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Parshat Mishpatim

Is it always prohibited to act unethically?

In his famous essay “Is There an Ethic Independent of Halakhah?”, Rav Aharon Lichtenstein Shlita concludes that any division between ethics and Halakhah is semantic; what is right is required, and what is wrong is forbidden, even if not every case can be covered by concrete or enforceable law. This seems an attractive and perhaps even self-evident proposition – how could it ever be genuinely permitted to act differently than G-d would prefer you to act?

I want to share with you a halakhic case or category that may challenge that proposition. Please bear with me through a somewhat extended exposition.

Mishnah Bava Metzia Chapter 4 opens by describing a commercial system organized around the categories “goods” and “currency”. The relevant distinction is that transferring goods to someone else can be sufficient to acquire their corresponding currency, but transferring currency to someone else is not sufficient to acquire their goods.

However, “goods” and “currency” are relative rather than absolute terms: thus for example silver may be currency relative to gold, but goods relative to copper.

Since transferring currency does not acquire goods, the question arises as to whether the other party to a contract can withdraw from a mutually agreed deal after receiving the currency, and return the currency rather than transferring the goods. The Mishnah says that the other party can, but that (the Sages) said: He Who exacted recompense from the Generation of the Flood and the Generation of the Division (=Tower of Babel) will ultimately exact recompense from a person who does not stand by their word”.

ROSH (Rabbeinu Asher, 13th Century) notes that the Mishnah does not say that parties to a suit stemming from this issue are informed about this Divine retribution, but the Talmud assumes they are. Abbayay argues that the parties are *merely* informed (according to Rambam in the third person, according to Maharam In the second, i.e. “will ultimately exact recompense *from you* if you do not stand by your word), but not the withdrawing party is not actually cursed; Rava argues that the withdrawing party is actually cursed.

What is the basis of this disagreement? The Talmud (Bava Metzia 48b) suggests that Rava based his position on Shemot 22:27

א(-)להים לא תקלל

ונשיא בעמך לא תאר:

You must not curse judges

and a *nasi* within your nation you must not anathematize.

The Rabbis derive from a combination of this verse and the verse that prohibits cursing the deaf (Vayikra 19:14) a general prohibition against cursing any human being within the Jewish nation. Abbayay therefore holds that the court can only inform about the likelihood of Divine retribution, but not actually seek to invoke that retribution. Rava notes that the rabbis also derived that each of the specific prohibitions against cursing – judges/G-d. nesi'im, and regular Jews – applies only so long as they are עושה מעשה עמך=do the actions of your nation. Rava argues someone who withdraws from such a contract has not lived up to the standards of the Jewish people, regarding whom Zephaniah 3:13 states

שאריית ישראל לא יעשו עולה ולא ידברו כזב

“The remnant of Israel would do no iniquity, and would not speak unreliably” ,

and therefore there is no bar to the court actually cursing such a person.

The Talmud suggests that Rava had a precedent, as follows. Rabbi Chiyya bar Yosef once accepted currency as a reservation for a salt delivery. The price of salt rose before he delivered, so he sought to withdraw from the deal. When the case came before Rabbi Yochanan, he ruled: “Go, give it to him, and if not – accept upon yourself “He Who exacted recompense etc.”. It seems unlikely that a scholar such as Rabbi Chiyya would have been unaware of the Mishnah, so the intent must be that Rabbi Yochanan actually invoked Divine retribution.

But why would Rabbi Chiyya act this way if he knew the Mishnah? Tosafot blandly say

דהיה יודע מתניתין, אלא היה רוצה לקבל לטותא קודם שיפסיד היוקרא.

He knew the Mishnah, but he wished to accept the curse rather than lose the profit.

Tosafot haRosh offer a remarkable alternate formulation:

כי רב חייא סמך על זה שהלוקח ימחול לו ולא יניה לקללו

R. Chiyya relied on the buyer forgiving him rather than allowing him to be cursed.

It is striking that neither the Talmud nor the Tosafists ever use the language of איסור=prohibition, instead of the language of consequences. How could R. Chiyya accept the curse for the profit? How could he seek to morally blackmail the other party into accepting his withdrawal? (The Talmud ultimately concludes that no evidence can be brought for Rava from this case: Rabbi Chiyya had simply made an error as to whether the Mishnah applied to his case. But the commentaries take this intermediate stage as plausible.)

Tosafot note that Rava's logic should lead to an open cursing season on R. Chiyya! Tosafot reject that possibility by asserting that R. Chiyya's actions were not a sufficient deviation from Jewish national

standards to permit anyone other than a court to curse him. Tosafot offer no evidence or textual basis for this innovative distinction.

It seems to me possible that Tosafot and the Talmud are intentionally constructing here a space outside the boundaries of Halakhah however defined. We cannot tell R. Chiyya that his action is prohibited, even though it displeases G-d greatly and will be subject to His retribution. But why not? And why don't we rabbinically legislate a requirement that in such cases the goods must be delivered?

Perhaps the point is that G-d ultimately wants us to have a space in which we can use the independent capacity to distinguish good and evil, acquired at such cost in Genesis. There has to be a space – however small – in which human beings are genuinely free. G-d first tried giving us almost unlimited space – but that led to the Flood. So He gave us the Seven Noachide Commandments – but that led to the Tower. So He particularized humanity, and gave Jews the Torah. And yet there has to be a space.

Shabbat shalom