The Discourse of Halakhic Inclusiveness

View PDF



Rabbi Dov Linzer is President and Rosh HaYeshiva of YCT Rabbinical School. This article appears in issue 1 of Conversations, the journal of the Institute for Jewish Ideas and Ideals.

Since the beginning of the modern era, the halakhic community and its decisors have had to grapple with the question of what halakhic status to give to the majority of Jews who were now non-observant. The Talmud (Eiruvin 69b) had ruled that a public desecrator of Shabbat was considered invalid to perform certain halakhic acts and Rambam (Laws of Shabbat 30:15; Laws of Divorce 3:15) declared that he was categorically invalid, going so far as to state that such a person was to be considered like a non-Jew in all areas of halakha.

What, then, was to be done in the period following the Haskalah, when most Jews were no longer Sabbath observers? Were the large majority of the Jewish people to be considered halakhically as non-Jews? While a number of decisors did, and continue to, rule in such a way, other great decisors found halakhic means to adopt a more inclusive policy.

The groundbreaking responsum on this issue was penned in 1861 by Rabbi Jacob Ettlinger, teacher of Rabbi Azriel Hildesheimer and Rabbi Samson Raphael Hirsch, and author of the Arukh La-Ner. Rabbi Ettlinger posits using the principle of tinok she'nishba, the infant taken captive and brought up in a non-Jewish household, and who, as an adult, is unaware of his Jewish identity. The Talmud (Shabbat 68b) had ruled that such a person was not to be held liable for his transgressions, and Rambam, later in his life (gloss to Mishna Commentary, Hullin 1:2, gloss to Laws of Rebels 3:3), had applied this category to Karaites who grew up in Karaite homes and could thus not be held responsible for not adhering to Rabbinic beliefs and commitments. [It is worth noting that in those passages Rambam only ruled that we were not to seek out their destruction, and did not actually use this

principle to argue for genuine inclusion. See, however, his responsum #449, where he does promote a proactive inclusive policy in regards to Karaites.] While Rambam's ruling had been debated, it was by-and-large accepted by later decisors (see, for example, Mishneh Berurah 385:1). On the basis of this precedent, Rabbi Ettlinger ruled that the children of the Reformers who had broken away from traditional Judaism, but who themselves had been raised in a Reform household and did not know any better, should be placed in the category of tinok she'nishba (Binyan Tzion HaHadashot 23).

Following his lead, almost all poskim who have adopted a more inclusive position have used the principle of tinok she'nishba to justify their rulings. While the tinok she'nishba category would seem to exclude a now-secular person who was raised in an observant household, Rav Kook called for a welcoming and inclusive stance here as well, using the principle of 'ones, involuntary compulsion, and stating that even such people have been seduced by the almost irresistible cultural and intellectual forces of the larger society (Iggrot Reayah I:138). It would seem, then, that for those wishing to adopt a more inclusive policy, the halakhic groundwork has been well laid and firmly established, and no more conceptual grappling or deliberations are left to be done.

This is not the case. For while the desired end result has been achieved, the path that has brought us there and the resultant discourse that we have created is less than ideal. Is not the use of tinok she'nishba vis-à-vis our coreligionists patronizing and infantilizing? Imagine if the situation were reversed. Consider a responsum from one of the other denominations deliberating on whether it was appropriate to count an Orthodox Jew towards a zimmun, or whether one could fulfill one's obligation of keriat megilah if the megilah were read by an Orthodox Jew. Given that Orthodox Jews affirm such "unethical" religious institutions as mehitsah, mamzerut and agunah, this responsum would argue, they should be excluded from performing such religious functions. This imaginary responsum (and responsa such as this do, in fact, exist) would conclude, however, that Orthodox Jews are indeed valid inasmuch as they cannot be held responsible for their "unethical" beliefs, as they are all tinokot she'nishbu.

What would be our reaction to such inclusiveness? Would it be satisfaction with the end result, or anger and frustration over how our beliefs and commitments had been trivialized? The truth is, that if non-Orthodox Jews are tinokot she'nishbu as a result of their education and upbringing, then Orthodox Jews are as well. Indeed, every person on this planet is a tinok she'nishba, to the degree that his or her beliefs and commitments are historically, societally, and

environmentally conditioned. If we are prepared to make this claim regarding others, we must make it regarding ourselves.

Both out of self- respect for my own convictions, and out of respect for the differing convictions of others, I, for one, am profoundly reluctant to use the category of tinok she'nishba or its related category of 'ones. Whether these are the arguments we give to our congregants and colleagues, or whether they are just the arguments we articulate to ourselves, they produce a discourse that does not do justice to a truly inclusive and respectful approach towards our fellow Jews.

What other justifications for inclusion, then, are available? Interestingly, in Rabbi Ettlinger's responsum two other justifications appear before he posits the tinok she'nishba category. Those two arguments warrant revisiting. The penultimate argument he gives is that in the past, Sabbath observance was a critical boundary issue because to violate the Sabbath was to deny God and Creation (see Rashi, Hullin 5a. See also Rambam Laws of Shabbat 30:15). Today, he argued, Sabbath violation does not necessarily reflect a rejection of these faith principles, as many non-Sabbath observers recognize Shabbat in some way and may, regardless, believe in God. Such Jews, then, should not be halakhically excluded.

This approach, which recognizes the religious beliefs of other Jews, produces a very different discourse. It is a discourse which is inherently validating rather than patronizing, and one that is much to be preferred (there is some precedence to this approach in discussions regarding Karaites – see Responsa Radvaz 2:796. See, also, Ramban Bemidbar 15:22, regarding an alternate belief system embraced by a community.) It is, however, more limited in scope, in that it would not warrant inclusiveness regarding Jews who avowedly do not believe in God or in Creation. Here we must turn to Rabbi Ettlinger's first argument. The Talmud in a number of places deals with the phenomenon of omer mutar, one who believes that a given forbidden act is permissible. The Talmud (Shabbat 72b, Makkot 7b and 9a) at times relates to such a person as 'ones, free from any blame, at times as shogeg, negligent, and at times as shogeg karov le'meizid, negligent on the verge of willful violation. The difference seems to be the degree to which one can say that such a person should have known better (see Tosafot Makkot 9a s.v. d'omer and Ramban, Makkot 7b, s.v. prat). Rabbi Ettlinger accurately described the non-Sabbath-observant Jews of modernity as omer mutar.

Here was an entire category of Jews – the majority of the Jewish people – who did not believe that the traditional categories of prohibited work on Shabbat were binding. What status of omer mutar should apply to them? In dealing with first-generation Reformers, Rabbi Ettlinger considered them as karov le'meizid – they

should have known better. However, in our current post-advent-of-Modernity reality, where religious truths have completely lost their taken-for-granted nature, it is impossible to argue that anyone who is not observant – even someone who grew up observant – should have known better than to hold his beliefs. It is true that such a person may very well know what the beliefs of observant Jews are, and may well know that observant Jews believe that he is also obligated, but how can we argue that he should have known well enough to have adopted this belief as his own? No matter how strongly we personally aver our own beliefs and convictions, is it not – in today's world – just as reasonable for a person not to believe as to believe? A look at the ratio of non-observant Jews to observant-Jews should certainly clear up any lingering doubt in this matter.

This argument, then, is structurally similar to that of tinok she'nishba, but in terms of the discourse it is drastically different. Rather than taking a patronizing stance vis-à-vis other Jews, we are actually adopting a more humble and self-aware position. We recognize – we are saying – that since the advent of Modernity there is no presumption of the truth of a given community's religious claims. As such, while we firmly believe in our religious truths, we have no expectations that someone else would believe them to be binding.

We must, however, ask ourselves how our halakhic system treats people who do not believe, and are not expected to believe, that this system applies to them. To this, our answer is that such people are not to be held liable or excluded as a result of their non-compliance with this system. Omer mutar accurately describes today's reality of the multiple and competing faith claims (and non-faith claims) that exist within Judaism. It is perfectly descriptive and non-judgmental, and should be a major part of our inclusive discourse.

The use of these two arguments, then, is an important and critical part of reshaping our discourse of inclusion. Recognizing that many non-Orthodox Jews are also believers in God and Creation, and approaching the non-observance of other Jews in descriptive, and not judgmental or patronizing, language, is necessary if we are to create an inclusive discourse that is also a discourse of respect. What these two arguments share is an affirming of the traditional halakhic boundaries of the community (belief and observance), but succeeds in including those who might otherwise be considered outside of those boundaries (by recognizing shared belief, or by not judging non-observance). What remains unexplored in this article is the possibility of defining the boundaries of the community in other ways, in ways which would be inclusive in the very drawing of the boundaries themselves. The discussion of this approach – both the halakhic feasibility of it and the pragmatic and religious costs and benefits that it entails –

will have to await a future article.