

Commentary with Rabbi Benjamin Hecht

The Same Sex Marriage and Defining Discrimination

Recently, various members of the news media in the United States have compared those who oppose same sex marriages to those, in the 19th century, who favoured slavery and/or those, in the 20th century, who opposed desegregation. One who opposes same sex marriages is simply seen, by such individuals, as one who discriminates against gays. I guess, one could also say that I also discriminate against non-Jews because I oppose intermarriage.

During my years as a university student, I worked for a professor who was noted for his consulting activities in a variety of Third World nations. He prided himself on forging relationships and developing friendships with individuals in many of these countries in which he worked. To him, multiculturalism was not just a slogan but a true belief. He advocated respect for people of all backgrounds and cultures, promoted the advancement of diverse lifestyles and insisted on the acceptance of all Mankind.

It was, thus, not surprising to me that, while he was not Jewish, he fully supported my adherence to my faith. There were many instances when I experienced his commitment to fairness and his tolerance towards my faith and my people. I also knew, though, that there was another side to this expression of tolerance that could potentially place me in a challenging position with him. My hope was that he would never raise the question but, one day, my fears were realized and he did. He asked me about my position on intermarriage. More to the point, he asked me if I would only marry a Jewish woman.

Attitudes of tolerance are often measured by a willingness to marry a person of a different societal grouping. A full commitment to tolerance, it is perceived, should result in an

individual not being reluctant to marry someone of a variant background; after all, we are all human. Acceptance of a different type of person should not only mean that one advocates for this person's rights, including the ability and/or opportunity to practice his/her culture, but also that one is open to marrying a person of this background. This professor shared this viewpoint. As such, when he was asking me about my views on intermarriage, he was quizzing me on my personal standards of tolerance. In his advocating for the rights of Jewish students, he had demonstrated his personal feelings on the subject. As one who benefited from his involvement in this cause, was I one who also shared these beliefs or was I just a beneficiary who actually did not share these beliefs? Was I a tolerant individual who would marry without regard for a woman's background or was I really an intolerant person who would only marry a Jewess?

My answer was that I was neither -- I was a tolerant person who, still, would only marry a Jewess. This, I knew, would have to be explained; that my desire to marry a Jewish woman was not a discriminatory statement against non-Jews. I had to clarify why a commitment to advocating for the rights of others still does not mean that one necessarily has to be open to marrying a member of this other grouping. The difficulty inherent in this challenge did not escape me. Historically, parameters on who one could marry did reflect a form of discrimination and were even a harbinger of potential persecution. The Nazi Nuremberg Laws, which outlawed relationships and marriages between Jews and Aryans, were a significant infamous step in the Nazi plan of persecution. As a member of a persecuted people over the centuries, it would, furthermore, seem hypocritical to challenge others for discriminating against Jews while harbouring similar feelings towards these others. The test I thus faced was to explain how certain parameters on a choice of a spouse, which I would also personally apply, were, in fact, justifiable and not racist. Bottom line, I had to explain that my desire to marry a Jewish woman was not discriminatory but had merit as a criterion for marriage.

The answer I gave, I believe, met this challenge. As I entered into my explanation, I mentioned that my focus, applying the famous Brisk distinction between *gavra*, person, and *cheftza*, object, was not on the person but the entity. I responded that the issue is the type

of marriage one wants, with my commitment to Jewishness reflecting a lifestyle decision. I wish to adopt a certain way of life and implement the values I perceive to be most important into this choice of lifestyle. As such, especially given the demanding nature of this lifestyle, it would be important to me that I marry someone who would also share this commitment. My choice in searching for a Jewish wife is thus not a negative reflection of racial or ethnic intolerance. It was not an issue of *gavra*. It was an issue of *cheftza*, the type of life I wish to live. It would not bother me to marry a convert to Judaism, a woman not born Jewish, if she shared the values that I wish to inculcate within my life. It is shared ideology that is important to me and this is clearly a criterion that has a place in the decision making involved in marriage.

What really is discrimination? It is not simply the implementation of distinctions in our social world. Distinctions are, in fact, a necessity. We do not invite every person wishing to attend medical school actually to do so. We distinguish between those who can attend and those who cannot. What we term discrimination, though, is the result of applying a standard which really is not a proper yardstick for achieving the desired result, when the criteria being applied in the distinction have no bearing on the reason distinctions are even necessary. Refusing to enroll a certain person in a medical school because of the colour of that person's skin is a clear example of this. Colour of skin has absolutely no connection to the potential success of one in medical school. Criteria based on intellectual ability, however, are understandable for this ability is directly related to success as a doctor. I was providing a similar argument. The criteria regarding Jewishness that I applied in choosing a spouse directly related to the desired outcome of the furtherance of a certain lifestyle. I wished a Jewish wife, i.e. a wife who shared with me a desire for a certain lifestyle, and the application of this criterion in such a forum is totally understandable.

Yet, could this commitment to "shared ideology" still not also reflect a lack of tolerance? Should a person not be open to sharing one's culture with others and other cultures – both through giving and receiving? Such overriding commitment to a specific lifestyle at the expense of being open to influences of other cultures could in itself be defined as discriminatory. There are people who would contend that discrimination between people

is reflected in the hesitancy to intermingle and interrelate with members of a different group. My contention was, though, that the call of tolerance demands of us to not harbour negative feelings against a foreign individual *qua* individual. Yet, in regard to lifestyle, in the choice we wish to make regarding how we live, tolerance cannot demand of us to integrate within this lifestyle a foreign act or ideology. My desire and commitment can be to a specific lifestyle that may exclude influences on this lifestyle that effectively would create a new entity and lifestyle. The key, though, is that my focus is on how I wish to live, not the limitations I wish to place on another person's life. My essential argument regarding the criteria I applied in choosing a spouse was that the issue was what I wanted not whom I did not want.

My professor understood my point. He already knew, because of our relationship, that I was respectful of individuals with differing ideologies although I maintained my disagreement. Clearly, within the context of the democratic society in which we live, I shared his belief in the right of an individual to follow his/her own values (given, of course, the parameter of not causing harm to another). He recognized, though, that a life partnership of marriage, as I and many others understand this union to be, demands more than mutual respect; it demands a sharing of vision, a commitment to a unified lifestyle. Recognizing that one would not be able to share a life across a major divide of life values, life purpose and lifestyle is not a statement of intolerance. I, similarly, could not have married a woman, born Jewish with intense Jewish cultural pride, who would not be halachically committed. This is not a critique of the other but a statement about self and personal thought.

Of course, this argument does not defend the views of Jews with negative attitudes to intermarriage based solely on an emotional feeling of Jewish identity without almost any application of Jewishness in their lives. Indeed, this is a question that many contemplating intermarriage asked as the numbers of intermarriage grew: why should a Jew only marry a Jew when the results of the application of this criteria in the determination of the union actually makes no practical difference? Simply, if the lifestyle one would have being married to a non-Jew would be basically the same as the lifestyle he/she would have being

married to a Jew with the same feelings of Jewishness, why should someone refrain from marrying a non-Jew? Of course, there are *halachic* arguments for why not and why a *halachic* individual should still encourage marriage amongst Jews. There are *halachic* responses that state that even if the two Jews would not practice *Taharat HaMishpacha*, the laws of family purity, it is better to encourage them to get together rather than acquiesce to them marrying non-Jews even though the violation of the laws of *niddah*, refraining from relations with a menstruating, Jewish woman, are much more severe. But the bottom line is that, even as I encourage another Jew who does not share my feelings towards Jewishness to still marry a Jew, my motivation is my desire for Torah, for Jewishness, to affect the world. It is not because of some exceptional, positive feeling towards fellow Jews (in a vacuum) or, more problematically, negative feelings towards non-Jews. We may go along with someone who feels the latter as a means to accomplish the former, but that is still far from the ideal and may, in itself, raise new questions and issues.

The essential point, though, is that our stand on marriage is not really about the people involved but about the institution of marriage – what it should be and thereby the criteria that should be applied in setting its dimensions. While some may have views that are personal, and even racist, the fact that these individuals may, by coincidence, be in the same corner as me cannot result in me forgetting or denying the value still inherent in my stand. I am against intermarriage because I believe in the importance of the marriage unit in laying the foundation of Jewishness in a society. I believe that Jews should be committed to these ideals. It is not because I discriminate against non-Jewish individuals. It is the *chevtsa* that is my issue, not the *gavra*.

Similarly, my views on same sex marriages are also not personal and reflect no negative feelings towards gays. While my viewpoint does clearly impact upon gay individuals, the reasons for my views are not based on an attitude of discrimination against gays. The underlying question for me in regard to same sex marriages is whether marriage is simply a public pronouncement of a relationship between two individuals or a qualitatively distinct entity, specifically built upon a union of a male and a female, that society wishes to acknowledge and use as a building block of community. My favouring of the latter view

reflects my understanding of marriage. Of course, my position is further open to critique, debate and discussion – much in the same way that my understanding of the significance of a *halachic* lifestyle could be open to such further discussion/debate for the purpose of clarification. But please do not describe either view as a simple result of discrimination. It is not an issue of *gavra*. It is an issue of *cheftza*. What is marriage? My definition specifically limits this entity to a union of a male and a female.

Of course, the question can be asked: why must this building block unit of society consist specifically of a male and a female? The simple answer, that the unit must be able to procreate, presents a problem in the case of a heterosexual unit that cannot have children: why should they be able to construct a marriage? The theoretical possibility of procreation, though, does present a distinction and this distinction, I would contend, should be a factor in our consideration of the definition of marriage.

The Torah view of adoption may provide a perspective that lays the foundation for this view of marriage and, by extension, the family unit. Let us first clarify that this perspective should not be understood as, in any way, lessening the importance and significance of the act of adoption. Bringing up a child that is not biologically yours is recognized in the Torah literature as a great act of *chesed*. The legal structure of Torah, though, still does not maintain a view of the adoptive parents that is similar to the laws of adoption within our general society. The *halachic* structure of the parent-child relationship cannot be created through an act of adoption, even as this act is praised and recognized as most significant and loving. All the Torah laws connected to the parent-child relationship are defined by the biological relationship. This is not to say that the relationship forged between adoptive children and parents is any less loving and committed. In fact, these relationships may be closer than ones between biological parents and their biological offspring. It is a question of legal definition, with a recognition that biological factors must continue to play a role in this definition.

To those who promote same sex marriages, there are two perceptions of marriage that are maintained in order to advocate for this type of union to be recognized as a marriage. One

is the view I alluded to previously, that marriage is essentially a public pronouncement of a certain human relationship, and so why, within the context of North American society, should the sex of the members of this relationship affect this definition of the unit? The fact that many, within the parameters of our general society, who support a definition of marriage as limited to heterosexual couples still advocate for all the rights bestowed on members of a heterosexual couple also to be bestowed upon individuals in a same sex relationship, indicates some empathy with this question. As a public pronouncement of affection, there should not be a distinction in this regard, within the context of our general society, based upon the sex of the members of this union. Thus the members of any couple should also, it is argued, gain the benefits that flow from such a recognition – just don't call it marriage. The issue revolves around this perception of marriage.

The crux of the issue revolves around the perceived and desired affect of marriage within society, specifically as a unit of nurturing and development within the society. The ability to procreate would thus be a potentially important factor in the definition of the unit. The challenge labeled against this argument, though, is that our society has divorced procreation from upbringing. The argument of proponents of same sex marriages is that two individuals of the same sex can nurture a family as well as a heterosexual unit. My argument does not necessarily disagree with this view. What I am contending, though, is that the biological basis of a family unit is still significant and must continue to be recognized in the definition of marriage. Similarly, while the Torah does not directly challenge the effectiveness, love and caring of adoptive parents towards their adopted children – in fact, there are many cases that clearly demonstrate these values in non-biologically based relationships of nurturing -- a connection between biology-procreation and nurturing-upbringing is still maintained. I would contend that this recognition must be maintained in the definition of marriage. Marriage is not just about the couple but about the family unit that flows from the marriage – and the biological basis of this unit must be recognized in the very definition of marriage. (I leave it to the reader to understand why reference to a heterosexual couple that cannot have children is not a challenge to this understanding.)

Obviously, as a Torah Jew, my views on marriage and homosexuality are defined by Torah – yet an argument solely based upon the perspective of Torah does not have a voice within this society. This is, ironically, a result of the freedom of religion that has provided a haven for Torah within this world and we, in turn, cannot expect an acceptance of the imposition of our values upon this society. It is not surprising that **Rav Moshe Feinstein**, in expressing what he felt should be our position regarding abortion in the debate that engulfed this issue in the 1960's and 1970's, placed the continuation of our right, as Jews, to have the ability to decide the matter pursuant to our beliefs, over the advocating for a law that would express the Noachide Law on the matter. He thus directed Agudath Israel to express itself as pro-choice, that abortion should be a decision of the person to be made in concert with her religious authority. As such, while numerous *midrashic* sources define the concept and, further, the implementation of same sex marriages as most immoral, I similarly cannot argue against same sex marriages simply because the Torah clearly looks upon them unfavourably. If I wish to take a stand on same sex marriages within this society, I must express myself within the context of this society, including its tolerant attitude towards homosexuality. I believe that the concept of the importance of the biological component in the bonding of two individuals is a way to express the Torah viewpoint within the context of our general society.

Our focus, within this context, must be on the *cheftza* of marriage, even as it should be viewed within this society. The stand against same sex marriages cannot be discriminatory nor is it. The question is: what is marriage? It is my belief that this definition must maintain a recognition of the biological basis of the family. This does not challenge the person who wishes to perform a great act of *chesed* and accept the responsibility for the upbringing of an adoptive child. That deserves our appreciation and honouring. Nonetheless, the biological roots of the family unit still demand to be recognized and preserved – and this must find expression in the definition of marriage as solely a term to describe a heterosexual couple.