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**

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This week’s *shiurim* are dedicated in memory of Israel Koschitzky *zt"l*, whose yahrzeit falls on the 19th of Kislev. May the worldwide dissemination of Torah through the VBM be a fitting tribute to a man whose lifetime achievements exemplified the love of *Eretz Yisrael* and *Torat Yisrael*.

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**Shiur #06: Independence of *Berit Avot* and Its Interaction with *Berit Sinai –* Part 1**

 In the previous *shiurim*, we outlined the general principles of *berit Avot*. We (1) identified the various components of *berit Avot*, (2) distinguished between the covenantal nature of *berit Avot* and the contractual nature of *berit Sinai* and (3) described some practical distinctions between the values of *berit Avot* and the laws of *berit Sinai*.

 Before proceeding to a more detailed exploration of the components of *berit Avot* and their manifestations in Jewish practice, however, we must address a possible critique. One could accept the entire thesis that has been presented so far, yet still deny that *berit Avot* has any relevance to us today. After all, the Rambam states explicitly:

Pay attention to this great principle… that you must know that [regarding] everything from which we abstain or that we perform today, we do so only because of God’s commandment through Moshe, not because God commanded so to prophets who preceded him. For example, we do not eat *eiver min ha-chai* [a limb from a living animal], not because God prohibited *eiver min ha-chai* to the descendants of Noach, but because Moshe prohibited *eiver min ha-chai* to us by that which he was commanded at Sinai that *eiver min ha-chai* should remain forbidden. Similarly, we do not circumcise because Avraham circumcised himself and the members of his household, but because God commanded us through Moshe to become circumcised as Avraham, peace upon him, circumcised. Likewise, regarding the sciatic nerve, we do not follow the prohibition of Yaakov our forefather but the commandment of Moshe our teacher. Take note of [Chazal’s] comment: “Six hundred and thirteen *mitzvot* were said to Moshe” at Sinai (*Makkot* 23b), and all of these are among the *mitzvot*. (Commentary on the *Mishna*, *Chulin* 7:6)

Does the Rambam not imply here that *berit Sinai* superseded all that came before it? Similarly, despite R. Chayyim of Volozhin’s novel interpretation of worship prior to Sinai that we analyzed at length in the previous *shiur*, did he not conclude, “Ever since Moshe came and brought [the Torah] down to earth, ‘it is no longer in Heaven’ (*Devarim* 30:12)” (*Nefesh Ha-chayyim* 1:22)—meaning that Sinai represents a radical break with what came before? Perhaps our readings of *Sefer* *Bereishit* are correct but nonetheless irrelevant for defining the scope of obligation incumbent upon a Jew today. *Berit Avot* lives on only in regard to God’s promises to the descendants of Avraham, Yitzchak and Ya’akov. Regarding their reciprocal responsibilities to Him, however, “Torah was given and *halakha* innovated” (*Shabbat* 135a-b)!

***Berit Avot* after Sinai**

First of all, it is worth reiterating that our core thesis—that the Jew today answers not only to *berit Sinai* but also to *berit Avot*—we inherited from R. Soloveitchik, and it therefore requires no further validation. But of course, we can do better than to just quote received tradition. Specifically, we can demonstrate how halakhic sources themselves imply the existence of extra-halakhic values that also guide and inform Jewish practice.

We will not look at the *halakha* with a cynical eye that seeks to expose its limitations in order to posit a complementary system to fill in the gaps. Rather, our goal is to show how the *halakha*, on occasion, appeals to something outside of itself in trying to communicate the full scope and depth of our responsibilities. In contrast to the Rambam’s words above emphasizing the uniqueness of Sinai, this *shiur* and the next will show how his rulings in *Mishneh Torah* repeatedly presume extra-halakhic values with regard to all three major components of *berit Avot*: commitment to Jewish peoplehood, connection to the Land of Israel and pursuit of the ethical life.

1. **Jewish Peoplehood – the Case Against Intermarriage**

 The twelfth chapter of the Rambam’s *Hilkhot Issurei Bi’a* deals with the prohibitions against marrying anyone who is not a full-fledged Jew. The Rambam opens by classifying marriage with a gentile as a negative commandment punishable by lashes (12:1) and later adds that cohabiting with a pagan woman is punishable by *kareit* (spiritual excision) (12:6).

 The Rambam then writes:

This transgression, even though it is not punishable by execution, should not be regarded lightly in your eyes, for it leads to a detriment that has no parallel in any other forbidden relationships. For a child from a forbidden relationship is [the father's] child in every respect and is considered a member of the Jewish people, even though he is a bastard; but a child from a gentile woman is not considered his child, as it states, “For he will turn your son away from following Me” (*Devarim* 7:4), turns him away from being a follower of God. (12:7)

While the Rambam’s words are in one sense uncontestable, they also contain a peculiarity. Why should the Rambam have to warn us to not underestimate the severity of intermarriage? After all, severity of a transgression is consistently judged in *halakha* by the punishment it incurs. Transgressions subject to capital punishment top the list, followed by transgressions subject to *kareit*, then those subject to death at the hands of Heaven, and so on.[[1]](#footnote-1) In principle, the punishment that the Torah prescribes for a given transgression should be fully reflective of its total gravity, including the consequences that emanate from it.

If intermarriage indeed stands out from amongst the forbidden relationships with regard to its implications for lineage, shouldn’t that, too, be reflected in its punishment? Conversely, why should we “second guess” the Torah by assigning greater weight to intermarriage than its punishment implies?

This question is magnified by jumping forward several *halakhot* to the prohibition against cohabiting with a converted slave, who “has left the midst of gentiles but has not yet entered the midst of Israel” (12:11). Though the Rambam rejects the opinion that this transgression constitutes a negative commandment punishable by lashes, he adds a comment similar to the earlier one about intermarriage:

This transgression should not be regarded lightly in your eyes, just because it does not involve lashes for a Biblical [prohibition], for this, too, causes a child to deviate from following God. For a son of a female slave is a slave and is not a member of the Jewish people; thus [the father] causes “the holy progeny” to be profaned and to become slaves. Behold, Onkelos the Translator included relations with a male or female slave within [the Biblical prohibition of] “There shall not be a promiscuous man” and “there shall not be a promiscuous woman” (*Devarim* 23:18). (12:13)

Here, the Rambam struggles even more to underscore the gravity of the transgression, as there is no Biblically prescribed punishment at all. Astonishingly, he cites Onkelos’s dissenting opinion as he gropes for a way to convey a sense of severity that is palpably lacking from the Rambam’s own position. It is almost as if the Rambam’s ruling betrays him, as he knows that marrying a slave cannot be this trivial. **But from where does he know this?** Why is he so certain that the *halakha* leaves something on the table?[[2]](#footnote-2)

***Berit Avot:* Independent but Complementary**

The Vilna Gaon, in his commentary on *Shulchan Arukh* (*Even Ha-ezer* 16:8), suggests a source for the Rambam:

That which it says regarding Avraham, “To be for you a God and for your progeny after you” (*Bereishit* 17:7), what is the Torah warning against there? This is what it intends: Do not marry a pagan woman or a female slave, for your progeny will not follow after you[r lineage]. (*Yevamot* 100b)

In other words, bearing non-Jewish children is a violation in its own right, not of a mitzva commanded to Moshe but of a charge given to Avraham. It constitutes an abrogation of the basic Jewish responsibility of sustaining and perpetuating a Jewish nation, a duty that long predates halakhic Judaism. As Avraham warned Yitzchak and Yitzchak, in turn, warned Ya’akov, intermarriage is a death knell to Jewish survival, not because of the non-Jewish partner but because of the non-Jewish children.

Another Talmudic interpretation of the same verse further highlights the responsibility of each Jew to sustain our peoplehood:

Others say [that not engaging in procreation] causes the Divine Presence to leave the Jewish people, as it says, “To be for you a God and for your progeny after you” (*Bereishit* 17:7). When “your progeny” are “after you,” the Divine Presence can hover. If “your progeny” are not “after you,” on whom can it hover? On sticks and stones?! (*Yevamot* 64a)

Here, the Talmud stresses that the theological vision of Torah depends upon an expanding and flourishing Jewish nation. Through bearing children, a Jew not only fulfills one of the 613 commandments of Sinai but also bolsters the nation that God envisioned for Avraham and which forms the foundation upon which the rest of his legacy is built. Most simply, Judaism, in all of its spiritual glory, needs Jews; or, translated into our own terminology, *berit Sinai* depends upon *berit Avot*.

 Returning to the Rambam, we can say that *berit Avot* is the source for the Rambam’s added admonitions against intermarriage. From the vantage point of *berit Sinai*, our original analysis is correct: Marrying a gentile is one negative prohibition (possibly punishable by *kareit*) amongst many and does not figure amongst the worst of the prohibited relationships. Marrying a converted slave, who practices the Jewish religion, is even less egregious than that.[[3]](#footnote-3) Put differently, the *halakha* narrowly considers the gravity of the specific “*ma’aseh aveira*” (liable act), and in this regard, cohabiting with a gentile or a slave cannot compare with incest or adultery.

 From the perspective of *berit Avot*, however, intermarriage constitutes a catastrophic breach of the covenant, undermining its very foundation—the perpetuation of the Jewish people.[[4]](#footnote-4) Incest and adultery are heinous acts that incur the worst punishments found in the Code of Sinai, but they do not threaten *berit Avot* per se. *Berit Avot*, then, is less concerned with the criminal act (the standard preoccupation of a legal code) than with its consequences. Thus, while *berit Sinai* perceives a wide gap between marrying a pagan and marrying a slave, *berit Avot* essentially equates them. Indeed, this is what makes the Vilna Gaon’s citation of *Yevamot* 100b, which lumps gentiles and slaves together in one category, so compelling as a source for the Rambam’s stance.[[5]](#footnote-5)

Finally, let us consider what these extraordinary passages tell us more generally about the Rambam’s approach. Let’s step back for a moment from the specific language of *berit Avot*.From even the most conservative reading of *Hilkhot Issurei Bi’a*, I believe we can learn two things: (1) there are extra-halakhic values that the *halakha* does not encompass; and (2) these values have their own, independent hierarchy. First, **the Rambam’s rulings constitute an emphatic rejection of halakhic exclusivism**. It is clear from the Rambam that the *halakha* as he interprets it neither reflects nor captures the full range and depth of the values at play. Halakhic positivism, on the other hand, would not (and could not) look any further than the specified punishment for a particular transgression or other legal parameters that characterize it. The Rambam’s other arguments, including his appeal to Onkelos, would simply be unintelligible.

Second, the traditional yardsticks of halakhic obligations, such as the punishment for a given transgression or other measures of its legal weight, may have limited use in analyzing extra-halakhic values. As these measures are themselves rooted in the legal system of *berit Sinai*, they cannot anticipate how a parallel, extra-halakhic covenant will prioritize various *mitzvot* and *aveirot*. Much of the contents of *berit Sinai*, such as the prohibitions against consuming blood or wearing *sha’atnez*, are of limited concern to *berit Avot*. On the other hand, responsibilities that the *halakha* downplays, such as the prohibition against marrying a slave, *berit Avot* may choose to emphasize.

It seems, then, that *berit Sinai* respects the independence of *berit Avot* and does not attempt to swallow it up and incorporate it into the halakhic system. Read through the Vilna Gaon’s eyes, the Rambam is affirming the persistent, dual relevance of both *berit Avot* and *berit Sinai* even after the giving of the Torah to Moshe.

**Separating from the Community**

 In his famous essay “*Kol Dodi Dofek*,” R. Soloveitchik points to a different ruling of the Rambam in order to demonstrate the ongoing partnership between *berit* *Avot* and *berit Sinai*:[[6]](#footnote-6)

A person who separates from the ways of the community, even though he has not committed any transgressions but simply separates from the congregation of Israel, and does not perform *mitzvot* in their midst, and does not participate in their suffering, and does not fast on their fast-days, but goes his own way like one of the gentiles and as if he is not from [the Jewish people], he has no share in the World to Come. (*Hilkhot Teshuva* 3:11)

What is remarkable is that the Rambam is excluding someone from the World to Come—the most devastating consequence possible—even though, by his own admission, “**he has not committed any transgressions**”! Furthermore, this individual observes the *mitzvot*, just not “in their midst,” that is, in the context of the community. His sole offense is that he has pulled away from active membership in the Jewish people—an offense whose source in the 613 commandments is at best uncertain—yet he joins the company of heretics, *apikorsin* (deniers) and rejecters of Torah in eternal damnation.[[7]](#footnote-7)

 The difficulty in the Rambam’s position is further highlighted by considering alternatives. For his list of those who do not have a share in the World to Come, the Rambam’s primary source is presumably a *beraita* cited in *Rosh Ha-shana* 17a that, amongst heretics and the like, includes “those who have separated from the ways of the community.” Rashi and the Ritva, apparently troubled by this phrase, both rework the *beraita* (in different ways) so that it reflexively refers to heretics, apostates, etc. The Rambam, however, deliberately isolates this phrase and stresses that they have “not committed any transgressions.” Why, then, are they treated so harshly?

 Following the thrust of “*Kol Dodi Dofek*,” we could say that one who leaves the community is judged not for his minor infringements of *berit Sinai*, but for his breach of *berit Avot*. God both blesses Avraham and demands of him that he grow into a “great nation” (*Bereishit* 12:2), unique in its character and singular in its destiny. This nation is destined to rise and fall with the turbulence of history, but its collective identity and its internal cohesion will keep it on course. However, one who walks away from the community and its historical experience—“does not participate in their suffering, and does not fast on their fast-days”—regardless of his involvement in Jewish religious practice, has betrayed the very premise that undergirds the rest of Judaism. *Berit Sinai* might struggle to prosecute him, but as far as *berit Avot* is concerned, he is forgotten.

**Conclusion**

 In the next *shiur*, we will return to the Rambam in order to show how *berit Avot* lives on in the context of its other components as well.

**For Further Thought:**

1. How one perceives intermarriage is also influenced by one’s reading of *Devarim* 7:4, in which the Torah warns us not to marry gentiles, “for he will turn your son away from following Me, and they will worship other gods.” Onkelos reads these two clauses together, interpreting “turn away” as pursuing paganism instead of worship of God. In that case the gravity of intermarriage may lie in its connection to idol worship, a central *berit Sinai* priority. This concern, however, does not exist regarding a converted slave, who has accepted upon herself the obligation of *mitzvot* (see Rambam *Hilkhot Issurei Bi’a* 12:11 and 14:9). The Rambam apparently interprets “turn away from following God” differently, as he references it regarding a child borne of a slave as well (*Hilkhot Issurei Bi’a* 12:13). For the Rambam it must mean losing Jewishness, the *berit Avot* concern that is common to children of both gentiles and slaves. Tosafot, *Yevamot* 17a s.v. *ve-ein*, cite both approaches. Also see Rambam, Commentary on the *Mishna*, *Kiddushin* 3:13.

2. The *Mishneh La-melekh* (*Avadim* 3:3) brings a proof that marriage to a slave must be Biblically prohibited from *Kiddushin* 21b. Of the permission given to an *eved ivri* (an indentured Jewish servant) to marry a female slave, the *Gemara* says that this is a halakhic “novelty” and should therefore apply to *kohanim* just as to non-*kohanim*. Where is the novelty in this law, the *Mishneh La-melekh* asks, if there is no Biblical prohibition to begin with? However, he does not specify what the Biblical prohibition, according to the Rambam, could be. Could the verse “To be for you a God and for your progeny after you” (*Bereishit* 17:7) explain the need for a “novelty?” Could it explain the expansion of the novelty to *kohanim* as well? See further in the sources listed in footnote #5, which, among other points, discuss why marriage to a slave is worse for a *kohen* in the first place.

3. Footnote #6 suggested that a Jewish woman who intermarries violates *berit Sinai* but not the verse of “To be for you a God and for your progeny after you.” Could the opposite be true regarding procreation? Even though a woman is exempt from the Biblical commandment to “be fruitful and multiply” (*Bereishit* 1:28; see Rambam *Ishut* 15:2), might this same verse impose responsibility upon her to marry and raise a Jewish family?

4. Regarding a person who secedes from the Jewish community, the analysis above presumed that the loss of his share in the World to Come is a punishment for his actions. Alternatively, one could suggest that this exclusion is not a punishment at all, but a natural loss of the privileges accorded to a person *qua* his membership in the Jewish people. If he renounces his affiliation, then the attendant privileges, such as a share in the World to Come, disappear. See *Sanhedrin* 90a and the extensive literature about the afterlife that revolves around this *mishna*. Would this different interpretation undermine our conclusion above?

**Questions or Comments?**

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

1. See Rambam, Commentary on the *Mishna*, *Avot* 2:1. [↑](#footnote-ref-1)
2. Tellingly, while the *Tur* (*Even Ha-ezer* 16) quotes both of these passages from the Rambam, the *Shulchan Arukh* quotes the Rambam’s rulings but omits these elaborations. The articulation of the “law,” it seems, is complete without them. [↑](#footnote-ref-2)
3. Whether marrying a slave is Biblically proscribed at all, according to the Rambam, is a matter of considerable debate. See *Hilkhot Issurei Bi’a* 15:4 and, for instance, *Mishneh La-melekh Hilkhot Avadim* 3:3, *Minchat Chinukh* 266:[17] (*Makhon Yerushalayim* edition) and *Chiddushei Ha-Grach al Ha-Shas*, *Kiddushin* 21b. [↑](#footnote-ref-3)
4. Also see *Eruvin* 19a, regarding Jews who are deserving of Purgatory: “Comes our father Avraham and extricates them and receives them, except for a Jew who has cohabited with a gentile, for she draws his foreskin [over his circumcision] and [Avraham] does not recognize him.” *Tosafot* (*Bava Metzi’a* 58b s.v. *chutz*) explain that cohabiting with a gentile does not by itself incur Purgatory but prevents Avraham from rescuing one who is deserving of Purgatory for other reasons (also see Bach *Even Ha-ezer* 16). In other words, even a Jew who wantonly violates the law has some merit to his name—his core Jewish identity as a child of Avraham. Thus, Avraham, through his legacy, will figuratively save those who still belong to *berit Avot*, even if they have forsaken *berit Sinai*. However, Avraham does not “recognize” one who has betrayed the patriarchal covenant through intermarriage. His identity as a child of Avraham—symbolized by his circumcision—has been masked by this act. [↑](#footnote-ref-4)
5. Another *nafka mina* (practical distinction) between intermarriage as a breach of *berit Avot* and intermarriage as a violation of *berit Sinai* is their respective applicability to Jewish women. As the Rambam makes clear, a Jewish woman who marries a gentile man has violated the same negative commandment as a Jewish man who marries a gentile woman and therefore incurs the same punishment of lashes (*Hilkhot Issurei* *Bi’a* 12:1); for Onkelos, the same is true with regard to slaves (*Devarim* 23:18). The warnings about lineage, however, whether in the Rambam or in *Yevamot*, are directed only at men, as the children of Jewish women will necessarily be Jewish. A Jewish woman who intermarries, then, transgresses a Biblical commandment but has not violated the verse of “To be for you a God and for your progeny after you,” even though her choice is clearly an affront to Jewish peoplehood in other respects.

In contrast to the Rambam’s clear division regarding intermarriage between the gravity of the act and its result, however, the Ramban links the two. From the law that “one who copulates with a gentile woman [in public], zealots may kill him” (*Sanhedrin* 81b), the Ramban derives that cohabiting with a gentile woman is on par with forbidden relationships that are punishable by *kareit* and death (“*arayot*”) and therefore requires martyrdom. However, this is only true for the union of a Jewish man with a gentile woman and not the reverse: “The reason is because the child of a female slave or gentile woman is like her, and he bears a child for idolatry, but [in the case] of a gentile man who cohabits with a Jewess, the offspring is [Jewish]” (*Milchemet Hashem*, *Sanhedrin* 18a in Alfasi). The Rambam, however, limits the zealot to avenging copulation with a pagan, which clarifies that this unique law is specifically a function of association with paganism, as is the punishment of *kareit* (*Hilkhot Issurei Bi’a* 12:5-6, 14; Commentary on the *Mishna*, *Sanhedrin* 9:6). The loss of Jewish lineage, on the other hand, has no direct ramifications in the law. [↑](#footnote-ref-5)
6. *Kol Dodi Dofek: Listen—My Beloved Knocks*, trans. David Z. Gordon, 99n. In this essay, the Rav contrasts *berit Sinai* with “*berit Mitzrayim*,” rather than *berit Avot*; however, as R. Reuven Ziegler argues (*Majesty and Humility: The Thought of Rabbi Joseph B. Soloveitchik* [Jerusalem, 2012], 283n.), the two terms seem to be interchangeable, for reasons that we will discuss in future *shi’urim*. [↑](#footnote-ref-6)
7. To be sure, this separatist Jew cannot technically fulfill all of the fine details of *halakha* while on his own. He cannot pray with a quorum or hear Torah reading; he cannot respond to *kaddish* or *kedusha*; and he violates the fast days ordained by the community. However, none of these infractions justify his endless punishment. [↑](#footnote-ref-7)