Poverty, Affluence, & Property:

Tzedakah as Distributive Justice

Rabbi Itamar Rosensweig
Maggid Shiur, RIETS
Dayan, Beth Din of America
Rav, The Merion Shtiebel

1. Introduction: Property, Charity, and Tzedakah

We often translate tzedakah as charity, but it means something else. Charity suggests a voluntary act of beneficence, a gift proffered by a generous donor.[1] The laws of tzedakah, by contrast, set forth a system of distributive justice, one that defines the property rights we have in the first place.[2]

Each society defines its own rules of property. Certain property rules pertain to what you can own. Before the Civil War, fifteen states permitted ownership of people (slavery), but the Thirteenth Amendment now prohibits it. Capitalist countries allow private ownership of the means of production; China does not. Other property rules relate to the rights we have in the things we own. In Sweden, you are permitted to trespass across someone else's land provided that you cause no disturbance or harm; in the United States you may be shot. Societies also differ regarding the amount of personal income you can own. In Florida you own your entire income, but California will take more than ten percent of it. Property rights can be specified in wondrously diverse ways.[3]

I shall argue that tzedakah is best understood as a property rule, a specification of what belongs to you and what does not, a law that reassigns property rights from the affluent to the least advantaged. I will defend the conclusion that Jewish law grants the indigent a right to welfare–that tzedakah belongs to the poor by right. The mitzvah of tzedakah is just to facilitate the transfer of these assets to their rightful owner.

2. Tzedakah as an Enforceable Obligation

The first proposition I wish to establish is that *tzedakah is a legally enforceable obligation*, not a discretionary donation. This is evident from the Talmud's report that Rava seized 400 *zuz* from R. Natan for tzedakah.[4] The Talmud concludes that a *beit din* can forcibly take tzedakah from someone who refuses to contribute his due, and such is the ruling of all the major codes.[5] Like taxes, tzedakah is not supererogatory but obligatory, and it is enforceable by law.[6]

What justifies the *beit din's* power to collect tzedakah by force? Some explain that Jewish courts have a universal mandate to enforce performance of positive mitzvot, and they can use physical force to induce compliance. This is based on the Talmud's position (*Ketubot* 86a-b) that a court can use batons to motivate someone to sit in a sukkah or shake lulav. On this view, the court cannot seize assets for tzedakah,

but it can incentivize compliance with baseball bats.[7]

The theory that coercion for tzedakah flows from the *beit din*'s mandate to enforce positive mitzvot runs into trouble. For one, the language of the Talmud (*Bava Batra* 8b) –"*mimashkenin*"– implies that the court can directly garnish assets for tzedakah. So rule the Rambam and the *Shulchan Arukh*.[8]

Second, the theory struggles to explain the case of the *shoteh*–a person of unsound mind. A *shoteh* is exempt from mitzvot. Yet the Talmud rules that the *beit din* must collect and distribute tzedakah from the *shoteh's* estate.[9] That ruling is indefensible if the basis for coercion is the individual's mitzvah obligation. The *shoteh* is not obligated.[10]

Third, many rishonim point to the rule that a court is not authorized to enforce performance of positive mitzvot whose reward appears in the Torah.[11] Wherever the Torah states a reward, it is at the discretion of the obligee whether he wants to comply and receive reward, or to not comply and forgo it.[12] Because of this rule, a court cannot coerce performance of *kibbud av va-em*.[13] Since the reward for tzedakah is explicated in the Torah, it follows that a court should not be authorized to collect tzedakah by force.[14]

These considerations indicate that the *beit din's* authority to coerce for tzedakah does not derive from its power to compel performance of positive mitzvot.

3. Tzedakah Modifies Property Rights: Liens and Liability

What, then, is the basis for the *beit din's* authority to coerce tzedakah? The *Kesef Mishneh* and Radbaz contend that the *beit din*'s authority to seize tzedakah derives from its power to enforce property rights. They explain that tzedakah actually modifies your property rights by creating a lien on your assets.[15] Like eminent domain, tzedakah redistributes property, assigning rights in what once was yours to the least advantaged.[16] The *beit din's* legal power to enforce tzedakah collection is identical with its power to seize assets to repay a defaulted-debtor's creditors. In Hohfeldian terms, tzedakah generates a financial liability rather than a mere personal duty.[17]

This explains why the court collects tzedakah from the *shoteh's* estate. The tentacles of tzedakah latch directly onto his financial assets and claim them for the poor. Thus, the estate of the *shoteh* is liable for tzedakah collection even if he, the *shoteh*, bears no personal obligation to contribute. Just as the *beit din* can take wrongfully held property from the *shoteh's* estate to return to its proper owner, so too it can seize tzedakah from his estate to distribute back to its rightful owners, the *aniyim*.[18]

This theory of the *Kesef Mishneh* and Radbaz also solves the problem of "a *beit din* cannot compel performance of positive commandments whose reward is stated in the Torah." The court, in garnishing tzedakah, is not acting to enforce performance of a positive mitzvah. Rather, the court acts in its capacity to enforce property rights, to return property to its rightful owners.[19] We have now established our second proposition: *tzedakah modifies your property rights by imposing a lien on your assets.*

4. Tzedakah Already Belongs to the Poor

Like the *Kesef Mishneh* and Radbaz, the *Ketzot Ha-Choshen* believes that the *beit din*'s authority to seize tzedakah flows from its power to enforce property rights. But his formulation advances our conception of tzedakah further. The *Ketzot* writes that the assets liable for tzedakah already belong to the indigent ("*mamon aniyim gabei*").[20] The court can seize tzedakah from the affluent person because he is holding money that belongs to the poor. According to the *Ketzot*, the transfer of ownership is so complete that the obligation of tzedakah is just to *return* to the needy ("*le-hachazir le'aniyei olam*") that which is already theirs by right.[21] With the *Ketzot*'s formulation we can articulate our third proposition: *tzedakah already belongs to the indigent, and it belongs to them by right*.

John Locke captures this idea in his *First Treatise of Government* when he writes that tzedakah grants the poor title to (or ownership of) the wealthy's abundance: "As *justice* gives every man a title to the product of his honest industry and the fair acquisitions of his ancestors … so *charity* gives every man a title to do so much out of another's plenty as will keep him from extreme want where he has no means to subsist otherwise."[22] Since charity is a poor translation of tzedakah, and since, as Maharal observes, tzedakah just means *tzedek*, justice,[23] we are better off rephrasing Locke: 'As *justice* gives every man a title to the product of his honest industry and the fair acquisitions of his ancestors … so *justice* (tzedakah) gives every man a title to so much out of another's plenty as will keep him from extreme want.'

Evidence for the total transfer of ownership can be adduced from the following ruling of the *Tur*. Generally, you can prohibit others from deriving benefit from you. The procedure involves a vow, but if done properly, the persons named are forbidden from receiving benefits from you, and consequently, they may not accept gifts from you. Now suppose you were to make such a vow against the poor: Are they permitted to accept tzedakah from you? The Tur (*Yoreh De'ah* 227) holds that they are permitted to, and the rationale, as explained by the *Perishah,* is that the vower has no power to deprive the poor of what already belongs to them.[24] Other commentators explain that the poor are not benefiting *from the vower*, as the Torah has already transferred the property right to them.[25]

5. Tzedakah as a Right to Welfare

The *Ketzot*'s conclusion–that the Torah has assigned the property right to the poor and that it is the wealthy's obligation

to return to them that which they already own by right–implies that the poor have a right to tzedakah, a right to welfare. Let us inquire, then, whether it is the wealthy's obligation that generates the poor's right or whether it is the poor's right that generates that wealthy's obligation. Which is more fundamental to the concept of tzedakah––the *ani*'s right or the *ashir*'s obligation?

It is sometimes held that mitzvot generate obligations only: honor your parents, don't murder, love a convert. R. Lichtenstein has even suggested that rights are alien to Judaism, and Robert Cover has argued that the West's rights-based *nomos* is in tension with Judaism's mitzvah-based one.[26] I remain unpersuaded by this thesis, as I have explained elsewhere.[27] The word mitzvah means commandment (or precept),[28] and a commandment (or precept) can generate either an obligation or a right. The concept of mitzvah is neutral between the two, and many of the mitzvot codified by Rambam as "*dinim*" confer rights.[29]

Let us focus here on tzedakah, but first a word is in order on the concept of rights. Joseph Raz has offered perhaps the most influential account of rights. The theory is known as the "interest theory" of rights because the function of a right, according to the thesis, is to further the right-holder's interests. Raz explains that "X has a right if X can have rights, and, other things being equal, an aspect of X's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty."[30] So if I have a right to a proper education, we are saying that an aspect of my well-being (say, my intellectual and moral development) is a sufficient reason for imposing a duty on some person(s) to educate me.

With this framework, I shall argue that tzedakah is a right-conferring mitzvah–that the mitzvah of tzedakah, first and foremost, confers upon the indigent a right to welfare. In Razian terms, to say the poor have a right to tzedakah is to say that their well-being is a sufficient reason for the Torah to impose a duty on the rich. We can prove that tzedakah is a right if we can demonstrate that the basis for the tzedakah obligation is the Torah's desire to improve the well-being of the destitute. This will establish our fourth proposition: *The Torah confers upon the needy the right to welfare–the poor person is entitled to tzedakah.*[31]

We can support this proposition by revisiting the *beit din's* authority to enforce tzedakah. Earlier we saw that this authority contradicts the rule that "Jewish courts cannot enforce positive commandments whose reward is stated in the Torah." Why does tzedakah break this rule?[32]

Ritva explains that the Torah carves an exception for tzedakah because of its acute concern for "the poor person's deprivation."[33] The *beit din's* power to enforce tzedakah reflects the Torah's commitment to improving the *ani*'s well-being.[34]

Maharal offers a more meticulous formulation: The *beit din's* power to enforce tzedakah stems not from the obligation of the *ashir* but from the right of the *ani.* With respect to the *ashir's* obligation, the *beit din* lacks jurisdiction to compel him to perform his halakhic duty–wherever the Torah explicates reward for a positive commandment, it is at the discretion of the obligee whether he wants to comply and receive reward, or to not comply and forgo it.[35] However, the *beit din* can compel tzedakah to protect the rights of the *ani,* to "support the poor person" and secure "his welfare."[36] As the *Arukh Ha-Shulchan* puts it, the coercion is not for the affluent's mitzvah but for the destitute's distress.[37]

These formulations suggest that the well-being of the poor serves as the sufficient reason for halakhah to impose the duty of tzedakah on the wealthy. On the interest theory of rights, we would say that the *beit din*'s power to enforce tzedakah flows from its responsibility to vindicate the rights of the poor.[38]

Conceptualizing tzedakah as a right illuminates two further features of the mitzvah. First, many authorities recognize a poor person's entitlement to seize tzedakah from a wealthy individual who altogether refuses to give.[39] This rings like a principle of self-help whereby the poor person is authorized to vindicate his rights. It's difficult to explain this ruling if tzedakah is exclusively an obligation on the giver.

Thinking of tzedakah as a right also explains the amount of tzedakah one is liable to pay. Contemporary discussions of tzedakah get bogged down in *ma'aser kesafim*, which quantifies the obligation from the duty-bearer's perspective, a percentage of his income. But *ma'aser kesafim* is most likely just a custom or rabbinic enactment.[40] The authentic halakhic obligation actually quantifies the amount of tzedakah due according to the needs of the poor. This is the doctrine of *dei machsoro* (Devarim 15:8), that the *ani* is entitled to "that which he lacks". The Rambam, *Tur,* and *Shulchan Arukh* all rule that you are liable to pay for tzedakah the amount necessary to satisfy the *ani*'s deprivation, if you can afford it.[41] So, the authentic halakhic calculation of tzedakah begins with an assessment of the *ani's* welfare, how much is needed to improve his well-being. That amount is then assigned to the well-off as their obligation.[42] Calculating tzedakah by the needs of the *ani* suggests that the mitzvah centers on the recipient's right, not the giver's obligation.

The point can be sharpened as follows. Imagine an affluent world where everyone's basic needs are satisfied and their welfare accounted for–a world with no poverty. It is clear from the Rambam that there is no obligation of tzedakah in that world.[43] Without needs of the poor, there is no duty assigned to the rich. It follows that the poor person's well-being is the reason for imposing the duty of tzedakah on the affluent, which is

equivalent to saying, in Raz's terms, that the poor have a right to tzedakah.[44]

The rays of light being cast on the indigent's right should not eclipse the obligation of the affluent which orbits beyond. Raz's analysis entails that rights and duties are closely related, and it was Hohfeld's incisive observation that rights are in fact correlative to duties.[45] Per Hohfeld, X's right against Y is equivalent to Y's duty owed to X. If I have a right against you not to trespass on my land, then you owe me a duty not to trespass.

It is not my intention to deny the obligation of tzedakah incumbent upon the affluent. That too is a piece of tzedakah. For to speak of the X's right to tzedakah against Y is to commit oneself to Y's duty of tzedakah owed to X. My intention is to cast light on the *more fundamental* dimension of tzedakah–viz. the indigent's right to welfare–that is obscured by our habit to reduce mitzvot to obligations.[46]

I have argued that the impoverished man's right to welfare grounds the affluent's obligation to give, and that it is not the other way around. Contrast this portrait of tzedakah with what some writers call the Christian conception of charity, according to which, "almsgiving was understood as a means to redemption" for the wealthy, not a means to aid the poor–"God could have made all men rich, but He wanted there to be poor people in this world, that the rich might be able to redeem their sins."[47] An obligation-based interpretation locates the moral edge of charity in the benefit it delivers to the duty-bearer (sin redemption). A rights-based interpretation locates the moral edge of tzedakah in the dignity of the right-holder, in the claims asserted by the *tzelem Elokim* residing within.[48]

Admittedly, echoes of the obligation-based interpretation of charity surface within the Jewish tradition.[49] These too may be facets of tzedakah. But to focus on these elements and to characterize the mitzvah as such is to be caught by what's *tafel* and not *ikar*.[50]

We have traveled quite far from the notion of tzedakah as charity that opened this essay–the notion of tzedakah as supererogatory beneficence, a gift proffered by a generous donor. It has been argued that (i) that tzedakah is an enforceable legal obligation which the courts can compel, (ii) that tzedakah modifies property rights by putting a lien on one's assets, (iii) that assets due for tzedakah belong to the poor, and (iv) the needy have a right to welfare.

My students at Yeshiva have raised the following objection. If tzedakah is the poor person's right, and if halakhah has transferred ownership to him, wherein lies the *ma'aseh ha-mitzvah*? The question assumes mitzvot need an act, either of omission or commission, and that assumption contradicts the set of mitzvot classified as *dinim,* where the mitzvah is conceptualized as a body of rules, law. The mitzvah of inheritance, for the Rambam, appears to include no *ma'aseh mitzvah*, just the rules of law that assign property rights in the estate to the proper heirs.[51] Under the rights-based theory of tzedakah, the mitzvah would operate analogously to the mitzvot classified as *dinim.* The mitzvah just is the reassignment of property rights from the affluent to the poor.[52]

There is a more moderate response to the objection, though equally rich in conceptual intrigue. It can be conceded that tzedakah involves a *ma'aseh ha-mitzvah,* but that obligation is just to facilitate the return of property to its rightful owner. Relevant paradigms might include the obligations to return lost property and stolen goods. In fact, the Talmud proclaims that one who facilitates the transfer of tzedakah from the rich to the poor has greater merit than the donor from whom the tzedakah was procured.[53]

6. Property Rights, Tzedakah, and Redistribution

One of the pressing moral questions of today is whether governments should use the tax system to redistribute property from the rich to the least advantaged. Many governments already do this by funding Medicaid and other welfare programs (food stamps, housing subsidies) from taxes collected from the better off. Opponents of wealth redistribution argue that governments have no right to take our hard-earned income and give it to others. Government sponsored theft is also theft.[54]

Proponents of wealth redistribution counter that the government does not take that which is yours. Rather, the amount you are entitled to own is limited by, restricted by, defined by, the needs and claims of society's most vulnerable members.[55] Such is the view of Thomas Aquinas: "According to the natural order instituted by divine providence, material goods are provided for the satisfaction of human needs. Therefore the division and appropriation of property, which proceeds from human law, must not hinder the satisfaction of man's necessity from such goods… whatever a man has in superabundance is owed, of natural right, to the poor for their sustenance…. The bread which you withhold belongs to the hungry; the clothing you shut away, to the naked; the money you bury in the earth is the redemption and freedom of the penniless".[56]

And I believe this is what the *Tur* has in mind when he counsels:

Do not let the thought stir in your mind "Why should I diminish my money by giving it to the poor." For you ought to know that this money does not belong to you. Rather you are a trustee with a mandate to manage it in accordance with the true owner's direction. And it is His instruction that you distribute it to the poor."[57]

Legal systems can specify property rights in different ways. The moral of tzedakah is that Jewish law defines what is ours only after accounting for the privation of others. We cannot call something our own–it is in fact not ours–until the hungry are fed, the naked are clothed, and the homeless are sheltered. We have no claim to property if the needs of our brothers have not been met.

The Torah does not ask us to support the poor. It overturns our property holdings and assigns the right of ownership to the person whose well-being depends on it.

The needs of our neighbors do not just beckon for our attention and our mercy. They assert deep, moral claims that define the universe of entitlements, privileges, and rights we are licensed to enjoy in the first place. This is tzedakah.

Endnotes

1. This point about charity is made by Peter Singer, "Famine Affluence, and Morality" *Philosophy and Public Affairs* 1 (Spring, 1972), p. 235: "The bodies which collect money are known as "charities… if you send them a check, you will be thanked for your "generosity." Because giving money is regarded as an act of charity, it is not thought that there is anything wrong with not giving. The charitable man may be praised, but the man who is not charitable is not condemned."

2. Sometimes called 'justice in distributions' or economic justice, distributive justice refers to the principles of justice that apply to the distribution of income and wealth in a society. See "Distributive Justice", *The Stanford Encyclopedia of Philosophy* (Winter 2017 Edition), Edward N. Zalta (ed.).

3.For the different ways property rights can be specified, see Itamar Rosensweig, "Property and Distributive Justice: A Theory of Moral Property Rights" (PhD Dissertation, University of Pennsylvania, 2022), Chapter 5. See also Tony Honore, "Ownership" in *Making Law Bind* (Oxford University Press, 1987).

4. *Bava Batra* 8b, *Ketubot* 48a.

5. See Rif *Bava Batra* 5b, Rambam *Matnot Aniyim* 7:10, *Tur* and *Shulchan Arukh Yoreh Deah* 248.

6. R. Soloveitchik also compares tzedakah to taxes in *Halakhic Morality*, p. 135. See also Peter Singer, above, n. 1, "We ought to give [this] money away… to do so is not charitable, or generous. Nor is it the kind of act which philosophers and theologians have called 'supererogatory'--an act which it would be good to do, but not wrong not to do. On the contrary, we ought to give the money away, and it is wrong not to do so."

7. See *Ba'al Ha-Ma'or Bava Kamma* 18b, Rashba *Ketubot* 49b. Some authorities hold that physical coercion is licensed only if the person will ultimately consent under pressure. See *Ba'al Ha-Ma'or* op. cit. If he will never consent, and the court knows this, they have no right to coerce him. See *Or Sameach Gerushin* 2:8.

For some authorities, the *beit din's* power to coerce a recalcitrant husband to give his wife a *get* stems from their power to coerce on positive mitzvot. See *Ketzot Ha-Choshen* 3:1. This would imply that wherever the *beit din* is licensed to compel a *get,* the husband has an antecedent mitzvah to divorce. See my forthcoming "*Mitzvat Gerushin*" (Hebrew) *Beit Yitzchak* 50 (New York, 2023).

8. See above, n. 5, and *Bach Yoreh De'ah* 248.

9. See *Ketubot* 48a, Rambam *Nachalot* 11:11.

10. This argument is made most forcefully by the *Ketzot Ha-Choshen* 290:3.

11. The rule appears in *Chulin* 110b.

12. See Rashi *Chulin* 110b s.v. *she-matan*.

13. See *Chulin* 110b.

14. The reward is stated in Devarim 15:10. See *Tosafot Bava Batra* 8b s.v. *ki* and *Chulin* 110b s.v. *kol*.

15. *Kesef Mishneh Nachalot* 11:11, *Radbaz Matnot Aniyim* 7:10. (A lien is a charge against real or personal property that can be taken as collateral to satisfy a debt.)

16. Eminent domain is the state's power to expropriate private property for the public good.

17. Hohfeld distinguishes between duties and liabilities. See Wesley Newcomb Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" *Yale Law Journal* 23 (1913), p. 30. A personal duty means you have an obligation to do or not do something, whereas a liability means that someone else has a legal power against you–in this case, to seize assets for tzedakah. For an overview of the Hohfeldian system, see "Rights", *The Stanford Encyclopedia of Philosophy* (Spring 2023 Edition), Edward N. Zalta & Uri Nodelman (eds.).

18. This explanation is offered by *Kesef Mishneh Nachalot* 11:11 and *Ketzot Ha-Choshen* 290:3.

19 See Ritva *Rosh Hashanah* 6a:

הכא לאו משום מצוה דרמיא עליה… כייפינן אלא מפני שחייב… לעניים, וכשם שכופין אותו לפרוע מה שחייב להדיוט.

20. See *Ketzot Ha-Choshen* 290:3.

21. Ibid:

ולפי מ"ש דבצדקה אית ביה שעבוד נכסי ליתן ממונו לצדקה וא"כ ממון עניים גביה הוא, כאילו חייב להם חוב ממש, א"כ זה שאנו כופין אותו, היינו להחזיר לעניי עולם מה שחייב להם, ובזה ודאי אפילו מתן שכרה בצדו נמי מוטל על הב"ד להחזיר מה שחייב, כיון דנכסוהי נשתעבדו.

22. John Locke, *First Treatise of Government*, 4.42.

23. Maharal, *Chidushei Aggadot Bava Batra* 9a.

24. See *Perishah Yoreh Deah* 227:6:

דלאו כל כמיניה להפסיד מהם מה שזיכתה להן התורה.

25. R. Ovadia Bartenura *Nedarim* 11:3 and Meiri *Nedarim* 83a. The most striking formulation appears in R. Gustman's *Kunteresei Shiurim* (*Nedarim* no. 11):

מתנות עניים היינו מתנות דרחמנא יהיב להו להעניים בעל כרחו דבעל הבית ומשמיא קא זכו העניים במתנות… ואין העניים לקחים אלא את שלהם, ולא מבעל הבית.

Most commentators address this question with respect to the agricultural forms of tzedakah–*leket shikhhah* and *pe'ah*–which is based on the Mishnah in *Nedarim* 11:3. The *Tur* expands the Mishnah's ruling to include financial tzedakah. See the discussion in *Beit Yosef Yoreh De'ah* 227:3 and the citation of Rabbenu Yerucham therein. On the *Tur*'s approach, the rationale supplied by these commentators applies with equal force to financial tzedakah.

Further support for the idea that the property right has been transferred entirely to the poor is the concept in halakhah of *gezel aniyim.* The idea is that someone who interferes with the poor's ability to take tzedakah–or even someone who attempts to lower his tzedakah liability–-is considered *stealing* from the poor. For *gezel aniyim*, see *Talmud Bavli Shabbat* 23a, *Mishnah Pe'ah* 5:6, *Pe'ah* 7:3, *Kiryat Sefer Matnot Aniyim* chapter 4, *Iggerot Moshe Yoreh De'ah* 1:150.

26. See R. Aharon Lichtenstein, "The Rights of the Individual Under American, Israeli, and Halakhic Law," *Congress Monthly* 45 (1978), p. 4 : "Rights, natural or other, are the current coin of Roman legists. They are the legacy of Locke and Montesquieu, of John Stuart Mill and Martin Luther King. They are not the lingua franca of the Torah or the Talmud, of Rabbi Akiba or the Rambam."

Robert M. Cover, "Obligation: A Jewish Jurisprudence of the Social Order," *Journal of Law & Religion* 5 (1987), pp. 65-73 (1987).

For an overview of their arguments, see Itamar Rosensweig & Shua Mermelstein, "Rights and Duties in Jewish Law," *Touro Law Review* 37, pp. 2179-2209.

27. Itamar Rosensweig & Shua Mermelstein op. cite.

28. Ibid pp. 2198-2200 and n. 86 therein.

29. Ibid 2194-2195. In addition to the mitzvot codified as *dinim*, some mitzvot are directly formulated as rights. See for example, the right of the agricultural worker to eat from his employer's produce. See ibid 2193-2194. See Rambam's formulation in *Sefer Ha-Mitzvot aseh* 201, *minyan ha-katzar* no. 201, and Rambam *koteret* to *Hilkhot Sekhirut* no. 4.

My analysis is limited to mitzvot *bein adam la-chaveiro,* where it makes sense to speak of mitzvot bestowing a right on an individual good against others. Granted, most mitzvot are formulated as duties. But, as we'll see below, many duties correlate to rights. It is an open question whether the formulation of mitzvot in the Torah and codes reflect pedagogic and rhetorical considerations (the system of law works better by prescribing duties) or metaphysical ones (a true description of ultimate halakhic reality). It was the Rambam's observation regarding anthropomorphic terms in the Torah that they reflect rhetorical considerations rather than metaphysical ones.

30. Joseph Raz, *The Morality of Freedom* (Oxford University Press, 1986), p. 166. For an overview of the interests theory of rights and competing theories, see "Rights", *The Stanford Encyclopedia of Philosophy* (Spring 2023 Edition), Edward N. Zalta & Uri Nodelman (eds.).

31. Note that R. Samson R. Hirsch refers to tzedakah as the right of the poor in his commentary to Vayikra 19:10: "For in the state governed by the law of God the care of the poor… is not left to feelings of sympathy… rather it

is a right that God has given to the poor." (*Recht* in the original German.) See also R. Joseph B. Soloveitchik, *Halakhic Morality* p. 136: "tzedakah is a legal bond, granting the beneficiary the right to donations and support."

32. Earlier we discussed the explanation of the *Kesef Mishnah*, Radbaz, and *Ketzot Ha-Choshen* that the power to coerce tzedakah derives from the *beit din*'s authority to enforce property rights, not their authority to coerce positive commandments. The commentaries we are about to see may agree or disagree with that analysis. If they agree, we can rephrase the question in the text above to ask: "why is tzedakah conceptualized as a reassignment of property rights rather than as a mere personal mitzvah-obligation?" If they disagree–and hold that the power of the beit din to coerce tzedakah derives from their power to enforce positive mitzvot--the question is just as it sounds: why is the court allowed to coerce for tzedakah as a positive mitzvah?

33. Ritva *Ketubot* 49b:

ואף על גב דהוי מצות עשה שמתן שכרה בצדה וקיימא לן (חולין ק"י ב') דכל מצות עשה שמתן שכרה בצדה אין ב"ד מוהרין עליה, התם הוא בשאר מצות כגון כבוד אב ואם וכיוצא בזה, אבל לענין צדקה כייפינן מפני מחסורם של עניים.

34. See also Radbaz *Matnot Aniyim* 7:10 who emphasizes that tzedakah provides "*takanah la-aniyim*" as the reason for allowing coercion.

35. See above note 12.

36. Maharal *Bava Batra* 8b s.v. *ki*:

ואף על גב דכל מצות עשה אשר שכרה כתוב בצדה אין ב"ד מוהרים, בודאי אין ב"ד מוהרים על הנותן, אבל איך יפרנס העני, ואם לא היו העניים צועקים לא הי' צריך לכוף אותם אבל בשביל צעקת עניים שהיה צריך להם חיות היו כופין... ולפיכך בצדקה מצוה לכוף, והיינו בשביל חיות העניים... בודאי חייב לכוף לצדקה משום פרנסת העני.

37. *Arukh Ha-Shulchan Yoreh Deah* 240:6:

ולכן בצדקה כופין ולא כדי שיקיים המצוה אלא מפני צער העניים.

38. These formulations can be disentangled into different theories. Ritva might hold that the *beit din* is coercing the giver to perform his positive mitzvah, and they are permitted to do so despite the general rule because the Torah has carved an exception so that the poor won't starve. Maharal and *Arukh Ha-Shulchan* might hold that the coercion has nothing to do with the giver's obligation, since the court is acting exclusively to vindicate the poor person's right. It's not clear, from their statements here, if Ritva and Maharal conceptualize the power to coerce tzedakah as an enforcement of a positive mitzvah (for Ritva, the giver's mitzvah-obligation, for Maharal and *Arukh Ha-Shulchan*, the recipient's mitzvah-right) or as a enforcement of property holdings. See above n. 32.

Radbaz (*Matnot Aniyim* 7:10), however, takes a stand on this question and explains that it is because the Torah seeks to protect the poor people's interests and welfare that it structures tzedakah as a direct redistribution of property rights. In other words, the *ani*-centric focus of tzedakah explains why the Torah designed the mitzvah as a redistribution of property rights rather than as a personal obligation left to the discretion of the giver:

והקשו בתוספות דהא קי"ל כל מ"ע שמתן שכרן בצדה אין ב"ד של מטה מוהרין עליה והרבה דברים נאמרו בתירוץ קושיא זו ונ"ל דשאני מ"ע של צדקה שיש בה תקנה לעניים והרי הוא כחוב עליו וכופין אותו לפרוע חובו ויורדין לנכסיו כאשר עושין למי שמסרב לפרוע החוב אשר עליו.

This unifies the analysis in this section with the analysis in section 3, above.

39. See *Machaneh Ephraim Zechiyah U-Mattanah* 8, *Gilyon Maharsha Yoreh De'ah* 248:1, *Tur Yoreh De'ah* 227 and *Beit Yosef Yoreh De'ah* 227:3 and *Derishah* 227:6.

40. See *Bach Yoreh De'ah* 331, *Arukh Ha-Shulchan Yoreh De'ah* 249:2.

41. See Rambam *Matnot Aniyim* 7:1 and 7:3.

לפי מה שחסר העני אתה מצווה ליתן לו.

Tur and *Shulchan Arukh Yoreh Deah* 249:1:

שיעור נתינתה, אם ידו משגת יתן כפי צורך העניים.

42. Halakhically, it appears that tzedakah is supposed to operate like a tax system. Each community would appoint *gabbaim* to administrate a centralized treasury. The *gabbaim* would first assess the needs of the community and determine the cost of satisfying those needs. Then they would audit the constituents of the community and calculate the amount of wealth that was available for redistribution. The *gabbaim* would then determine a fair way of distributing that burden across the different constituents based on their income and wealth. See *Bava Batra* 8b, *Responsa Rashba* 3:380, *Shulchan Arukh Yoreh De'ah* 250:5. Note also the Rambam's use of "*ra'uy*" in *Matnot Aniyim* 7:1 and 7:10, suggesting a legal determination of the amount liable for tzedakah.

The Talmud (*Bava Batra* 8b) explains that the administration of tzedakah requires a *beit din* because these tzedakah-tax assessments demand the rigor and integrity of *dinei mamonot*. (See also Tosafot Bava Batra 8b s.v. *u-mitchaleket*). The requirement of a *beit din* to assess tzedakah liabilities as a form of *dinei mamonot* also follows from the nature of tzedakah as a redistribution of property rights. Tzedakah assessments are like adjudicating monetary disputes because the process determines and assigns ownership.

43. See Rambam *Matnot Aniyim* 7:1 and 7:3. This point is made by *Shevet Ha-Levi* (4:124).

44. See my father's striking formulation in R. Michael Rosensweig, "*Tzedakah ke-Chiyuv u-ke-Mitzvah*" *Torah She-Ba'al Peh* Vol. 31 (5750) p. 151:

מחסורו של העני ומצבו הגרוע הם היוצרים חיוב נתינת הצדקה.

I should note that the poor person's right to tzedakah does not exempt him from attempting to alleviate his own suffering, and his failure to do so may quash his right. See *Keli Yakar* Shemot 23:5:

ומכאן תשובה על מקצת עניים בני עמינו המטילים את עצמם על הציבור ואינן רוצים לעשות בשום מלאכה אף אם בידם לעשות באיזו מלאכה או איזה דבר אחר אשר בו יכולין להביא שבר רעבון ביתם, וקוראים תגר אם אין נותנים להם די מחסורם, כי דבר זה לא צוה ה' כי אם עזוב תעזוב עמו הקם תקים עמו כי העני יעשה כל אשר ימצא בכוחו לעשות ואם בכל זה לא תשיג ידו, אז חייב כל איש מישראל לסעדו ולחזקו וליתן לו די מחסורו אשר יחסר לו.

45. See Wesley Newcomb Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning", above, n. 17, pp. 31-32.

46. There may be cases where the *ani* has a right to tzedakah without a corresponding obligation on the *ashir*. Earlier we saw that the *beit din* takes tzedakah from the *shoteh*'s estate even though he is not obligated in mitzvot. So it seems that the poor person's right can generate a lien against the *shoteh's* estate, even though the *shoteh* bears no obligation of tzedakah.

Some commentators struggle to understand how the *shoteh*'s estate can become liable without the *shoteh* being obligated. Doesn't the financial liability have to arise from a personal obligation? See *Responsa Avnei Nezer Yoreh Deah* 167:3, *Machaneh Ephraim Tzedakah* no. 1:

איכא לאתמוהי דגבי שוטה כיון דחיובא דמצוה ליכא עליה, שהרי הוא פטור מכל המצות, מאי שיעבוד נכסים שייך כאן.

Recognizing the centrality of the *ani*'s right to the mitzvah of tzedakah solves this problem. The *Machaneh Ephraim* and *Avnei Nezer* assume that tzedakah must start with an obligation. However, according to our analysis that tzedakah begins with the right of the poor, it is natural that the poor person's right to tzedakah should directly generate the financial liability in the *shoteh's* estate–without having to wind its way through a personal obligation of the *shoteh*.

47. These quotations are from Samuel Fleischacker, *A Short History of Distributive Justice* (Harvard University Press, 2004), p. 2 and p. 64.

48. The idea that rights arise from the metaphysical and moral status of persons as endowed with *tzelem Elokim* is implied by Bereshit 9:6 and *Bereshit Rabbah* 24:7. See also *Avot* 3:14 and Itamar Rosensweig & Shua Mermelstein "Rights and Duties in Jewish Law" *Touro Law Review* 37 note 117 therein. One important consequence of this idea is that *mitzvot bein adam la-chaveiro* are genuinely owed to the recipient/beneficiary. They are not just occasions for the obligee to perform a mitzvah owed to God. See idem "Rights and Duties in Jewish Law" 2204-2208.

49. See statements of R. Meir and R. Akiva in *Bava Batra* 10a.

50. For example, the source cited in the above note states that God allows the rich to support the poor so that they may receive reward for doing a mitzvah. But this does not imply that the *purpose* or *reason* for the mitzvah of tzedakah is to provide the rich with an opportunity for reward. Rather, the *mechanism* for the execution of tzedakah (taking money from the wealthy) was chosen to provide them with reward.

It's also possible that tzedakah carries a second, ancillary *din* that focuses on the duty of the giver, distinct from the first *din* that focuses on the right of the *ani*. Perhaps this is what the *Arukh Ha-Shulchan* has in mind in *Yoreh De'ah* 248:1-3.

51. See Rambam *Sefer Hamitzvot*, *Aseh* no. 248.

52. This is the *Sifra*'s point when it suggests that you have performed tzedakah if you lost a coin and a poor person retrieved it for himself. See *Sifra* Vayikra Parsha 12, 20:13. As some commentators note, the point of the *Sifra* is that tzedakah has no defined *ma'aseh ha-mitzvah*. See *Responsa Le-Horot Natan* 3:37.

53. Perhaps the best way to unpack this statement is that the property right has already been transferred to the poor. So the real moral action in tzedakah lies in ferrying the money back to its rightful owner.

Another way to construe the *ma'aseh ha-mitzvah* is that it may lie in the manner in which the *ashir* interacts with the *ani*–kindly and graciously. See *Shulchan Arukh Yoreh De'ah* 249:3 and Rambam *Matnot Aniyim* 10:7-14.

54. See Robert Nozick, *Anarchy, State, and Utopia* (1974), p. 168.

55. See John Rawls, A Theory of Justice (Harvard University Press, 1971), p. 302, and Rawls, *Justice as Fairness: A Restatement* (Harvard University Press, 2001), pp. 138-139. And see my "Property and Distributive Justice: A Theory of Moral Property Rights (University of Pennsylvania: PhD Dissertation, 2022) 224-228.

56. Thomas Aquinas, *Summa Theologica* II-II, Question 66 Article 7.

57. *Tur Yoreh De'ah* 247.