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AGGADIC HALAKHAH, HALAKHIC AGGADA, AND JUST PLAIN HALACHA

By Rabbi Aryeh Klapper

The categories halakhah and aggada are impossible to define precisely. Part of the problem Is that we look for definitions that classify all units of text as either pure halakhah or else as pure aggada. But there's no reason outside our own biases to assume that many units of text aren't hybrids or mixtures. After all, Chazal wrote midrashei halakhah and midrashei aggada on the same Biblical verses.

Consider this analogy. A beraita on Kiddushin asks "Which is *kavod*/honor and which is *mora*/reverence (or parents)?" It answers with a list of examples for each category. These examples can be fit to definitions that would create largely separate halakhic realms. For example, all the examples of *kavod* are actions, whereas all the example of *mora* are inactions. However, so far as I recall, the Talmud nowhere else defines any legal action or inaction as fulfilling *kavod* to the exclusion of *mora*, or *mora* to the exclusion of *kavod*. The terms *kavod* and *mora* (more often *yir'ah*) seem to be used interchangeably. A reasonable explanation is that the vast majority of real-world situations involve both *kavod* and *mora*, while the *beraita* is listing cases that are exclusively one or the other.

If most cases are simultaneously *kavod* and *mora*, why are definitions important? One possibility is that they cover the extreme cases. A second possibility is that we understand what G-d wants better when we recognize that the legal mandate embodies multiple values. A third possibility is that some (in)actions are more *kavod* than *yir'ah,* and other are more *yira'h* than *kavod*, and that which one is preponderant has legal consequences.

We should also consider the analogy to hybrids in greater depth. An aprium is not the same as a pluot; a mule is not the same as a hinny. So too, aggadic halakhah is not the same as halakhic aggada, just as neither is the same as just plain halakhah.

Aggadic halakhah can differ from just plain halakhah in at least two ways.

1) It can take for granted that the norm or practice of a righteous person is halakhic even when that norm or practice appears to differ from the halakhic halakhah.

Thus Yaakov marries two sisters, and King David sleeps with a married woman, but – it turns out that it was ok for the Forefathers to violate (at least some elements of) halakhah outside Israel, and that all the soldiers in Jewish armies gave conditional divorces to their wives.

We are forced to these conclusions by our assumptions about these narratives rather than reaching them through purely halakhic dynamics. At the same time, they have to be legitimate possibilities within the framework of just plain halakhah, or they don't work aggadically either. It's therefore not surprising that aggadic halakhah can have real influence on just plain halakhah. For example, arguments against using conditional divorce as a "silver bullet" solution to agunah issues always have to explain why pre-battle conditional divorces are different, and therefore have to concede that conditional divorce can work at least in some cases.

2) It can apply a principle of halakhah to an extreme case where in just plain halakhah it would be overridden by a different halakhic principle.

A narrative example is the discussion of why Yiftach did not annul his vow to sacrifice to G-d the first living thing to emerge from his house on his return from war, rather than sacrificing his daughter. This discussion assumes that his vow was binding unless annulled. But of course that is nonsense - one has no obligation or permission to kill a human being because one has vowed to do so. Anyone wishing to reconcile Yiftach's action with just plain halakhah must begin by accepting Ramban's position that the vow did not require killing the daughter but only leaving her celibate-for-life (and even then the reconciliation cannot really stand halakhically). I'm rather terrified by the nontrivial efforts that talmidei chakhamim who mistook the genre, and thought the conversation was just plain halakhah, have made to contrive circumstances under which a vow to murder could be binding.

A non-narrative example is the statement, derived from the story of Tamar in Bereishit, that "It is better for a person to throw themselves into a fiery cauldron than to humiliate his fellow publicly". That it is "better" certainly does not make it obligatory, and absent an extraordinarily high degree of humiliation, it's presumably forbidden as unjustified suicide. Here again confusion of genres can yield dangerous results.

Halakhic aggada assumes that halakhah as-is is correct, and then extends it to realms where one might have thought halakhah was inapplicable. For example: once we know that G-d wears tefillin, we assume that His tefillin must follow the same halakhot as ours (except that while the texts in ours affirm the "oneness" of G-d, those in His testify to our collective "oneness").

My focus in this essay is on another such case, and on the possibility that it affected halakhah.

Just plain halakhah recognizes several circumstances in which weddings can be retroactively annulled. In the nineteenth century, some decisors independently arrived at a suggestion to deliberately engineer those circumstances in specific kinds of cases. (The two previous weekly essays opened a series about a 20th century descendant of those suggestions; this essay is a tangent off those.) For example, Maharsham suggested this – perhaps only hypothetically – in the case of a woman who had been misled by solid evidence into believing that her husband was dead, and on that basis had borne a son to a second "husband". Annulling the first marriage retroactively removed the taint of mamzerut from her son from the second marriage.

The principle behind these suggestions is that it would be unfair and unwise in specific cases to allow the halakhah to have the consequences that naturally flow from it. I need to be clear that they don't argue that these consequences are always unfair and unwise. For example, Maharsham did not propose even as a hypothetical trial balloon using this mechanism whenever it could resolve a case of mamzerut – he seems to have seen his case as an exception, for various reasons.

These suggestions therefore differ in kind from Rabbi Akiva's use of infinite interrogatories to prevent the death penalty generally. They are in a way more radical. By applying his mechanism without regard to the details of any case, Rabbi Akiva ends up merely redefining the law. By contrast, Maharsham is plainly subverting the law. Is that a legitimate judicial function?

I suggest that a halakhic aggada may be a precedent for Maharsham. I'll quote the version from the medieval anthologic commentary Daat Zekeinim to Devarim 9:16, but I believe it is just a clearer version of Shmot Rabbah Ki Tisa 43.

A parable:

To a king who betrothed a woman and said to her:
"After some time, I will send your ketubah via an escort."
When the escort came, with the ketubah in his hand –
he found that she had corrupted and committed adultery.
The escort saw the corruption and tore up her ketubah.
He said:
"Better that she be judged as an eligible woman, and not as a married woman."
So too
the Holy Blessed One betrothed the Jews at the Giving of the Torah
and said to send the Tablets, which were the ketubah, within 40 days via Mosheh
the *shoshvin*.
Mosheh came with the ketubah in hand and saw that they had corrupted via the Calf,
so he broke the ketubah.

If the ketubah means merely the document of the marriage contract, this text is inexplicable. I suggest that the situation is one where the parties have made an agreement to marry on the order of *tenaim*, which binds the parties to marry on specific economic terms without actually marrying them.

This text seems inexplicable – how would tearing up a document help! A betrothal must happen in the presence of valid witnesses! I suggest that the situation is one where the parties made the betrothal conditional on the husband or his agent bringing the wife her *ketubah* together with the husband's property pledged in the ketubah within a specified amount of time. Tearing up the *ketubah* therefore meant that the condition had not been met, and so the marriage was retroactively invalidated, and she was not an adulteress.

Consensual Adultery has two legal consequences for the wife: she can be executed if the evidence is sufficient (almost impossible), and she is forbidden to both the husband and to the adulterer. In this case, by retroactively undoing the marriage, Mosheh Rabbeinu not only mitigated the Jews' crime, he also made it possible for G-d to betroth them a second time, and that second time he delivered the ketubah.

Do you think Mosheh's actions, which ensured that a condition on which a prior conditional marriage depended was deliberately not met, is a significant precedent for Maharsham's suggestion to deliberately create situations which allow the retractive annulment of a marriage?

Shabbat Shalom!