּוֹר יְגִיעוּ רְחֻמֶיךָ was the title or refrain of a then well-known composition (subsequently forgotten) that was objectionable, not that the statement itself was the issue.