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DOES THE TORAH PERMIT INTRA-JEWISH SLAVERY?

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It's hard to imagine how crushing I would find the opening of Parshat Mishpatim if I weren't expecting it. "These are the laws which you must place before them. When you buy a Jewish slave etc." – can this really be the Will of the One who identifies as "Hashem your G-d Who took you out of the Land of Egypt, the House of Slaves"?! Something has gone terribly wrong.

In Slaves, Wage Slaves, and Divine Service, I approached this question from the perspective of a sugya in the Talmud Bavli. Here, I'll start from Talmud Yerushalmi, Bava Metzia 6:2, discussing why employees cannot be held to specific performance if they wish to end their employment:

רב אמר:
[ויקרא כה:נה] *כי לי בני ישראל עבדי'* – אין ישראל קונין זה את זה.
א"ר יוחנן:
עבד עברי היא מתני'.
על דעתיה דרב – בין פועל בין בעל הבית יכול לחזור בו;
על דעתיה דרבי יוחנן – פועל יכול לחזור בו, ולא בעל הבית:

Rav said:
[Vayikra 25:55] *because the Children of Israel are slaves to me* – Jews cannot acquire each other.
Said Rabbi Yochanan:
The Mishnah (which permits employees to renege) is about a Jewish slave.
According to Rav's opinion – both an employer and an employee are able to renege;
According to Rav Yochanan's opinion – an employee can renege, but not an employer.

The commentary Yedid Nefesh offers what seems to me the simplest reading of Rav's position. Any contract that creates an obligation for specific performance is null and void and not binding on either party, because a Jew cannot have an ownership interest/*kinyan* in another Jew's body.

How can Rav say this when the Torah itself recognizes the category *eved ivri*!? We are compelled to say that Rav quarantines or *chok*ifies the law of *eved ivri*. That law exists in opposition to the foundational value expressed by *"because the Children of Israel are slaves to me*". Its only legal effect is to ban labor relationships that are equivalent to *eved ivri*, namely to ban any requirement for specific performance.

What does Rav Yochanan mean by saying that "The mishnah is about an *eved ivri"*? Clearly the mishnah is not actually about Jewish slaves, but rather about ordinary employer-employee relationships! Yedid Nefesh explains that according to Rav Yochanan the right of a worker to renege is **derived** from the laws of *eved ivri*. Just as an *eved ivri* may buy his way out of slavery midway through the original obligation, so too an employee may renege in midcontract.

In other words:

Rav contends that halakhah defines intra-Jewish employment as the **antithesis** of intra-Jewish slavery, which is irredeemably against Jewish values. The Torah's regulation of intra-Jewish slavery, like its regulation of the laws of the beautiful captive, is an attempt to mitigate the damage from an inherently unethical power relationship.

By contrast, Rabbi Yochanan contends that halakhah defines intra-Jewish employment as a **form** of intra-Jewish slavery, which can be ethically legitimate when properly regulated. Intra-Jewish employment contracts are required to meet the ethical standards established by the Torah in the context of intra-Jewish slavery.

Let me confess that Yedid Nefesh does not mention ethics at all – all he says is that for Rav, the right to renege is derived from a prohibition against slavery, whereas Rav Yochanan derives that right from the law of slavery. The question is whether my insertion of ethics represents the best way to make sense of the dispute.

I think it does, because otherwise neither position is coherent. Rav contends that a law in the Torah bans something that the Torah explicitly permits – how can that be, unless we create a gap between what the Torah permits and what it tolerates? Rabbi Yochanan contends that employees receive protections derived from slavery – why, unless he thinks of employees as desperately vulnerable?

I suggest further that Rav and Rabbi Yochanan should be legally interpreted in accordance with their ethical goals.

However, a reasonable counterargument is that whatever a law's purpose, once established it functions conceptually rather than ethically. The most one can ask is that it not be interpreted in ways that contradict its purpose, and one cannot ask that if it would make the law incoherent.

This may be the approach of Nesivos HaMishpat. He argues

that the ONLY legal consequence of Rav's opinion is that contracts for specific performance are invalid. Thus employer-employee agreements remain in force only so long as both parties continue to willingly abide by them, and may be unilaterally vacated by either party. Once an employment contract is breached by either party, we evaluate how much is owed to whom on the basis of ordinary tort laws, just as if there had been no contract.

Similarly, the only LEGAL consequence of Rabbi Yochanan's opinion is that employment contracts may be breached in and only in the same ways as *eved ivri* contracts. Thus, just as an owner cannot end an *eved ivri* agreement, but an *eved* can, so too employees can unilaterally end contracts, but employers cannot.

Nesivos presents at least two practical differences between Rav and Rabbi Yochanan's ways of precluding obligations for specific performance.

The first is how much the employee should be paid when employment ends partway through the originally agreed term.

According to Rav, since there was actually no contract, the employer pays only for damage actually caused to the employee. The **maximum** payment for work already done is therefore the amount that was due under the terms of the original agreement, plus whatever opportunity cost (if any) the employee incurred by committing to work for the longer term. If the employee can still be hired for the remaining term at the same rate, the employer owes no compensation for that period. Furthermore, if the employer reneged under external compulsion, or the employee reneged voluntarily, the employer owes no compensation for the remaining term, even if the employee cannot find equivalently remunerative work, since one is not ordinarily liable for actions done under compulsion or for damage that another person incurs voluntarily.

According to Rabbi Yochanan, employment relationships are governed by the laws of *eved ivri.* An *eved ivri* who seeks to end the relationship early repays the original purchase price minus the worth of the time already labored. According to Rav Nachman bar Yitzchak on Kiddushin 20b, the deduction is valued at either the original or the present price of labor, whichever is higher. For example, if the price of labor has doubled, an *eved ivri* can go free three years into a six year contract, since deducting the PRESENT value of past labor from the original purchase price leaves nothing to be repaid, even though a change in the price of labor cannot extend an *eved*'s term of service. Similarly, an employee who was paid in advance and quits halfway through the contract does not repay any of the advance if labor prices have doubled.

Nesivos' second difference is whether a worker can avoid being held to specific performance if they were paid an advance and cannot immediately return it.

According to Rav, the employee can always avoid specific performance, because ANY requirement for specific performance violates the prohibition against slavery. The advance is therefore converted into a loan which the employee must repay as soon as practicable.

According to Rabbi Yochanan, just as an *eved ivri* can breach the *avdut* relationship only by repaying cash for the remaining years of the contract, so too an employee who was paid in advance can avoid specific performance only by repaying cash for the remaining labor. Thus Rabbi Yochanan's position is better for the employee economically than Rav's, but requires specific performance in some cases, whereas Rav bans specific performance entirely, but does not give employees any legal advantage over employers with regard to payment or repayment.

In other words, according to Nesivos, halakhic interpretation is not driven by the goal of protecting employees against employers. No one suggests that employment law is governed by **either** the ban on slavery **or else** by the parallel to slavery, whichever is more beneficial to the employee.

However, such a position emerges from Teshuvot Maharam MeiRottenberg #640. Maharam uses Rav to nullify all contracts for specific performance other than *eved ivri*, and uses Rav Yochanan to govern the employee compensation when employment ends before the agreed term. Moreover, he states that the *eved ivri* paradigm governs only when it advantages the employee, and that it applies to all aspects of employment:

דכל קולי דעבד עברי יהבינן לפועל מקל וחומרו,
השתא עבד עברי
דעבד איסורא ועבר על *כי לי בני ישראל עבדים*
ולא עבדים לעבדים [קידושין כב:]
וגופו קנוי –
מקילין ביה,
כל שכן פועל!?

Because we give all the leniencies of *eved ivri*
to an employee via *kal vachomer:*
If an *eved ivri*,
who transgressed the prohibition *"for the Children of Israel are My slaves* – and not slaves to slaves"
– is given this leniency,
all the more so an employee!?

Maharam's approach seems to me the best explanation for the moral shock of placing the law of *eved ivri* at the head of Jewish civil law. Slavery is intrinsically forbidden, and the Torah includes its laws to emphasize how much it is reprehended. Those who violate the law and sell themselves still deserve and recei

ve legal protections, including the right to extricate themselves – but those protections are the minimum, the floor, for what halakhah does to prevent abuse by the powerful.

Shabbat Shalom!

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