

Between Humaneness and Human Rights. A Jewish Perspective on Modern Bioethics

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Right-based vs. duty-based morality

At a first glance it seems that rights and duties are mutually dependent, or in the language of philosophers – “correlative”: if I have a duty to tell you the truth, you have the parallel right (against me) not to be told lies, and vice versa; if a doctor has a duty to treat people even if they do not have money, the poor have a right to be medically treated, and vice versa. But this correlativity is obviously false. For example, I may have a duty to procreate (as is the case in the very first commandment in the Bible), although there is no parallel right of non-existent people to be born; or I may have a natural right to property, even if I live on a desert island with no one having a duty to avoid transgressing my holdings, let alone provide me with a piece of land. Furthermore, even if there is some correlation of rights and duties, the direction of dependence of the one upon the other demonstrates that rights and duties are not simply two sides of the same coin. Thus, the duty of the government not to restrict my expression is *derived* from my right to free speech (rather than the other way round); on the other hand, the right of the library to fine readers for late returns of books is derived from the duty of the borrower to return the books on time (rather than the other way round).

Ronald Dworkin coined the terms “right-based” and “duty-based” normative theories to characterize the significant difference between two opposite approaches to the justification of norms.¹ What makes the difference is which of the two terms – rights

or duties – is *fundamental* and justified by reasons other than the other term. For example, right-based contract theory or constitutional law is justified in terms of the value of *autonomy*; duty-based religious ethics is based on the value of *obedience to God*. It is easy to see why. The reason for the right of civil disobedience is not the duty of the state to tolerate it, but definitely the other way round. So this right must be based on some other value (like autonomy). The reason for the duty to follow the Ten Commandments cannot be the right of God to be obeyed but must be the independent principle of the created being obedient to the creator, recognizing his authority. Thus, the two alternative ways of reasoning about the justification of norms – starting with rights and deriving correlative duties from them, or starting with duties and inferring rights from them – are not only substantially different from each other but, as we shall see, in potential conflict with each other. I want to claim that religion and modern (often called “Western”) bioethics stand in sharp contrast to each other as duty-based vs. right-based normative systems. Religion in general and Jewish religion in particular is founded on duties and commandments which derive their authority from a metaphysical, divine source. Interestingly, the Hebrew word for religion, DAT (דת), means *law* in its original Persian source (going back to Sanskrit) and is associated with the Latin “datum” (given).² Religion, in other words, is a system of laws which are given to human beings rather than legislated by them. The Jewish religion has no official theology or dogmatic thinking. Its core content is consti-

tuted by commandments (*mitzvot*) which cover all aspects of human and social life and following them is the core expression of a person's religious commitment.

Modern medical ethics, at least as we know it from the past fifty years, is a sub-field of ethics which is typically (even if not exclusively) based on the idea that in the doctor-patient relationship, the doctor's duties are created or at least constrained by the patient's *rights*. The development of this field in the 1950's was particularly focused on the practices of experimentation on human subjects, abortion and euthanasia and were normatively driven by the central role of informed consent, the respect for the patient's will and the general constraints imposed by the treated person on the manner in which she is treated. These so-called patient's rights have been and still are ultimately grounded in one general principle, that of personal *autonomy*. Doctors' duties are either based on, or at least conditioned by, patients' rights. This is a reversal of the traditional medico-ethical approach in which the duties of the doctor were justified in terms of either religious commandments or of the integrity of the profession itself (as typically expressed by the Hippocratic Oath). The patient's will or beliefs were not considered relevant to the doctor's obligations, an approach which is now referred to as paternalistic.

The Development of the Jewish Attitude towards Medical Practice

Jewish medical ethics is, thus, typically duty-based and we will explore later on the tension created by the challenge of modern bioethics which is typically right-based. But even the duty-based view of medical practice was for centuries a matter of controversy. In the Hebrew Scriptures (i.e. the Old Testament), the sole "doctor" is God himself. Although there are some stories of human intervention in cases of malady, they are usually undertaken

by prophets (Elisha and Isaiah), that is to say, under God's power and instruction. Medicine is not recognized as a separate profession and ordinary people trying to cure illnesses are suspected of transgressing the sovereignty of God.³ Later on, under Stoic influence, Jewish views of the illness and cure in the Talmudic literature (in the first few centuries of the Christian era) consider illness as either a matter of divine providence, or of fatalistic necessity, or of materialistic causation – none of which can be controlled by human beings. The Talmud's hostile attitude to medicine is encapsulated in the famous saying that "the best of doctors deserves hell".⁴ This peculiar

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proverbial aphorism is almost universally interpreted by later commentators in much more qualified and less negative terms (for example, that the saying applies only to physicians whose motivation is malice, or that doctors who cause death due to a mistake are not

liable in civil or criminal court but only before God). As can be understood from the following passage, there is a transition from the general prohibition to heal to a more permissive attitude.

On going in to be cupped one should say: "May it be Thy will, O Lord, my God, that this operation may be a cure for me, and mayest Thou heal me, for Thou art a faithful healing God, and Thy healing is sure, since men have no power to heal, but this is a habit with them". Abaye said: A man should not speak thus, since it was taught in the school of R. Ishmael: [It is written], He shall cause him to be thoroughly healed. From this we learn that permission has been given to the physician to heal.⁵

From a plain prohibition on human healing, which is considered a transgression, we move to the first a sign of a more conciliatory attitude towards the human "habit" (of getting such healing services as a matter of human psychological need), and then to straightforward principled permission to practice human healing as a delegation of divine

power. Furthermore, in the debate between rabbis about whether to feed someone who says he does not need food though the doctor says he should eat, the tendency of the rabbis is that “he should be fed according to the experts” (namely, the physicians) rather than follow the wishes of the patient.⁶ And even those who say that one should follow the patient’s choice justify their view by appeal to a quasi-medical argument, viz. that the patient’s inner feeling should be trusted. It is not anymore a theologically grounded hostility to human medical intervention as such.

The debate about the legitimacy of medical practice ended some time in the high middle ages. The development of the positive attitude to medical treatment is gradual. Ibn Ezra (12th century) judges that the doctor may only treat external injuries (rather than internal syndromes), and Nahmanides holds a peculiar position that the doctor is permitted to treat but the patient is prohibited from undergoing treatment. But ultimately, the doctor is conceived as the delegate of God which grants him not only a permission to heal but imposes on him a positive duty to do so. The view of Maimonides, the famous philosopher and interpreter of Jewish law (1135-1204), is that since God’s intentions and design is expressed in the world through the laws of nature, the use of science to cure illness by understanding and manipulating natural causation is not only allowed but also the ultimate religious acknowledgement of divine providence.⁷ And together with the physician’s duty there is a positive duty of the patient to seek medical treatment.⁸

The growing appreciation of the medical art is primarily motivated by the fundamental value assigned to human life. The basic term in this context is *pikuach nefesh*. Its origin is the early debate whether it is permitted for a Jew on the Sabbath (in which all work is prohibited) to uncover an individual buried under a pile of stones which have fallen on him so as to save his life. The answer is positive and the rule is that it is not only permitted but also a duty due to the sanctity of life which over-rides even the holiness of the Sabbath. The idea is that one should live by

Torah law rather than die for it. The particular example of the uncovering of stones is then extended to all circumstances of saving lives and particularly to medical practice, and its scope widened to apply to any significant risk of losing life or undermining its prospects. This opens the way to a full endorsement of medical treatment as obligatory also from the religious point of view.

The [laws of] the Sabbath are suspended in the face of a danger to life, as are [the obligations of] the other mitzvot. Therefore, we may perform - according to the directives of a professional physician of that locale - everything that is necessary for the benefit of a sick person whose life is in danger.

When there is a doubt whether or not the Sabbath laws must be violated on a person’s behalf, one should violate the Sabbath laws on his behalf, for the Sabbath laws are suspended even when there is merely a question of danger to a person’s life.⁹

Nowadays there are only very few and marginal remnants of the old hostile attitude to medical intervention, but the support of medical treatment on the basis of the principle of life’s sanctity has become so widely interpreted that it covers also the permission of IVF treatment, PGD, abortions that serve to save the life and health of the mother, and even – although it may sound paradoxical – some limited forms of euthanasia in extreme terminal cases.¹⁰ Medicine should not only be allowed to save life but also to positively promote it.

From duties to rights

Despite its current highly pro-active attitude to medicine, Jewish bioethics is still typically duty-based. The sick person must seek treatment while the doctor ought to apply it. There is no general right to health and patients have no rights against their physicians. There is nothing surprising in this absence of the language of rights from religious discourse. Rights as we understand them are the product of 17th-century philosophical culture in Europe. It is a modern concept. But beyond that, even after its integration in

modern liberal worldview, it has not been easily digested by religious thought in general and that of Judaism in particular. For rights are claims that human beings have against each other, or against the state; but it would be absurd to make claims against God. Rights particularly call for the protection of the interests of an individual from competing interests of other individuals (or the state); but God has no competing interests against which a human being must be protected. Rights are not derived from duties but rather *impose* duties on others.¹¹ Obviously, human beings cannot impose duties on God and hence can have no rights against Him. Rights are characteristically mutual, that is people have at least the same human rights against each other. But this reciprocity cannot apply to the relation between humans and God. There is something intrinsically alien in the concept of rights in the sphere of religious, duty-based ethics.

Furthermore, even within the relations between human beings, such as doctor-patient relations, rights do not serve as a normative basis for the conduct of the two sides. The ultimate ground for medical practice is the value of human life (and health) – not the way the individual forms her preferences and desires. In other words, the starting point in the traditional, duty-based conception of medical practice is the objective value of life and health rather than the free choice and preferences of the individual, namely her *autonomy* or her liberty to plan her life as she finds fit. Consent plays a major role in medical treatment and is an almost absolute constraint from the liberal point of view. Hence, there cannot be from that perspective any general duty to subject oneself to medical treatment, even under life threatening circumstances. This of course cannot be accepted by religious medical ethics, especially in the Jewish tradition which puts such a premium on life itself and its preservation. Autonomy is anchored in voluntariness which is the core of individualism. But these principles lie outside the religious framework which does not recognize the individual and his will as a source of intrinsic value.

With all its modernization and sophistication, the current religious literature in Jewish bioethics avoids almost completely the notion of rights. Although the word used to designate rights in modern Hebrew, *zechut*, is an old Hebrew word, it originally meant something else – moral credit or merit. It is only with recent liberal political and jurisprudential discourse that the term has become to be used to refer to right in the sense of claim. This change of meaning seems to express a deep transformation in ethical view. For merit or credit are essentially *differential*, or even elitist, while claim rights are essentially egalitarian and universal. There are contemporary Jewish thinkers who try to show that Judaism leaves an essential place for human autonomy and responsibility since the nature of God can be described only through the mediation of the *human* strife to recognize God. But even in their attempt to reconcile liberal autonomy with traditional Jewish theology, the ultimate approach is duty- rather than right-based, since the ultimate goal of the strife is a matter of value rather than of right.¹² However, in medical ethics this shift of meaning in the term “right” is of less ethical consequence, since, as I wish to argue, the difference between the duty-based and the right-based bioethical norms is not as significant as one might think from abstract theoretical reflection. In other words, my understanding is that in bioethics the religious approach, despite its different discourse from the secular-liberal one, can more easily integrate modern principles of bioethics than modern liberal principles in other spheres of political life (such as those pertaining to constitutional rights and the democratic procedure, education, or gender equality).

I propose the following explanation for this adaptability of Jewish religious discourse on bioethics to current ethical standards of Western democratic countries and international forums. The fundamental view of human beings in the Jewish tradition is originally egalitarian: all human beings are created in the image of God, a fact which grants them all with a basically equal moral standing.

Every human being has dignity which is derived from his or her pure “human-ness”, i.e. belonging to the privileged species in nature. Distinctions between people of different religious status come only after the fundamental dignity of human beings as such has been recognized and respected. And since life is the basic starting point, medicine is more easily accepted as a universal practice than practices and institutions which are concerned with more particular values than that of life itself. Thus, although the Jewish religion has little place for the idea of human or individual rights, the principle of *humaneness* plays an important role in it. Beyond its particularistic character, expressed in the special duties imposed on those belonging to the Jewish people, the overall value of human existence lies in the universal idea of spreading God’s image through procreation of human beings.

According to my interpretation of modern Jewish bioethics, we might refer to the relation between the autonomy- or right-based liberal approach to medical ethics and the religious, duty-based approach in terms of what philosophers call “extensional equivalence”. This means that there is an overlap in the *content* of the norms guiding the practice of medicine in at least many of its fields and circumstances, although the *grounds* or justification of these norms come from completely different sources. This equivalence is of course only partial and contingent, and hence fragile (because it is not “principled”), yet is dynamic in the sense that the two perspectives over the same issues (the liberal and the religious) constantly influence each other. Bioethics is a most interesting test case for this phenomenon. One example is abortion. The qualified permission to get have an abortion is justified by liberal bioethics in terms of the right of the woman over her body, while the orthodox Jewish approach justifies it in terms of

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the danger to the physical and mental health of the mother. Or take organ donation. Liberal bioethics grounds the practice in terms of the autonomy of the person to decide what to do with her body after her death, whereas many Jewish religious authorities are happy to accept the norms and regulations of organ donation on the basis of the priority of the value of life over that of the integrity of the corpse. Or, a third, interesting example is reproductive technologies such as sperm donation, IVF and even surrogate motherhood, which have been lately endorsed by mainstream Jewish rabbis on the basis of their potential contribution to the increased chance

of procreating, whereas the standard liberal reasoning appeals primarily to the desire of the prospective parents to have a child, or to fulfill their own life plans which include parenthood.

I could go on with many more examples of such convergence of actual acceptance of new norms in medical practice which originate in radically different reasoning and justifying principles. But this convergence can be generalized to duty-based and right-based norms in doctor-patient relationship. The right of the patient to get medical help overlaps the duty of the doctor to lend such help. The duty of confidentiality, derived from the physician’s Hippocratic Oath, is the other side of the coin of the patient’s right to privacy – at least in terms of the *content* of the sphere of secrecy. But the surprising thing in extensional equivalence is that despite the convergence in the actual norms accepted by the two parties, the general principles underlying this acceptance might be not merely different but straightforwardly contradictory or incompatible. For example, autonomy might be regarded as a human hubris by religious views while obedience to a transcendent authority may be considered by liberals as lacking rational and hence

moral justification. This is why the convergence itself remains shaky.

Universal Human Rights and Multiculturalism

The tension between the religious, duty-based perspective in Jewish bioethics and the liberal, right-based approach is manifest in contemporary Israeli society. Israel is a typically multicultural society with a large sector (among other sectors) of religiously committed Jews who follow the Halakhic law and have strong influence on legislation and regulation. It is an interesting test case for the problem of forming bioethical guidelines within a democratic constitutional framework which would be nevertheless acceptable to all sectors. As I have tried to show through the idea of convergence or extensional equivalence, the closeness in content of the two points of view makes the accommodation of religious sensitivities in secular state legislation somewhat easier in the sphere of medical practice than in other contested normative issues (such as the regulation of the Sabbath in the public sphere, the framework and content of school education, or the laws of marriage and divorce). From the other direction, it is also easier for the religious sector to accept some of the new bioethical regulations since many of them fall within the values of that sector too. As I mentioned, it is striking how overall easy it was to pass laws in Israel allowing technologies of assisted parenthood, including controversial practices such as surrogacy or stem cell research, with little religious resistance – the simple reason being that these technologies proved so effective in the promotion of reproductive capacity of previously barren couples.

In a way, the very success of multicultural society is constituted by the ability to bring people to converge on some core institutions and rules, without conditioning it by some shared value system or normative view. This is an aim which goes beyond simple compromise or mutual toleration.¹³ It satisfies different sectors in society without forcing them to adopt a particular normative point of view

(typically that of the majority). But of course this is only an ideal and in reality the tension between systems of values may not be resolved in convergence and the debate will not only revolve around the forms of justification of practices but also about the content of the practices.

But on the more general level of the clash between human rights and multiculturalism I find that there is some deep chasm that cannot be easily bridged. The best way to examine it is through a close reading of Article 12 of the UNESCO Declaration on Bioethics and Human Rights (2005):

The importance of cultural diversity and pluralism should be given due regard. However, such considerations are not to be invoked to infringe upon human dignity, human rights and fundamental freedoms, nor upon the principles set out in this Declaration, nor to limit their scope.

Here, we are taking one step up in moving from multicultural plurality *within* a given society to cultural diversity and pluralism in the world as a whole. This step uncovers a serious conceptual problem in the accommodation of multicultural plurality in the framework of universal human rights. The whole idea of human rights is based on the *individual* as the fundamental moral unit, as the subject of autonomy and freedom and as the object of dignity and respect. These are all explicitly mentioned in the preceding articles of the Declaration. Now, multiculturalism refers to *cultures*, that is to say, to a community of people rather than to individuals. Multiculturalism wishes to preserve the pluralism of whole systems of values and ways of life – not just the pluralism of individual preferences and choices. But this creates an inevitable tension between the rights and dignity of an individual and the value of maintaining the culture in which this individual happens to live. For respect for the rights of an individual may conflict with respect for the system of norms of the culture or sector to which the individual is subjected. Thus, from a human rights perspective, informed consent is a basic principle in medical ethics which should (with some well-known exceptions) be routinely ad-

hered to. But from a religious or other traditional point of view, the welfare of the patient should be the guiding principle in doctor-patient relationship. And as we know, the autonomous decision of the patient may very well conflict with her real interests or objective welfare, let alone with the values of the community to which she belongs.

Now Article 12 is a bit vague and does not specify the kind of force the consideration of cultural diversity should play in the creation of normative bioethical rules. But the value of diversity as such cannot be interpreted as a right, for there is no particular individual it protects. And the Declaration explicitly demands that consideration of pluralism should not “infringe upon” human rights. But in the multicultural debates the argument is often raised that there is something partial, not universal in the culture of rights and that there are societies in which rights do not play a major role (as my paper has shown regarding religious Jewish culture). The question is then raised about the possibility that the Western liberal culture of rights just forced its own values and principles as if they were universal. From the point of view of societies which do not share the principles of individual autonomy and which hail communal or family values or norms there is nothing sacrosanct about liberal ethics or bioethics.¹⁴ There is no easy answer to this challenge. Historically speaking, the 1948 UN Declaration of Human Rights could be called “Universal” since most of the member states of the institution at the time belonged to roughly the same cultural tradition. But in 2005 the awareness of multicultural heterogeneity has become acute and the adjective “universal” more difficult to apply. For it is often heard that the concept of human rights itself can be extended to apply to claims by societies to be permitted to stick to their values and norms in which there are often practices that are incompatible with individual human rights. This is a shift of meaning of rights from the individual to whole communities. This changes the basic sense of the concept itself. Article 12 seems to be aware of that problematic shift of

meaning and insists that despite the respect owed to diversity of cultures, this cannot serve to limit the scope of human rights, let alone infringe upon them.

Summing up by returning for a moment to the Jewish approach to bioethics, one should note that despite the reluctance to adopt a rights point of view in medical ethics, the religious sector often does appeal to rights in the multicultural sense of the autonomy and freedom of a particular community within the larger society to maintain its traditional norms (and of course the ways of reasoning about them), even if from the liberal, right-based morality, some of these norms infringe upon the rights of individuals. It is the weakness of liberalism that it cannot fully respect individual rights and at the same time respect cultural autonomy. But modern Jewish bioethics may serve as an example of an attempt to create some tense but tolerable co-existence between the two approaches and gradually adapt to each other’s point of view even without fully accepting it.

NOTE

¹ R. DWORKIN, *Taking Rights Seriously*, Harvard University Press, Cambridge, MA 1977, 171ff. Dworkin applies the distinction to political theories, but it can be equally employed to characterize moral theories, as I will do here.

² See *Oxford English Dictionary* (“datum”) and in the Hebrew Bible, *The Book of Esther* 3: 8.

³ “In the thirty-ninth year of his reign, Asa suffered from an acute foot ailment; but ill as he was, he still did not turn to the Lord but to physicians”. II Chronicles 16: 12. (The following verse tells us that Asa died two years later, but there is no hint whether the timing of death had to do with his appeal to physicians rather than to God).

⁴ *Babylonian Talmud*, Tractate Kiddushin, 82a.

⁵ Tractate Berachot, 60a.

⁶ Tractate Yoma, 83a.

⁷ For a good exposition and analysis of this Maimonidean view, see N. ZOHAR, *Jewish Bioethics*, State University of New York Press, Albany 1997, 29-31.

⁸ For these stages in the development of post Talmudic medical ethics, see J. PREUSS, *Biblical and Talmudic Medicine*, Magnes Press, Jerusalem 2012, chap. 1. [This is a Hebrew translation of the original 1911 book published in German].

⁹ MAIMONIDES, *Mishneh Torah* (trans. Touger), Shabbos, chap. 2, article 1. Maimonides goes out of his way to

emphasize the principle of the sanctity of life in declaring that even a hundred Sabbaths should be violated in order to save one life.

¹⁰ Pain and suffering have no religious meaning in the Jewish view and hence not only should be relieved even when this involves a violation of another commandment, but also totally avoided in extreme cases by allowing for example a woman whose anguish of further births is particularly great to get contraceptive pills or for a dying person to get no treatment which would just prolong his suffering. See I. JAKOBOVITS, *Jewish Medical Ethics*, Bloch Publishers, New York 1959, chap. 8.

¹¹ J. RAZ, *The Morality of Freedom*, Clarendon Press, Oxford 1986, 181.

¹² L. GOODMAN, *Judaism, Human Rights and Human Values*, Oxford University Press, Oxford 1998.

¹³ It would be interesting to compare this notion of convergence with John Rawls' idea of "overlapping consensus", developed in his *Theory of Justice*, Harvard University Press, Cambridge, MA 1971. Rawls seems to be a little more ambitious in the characterization of the overlap, which extends beyond the content of the agreed upon practices to some form of common commitment to formal rules of the political game, i.e. fairness.

¹⁴ There has been an intense debate whether liberalism itself is just one "parochial" political view among others and that it consequently has no particular standing on the cosmopolitan level and cannot claim universality. This has often been the argument against liberalism put forward by communitarians such as Michael Sandel and Michael Walzer.