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MORAL AND OTHER SEVAROT

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A fundamental premise and moral of Talmud study – the one lesson without which (in my humble opinion) one has learned little or nothing – is that reason (practical and pure) and revelation need each other. It is arrogance to believe that one can discover the truths of Torah simply by looking into oneself or by unaided contemplation of the world; it is megalomania to believe that one can understand Torah without the mediation of human intellect.

Our tradition demands that we develop a dialectical epistemology, an approach to truth that balances and interweaves autonomous investigation with acceptance of the received Word.

Talmud is often taught and learned without explicitly referencing this issue, and "dialectical epistemology" is not a self-explanatory phrase. So I'll try to provide in this week's essay a clear illustration of what I mean.

Bava Kamma 46b records a halakhic dispute between Symmachus and the Sages in the following case: An ox gored a pregnant cow to death, and the cow was found next to its stillborn calf. Do we presume that the stillbirth occurred before the goring, or rather that it was caused by the goring? Symmachus says that the issue is in doubt, and so the gore-r pays half of what he would pay were his responsibility clear; the Sages say המוציא מחבירו עליו הראיה = "The one who wishes to take something away from his fellow has the burden of proof", and so the gore-r pays nothing.

Several hundred years later, R. Shmuel bar Nachmani asks: What is the Biblical source for the Sages' principle? He responded by citing Exodus 24:14.

וְאֶל־הַזְּקֵנִים אָמַר֙
שְׁבוּ־לָ֤נוּ בָזֶה֙ עַד־אֲשֶׁר־נָשׁ֣וּב אֲלֵיכֶ֔ם
וְהִנֵּ֥ה אַהֲרֹ֖ן וְחוּר֙ עִמָּכֶ֔ם
מִי־בַ֥עַל דְּבָרִ֖ים יִגַּ֣שׁ אֲלֵהֶ֑ם –
יגיש ראיה אליהם.

"To the Elders he said:
Sit for us in this situation until we return to you
and behold Aharon and Chur with you
whoever is a baal devarim *(= plaintiff)* yigash *(=will draw near) to them" –*
meaning that he will draw-near a proof to them.

R. Ashi then attacks Rabbi Shmuel bar Nachmani's premise:

הא למה לי קרא!? סברא הוא!?
דכאיב ליה כאיבא, אזיל לבי אסיא!?

Why should a verse be needed?! This can be derived from sevara *(=reason)!?*
The one who experiences the pain goes to the house of healing!?

Rav Ashi's attack appears to be based on the claim that unaided practical reason can reliably derive some Halakhic truths. The relevant halakhic truth here seems roughly equivalent to "Possession is nine-tenths of the law." Since not all halakhic truths can be derived in this way, Revelation is still needed, but only to supplement reason. We therefore expect Rav Ashi's attack to be followed by an understanding of the verse as teaching such a supplemental truth, and we are not disappointed:

אלא קרא לכדר"נ אמר רבה בר אבוה,
דאמר רב נחמן אמר רבה בר אבוה
מניין שאין נזקקין אלא לתובע תחלה,
שנאמר:
מי בעל דברים יגש אליהם –
יגיש דבריו אליהם

Rather, the verse is needed (as the basis) for R. Nachman in the name of Rabbah bar Avuha,
for R. Nachman bar Avuha said:
What is the Biblical source for the principle that we take cognizance only of the plaintiff initially?
Scripture says:
"Whoever is a baal devarim *(=the plaintiff) will* yigash *(=draw near) to them" –*
meaning that he will draw-near his words to them.

This new conclusion seems unrelated to its predecessor; rather than establishing who has the burden of proof, it establishes a principle of judicial procedure. However, Rashi draws a connection:

כגון
ראובן תובע משמעון מנה שהלוהו (בעדים או בשטר)
ושמעון משיבו 'תפסת משלי - החזר לי מה שתפסת',
או
'משכון היה בידך ונפחת מדמיו, שנשתמשת בו' –
בתחילה נזקקין לטענת ראובן ומוציאים לו המנה משמעון,
ואחר כך נזקקין לו לטענת שמעון לדון על דבר התפיסה והמשכון

An example (of taking cognizance only of the plaintiff initially) is
Reuven sues Shimon for a mana *that he has lent him*
Shimon replies: 'You (illegitimately) seized something of mine - return what you have seized'
or
'You had my pledge in your possession and it lost value, because you made use of it' –
We initially take cognizance of Shimon's claim and extract the mana *from*

Shimon for him,
and afterward take cognizance of Shimon's claim to judge the matter of the seizure or the pledge.

According to Rashi, Rav Nachman is not introducing a new axis. Rather, he introduces a special circumstance in which Rav Shmuel bar Nachmani's principle is true but its implications are not obvious. What happens when the defendant counterclaims, and offers to bring proof? The verse teaches that the burden of proof needs to be met only with regard to specific claims, rather than to the general financial balance between the parties. To extract money from Shimon, Reuven needs to prove only that Shimon's owes him, even if the possibility remains that he has equal or greater counter-obligations.

Rav Nachman's statement should end the sugya. Instead, the Talmud cites an astonishing coda:

אמרי נהרדעי:
פעמים שנזקקין לנתבע תחלה.
והיכי דמי? דקא זילי נכסיה.
The Nehardaens say:
Sometimes we take cognizance of the defendant initially.
When is that? When his assets are losing value.

Rashi provides two illustrations of losing value.

1. when Shimon has a deal in place to sell the object he is counterclaiming from Reuven.
2. when Shimon is under financial pressure and will have to sell his real estate at a below-market price in order to pay Reuven.

The common denominator of these cases is that the Nehardeans disregard R. Nachman's clarification when they see it as generating injustice, despite its Biblical derivation, and even though their standard of injustice is derived solely from intuition. What entitles them to do this?

With this question in hand, let us return to Symmachus and the Sages, and ask an almost opposite question. If the Sages' principle is so obviously true that no verse is needed to teach it, how could Symmachus disagree with them?

The answer is that Symmachus also addressed a special case. How heavy is the burden of proof? In many areas of halakhah, a probabilistic argument (=*rov*) is sufficient – if it can be demonstrated that possibility X is more likely than possibility Y, halakhah will treat X as true. Symmachus held that such a demonstration was also sufficient for the purposes of extracting money, but the Sages disagreed. (Perhaps the Sages believe that Revelation is needed to overrule Symmachus.)

ROSH (Bava Kamma 5:1) collects several interpretations that disagree with Rashi's. Rabbeinu Tam, for example, thinks that Reuven's claim must be for personal injuries rather than property damage, and ROSH thinks that in such a case Shimon doesn't even get the standard 30-day stay of judgment to collect exculpatory evidence. RIVA interprets "taking cognizance of only the plaintiff initially" as meaning that the plaintiff gets to put his full case on before the defendant rebuts, and wins the case even if the defendant plausibly claims that his witnesses died or left town owing to the delay. RAAVAD interprets it as giving the plaintiff the right to suspend his case indefinitely without prejudice, even if the defendant asks for a verdict.

What matters for us is ROSH's summary comment:

וכל הני פירושי סלקי אליבא דהלכה
דסברות גדולות הם:
All these interpretations come out in accordance with the halakhah,
because they are in great accord with reason (=sevarot gedolot*).*

What sort of reason? Remember that Rav Ashi gave what appeared to be homespun wisdom via analogy – the burden of proof is on the plaintiff, as why should the healthy party (=the party in possession) go to the doctor (=*beit din*)? Shitah Mekubetzet cites Rav Yehonatan as offering a very different interpretation:

כלל גדול נתן משה רבינו עליו השלום לשבעים זקנים ואהרן וחור
שלא ידינו שום אפוקי ממונא בדעת מכרעת וברובא
אלא בראיה.
סברא הוא דכאיב ליה כאיבא אזיל לבי אסיא –
לא היה צריך משה להזהירן,
דפשיטא הוא דלא גרע דין אחד ממשפט הרופאים,
שאין הרופא דן את החולה לפי סברתו לבדו
עד שאומר לו החולה 'ראשי כבד עלי ובמקום פלוני', 'ומשתנה עלי במקום פלוני למקום פלוני',
ולפי שהוא מראה לו פנים הוא דן אותו
כך התובע צריך להראות לו פנים שתביעתו חזקה וברורה כלומר בעדים.
Mosheh Rabbeinu of blessed memory gave a broad principle to the seventy elders and Aharon and Chur
that they should not extract any money judicially on the basis of compelling reason or probability
rather (only) via proof.
But (Rav Ashi held that) "the one who experiences the pain goes to the house of healing"
and therefore Mosheh did not need to command them about this,
since it is obvious that legal judgement does not require less care than medical judgement,
and a physician does not judge the patient on the basis of his unaided reason
rather he waits for the patient to say "My head is heavy and hurts in that place", or ?
and he judges in accordance with what the patient makes apparent to him
so too the plaintiff must show that his claim is strong and clear,
namely via witnesses.

According to R. Yehonatan, reason teaches that one cannot extract money on the basis of reason alone!

Bottom line: Reason can be a source of halakhic truth. When this appears to make a verse of Revelation redundant, we may interpret that verse as limiting or countering the halakhic truth derived from reason. But this does not shake our underlying epistemological faith in reason, so we may limit that limit on the basis of reason. This cycle can and should be iterative. Shabbat shalom.