

Ki Tetze

Dead Man Falling

Chavruta study

1. Devarim 22:8
2. Rashi “ki yipol hanofel” and Rashi on Shemot 21:13
 - What textual difficulty bothered Rashi in the Devarim passuk?
 - What philosophical standpoint do both these Rashi’s adopt?
3. Avot 2:7
 - How does this Mishna fit in with Rashi’s approach?
4. The Sefer Hachinuch on this Mitzva is rather fascinating.

Shiur

PART I – A SAFETY NET.

“When you build a new house, you shall make a parapet for your roof, so that you do not bring bloodguilt on your house if anyone should fall from it.” (22:8)

It is interesting that for certain mitzvot in our Parsha, Torah Sheb'al Peh finds a way of limiting the mitzva whereas for others, the tradition of Chazal expand the mitzva.

Let me explain what I mean.

Take *Ben Sorer Umoreh*¹ – the rebellious son – for example. If one reads the pesukim at face value, one emerges with the impression that we are dealing with a difficult son who “doesn’t listen” to his parents, but not one who is engaged in any crime of significance. He is given a court warning for his behaviour. Apparently, he is also a glutton and a drunkard. Well – what happens to this free-spirited young man? He is publicly put to death.

Does this sound a little extreme? I guess that on face value it is. Teenage rebellion that seems, in contemporary terms, rather mild meets with death! In Chazal however, this mitzva is severely limited. Chazal (see Rashi) begin with a strict minimum limit upon the quantities of wine that he must consume and of meat that he must steal in order to even enter the category of the “wayward and rebellious son.” In addition we hear of Beit Din giving him 39 lashes when they caution him. He then

needs to steal a second time, and be caught. Both parents need to agree to hand him over to Beit Din. All this must happen in a 3 month period from his thirteenth birthday or else he is absolutely acquitted.²

Maybe we now can understand why Chazal state that the *Ben Sorer U'moreh* never occurred³! How could it occur? The restrictions that the Halakha imposes upon this situation, means that it is practically impossible for all the conditions to be met.

How about other examples of a “restriction,” or “shrinking” of the scope of a particular Halakha? See the Mitzva, quoted in our parsha that issues a prohibition of conversion for those descended from the nations of Ammon or Moav⁴. The Torah Sheb'al Peh applied this law to male representatives of these nations alone, and not the female representatives⁵.

Another example: The Halakhot of purity in the war camp which are detailed in our parsha⁶. The war-camp must be kept pure,

“...since the Lord your God walks in the midst of your camp to save you from your enemies, thus let your camp be holy; let Him not find anything unseemly among you.”

This law would seem to apply in the war camp of B'nei Yisrael at any particular time or place. The implication of the passuk is that God accompanies His people on the battlefield. Torah Sheb'al Peh⁷, however, restricts this parsha to a particular situation. These laws apply ONLY if the *Aron* – the covenantal ark – is present in the camp. Obviously the Ark as seat of the Shekhina is a manifestation of God's presence (as David describes (Shemuel Bet ch.6) dancing before the Aron as dancing “before God.” But I think we would agree that this is far from the *Peshat* of the verses. The *Peshat* seems to indicate that God's presence is evident, palpable in the standard war camp. God accompanies His holy soldiers when they go to war. Hence, once again, the Halakha constricts the scope of this law.

THE PRACTICAL AND THE IDEAL.

How might we explain this phenomenon? We could say this. There are times when there is some sort of dissonance between the “spirit” of the law and the letter of the law. That God has built the Torah with the scope to allow a “layered” perspective, a harmonious duality in order to give depth to Mitzvot. The written Torah offers one layer, and the Oral Torah presents a second one.

² See the Mishna in the 8th perek of Sanhedrin, or/and Rambam; Hilchot Mamarim ch.7

³ Sanhedrin 71a

⁴ 23:4-6

⁵ This is the famous law of “*Moavi velo Moavitt*” (Yevamot 76b) which we talk about with reference to the Biblical figure, Ruth.

⁶ 23:10-15

⁷ Pesachim 68a. See the Ramban on 23:10.

¹ 21:18-21

The Torah expresses this dual level, this multiplicity of perspective, by creating a dissonance between *Peshat* and (Halakhic) *drash* i.e. Halakha itself. We claim then, that the Torah text expresses the Halakha in a certain form that is expressive of the spirit of that particular law. However, in the Torah Shebal Peh, objective quantifiable criteria and fixed definitions create the law in its strict legal formulation. This is the "shrinking" or "constriction" of the law. Apparently God is interested in passing to us these two dimensions, understandings, layerings of a particular phenomenon.

A good example of this might be the parsha of Kriyat Shema which in its original form describes a reality of talking about the Torah⁸ at all times and in all situations: "sitting at home, while in transit, when you awake, when you go to sleep." The Torah would seem to be asking us to meditate upon the words of God in every situation that we find ourselves. However, the objective definition of the Halakha obligates us to recite a simple paragraph in the morning and evening, but clearly the original text of the parsha has a more demanding thrust.

Why is there a need to "shrink" the application of the law?

Maybe the Torah needs to be able to be performed by all Israel. It is impossible to instruct every person to talk Torah all day, but as an ideal, as a maximalist position, it shines there as a target, a goal, an aspiration, and an attainable one too! The Halakha is pragmatic; the *Peshat* expresses a more utopian reality.

Likewise with the army camp - every soldier should read the parsha and feel that God marches with the Jewish army. And this demands a high level of ethical conduct, even of Kedusha. Halakha says, that whereas this should be the ideological concept for a Jewish army, in practice, the law applies only when there is a concrete presence of the Shechina in the camp.

MITZVAT MA'AKEH

I give this introduction because *Mitzvat Ma'ake* is a Mitzva which works in precisely the opposite direction. In this situation, *Torah Sheb'al Peh* actually EXPANDS the mitzva in accordance with the spirit of the law⁹. The Gemara in Baba Kamma (15b) expresses it in the following way:

"What is the source for the law that restricts one from bringing to one's home a wild dog or an unsafe ladder? The Torah teaches: You shall not bring bloodguilt on your house (22:8)"

⁸ The scope of "*Hadvarim Ha'eleh*" would seem to involve more than simply parshat Kriyat Shema. Note the parallel between this phrase in Devarim 6:6 and 5:18 for example.

⁹ This should not surprise us. The Halachot of Shabbat, Kashrut, are classic examples of laws in which Chazal dramatically expand the boundaries of the law well beyond the *peshat* of the passuk.

The Rambam in his "Laws of the Murderer and Life-Prevention" spends two entire chapters detailing all sorts of safety measures to ensure that people do not enter dangerous situations. The halakha which opens the entire section on "safety" is the law of the parapet – the *Ma'akeh*.

So this Halakha sets a Torah precedent for a sensible degree of caution and what we nowadays call safety standards and regulations, in the face of life-threatening situations. In this case The Oral Law widens the scope of the law rather than shrinking it.

And now a question for us to consider. When does our Torah Sheb'al Peh expand an area of Halakha and when is a particular Halakha expanded? Is there any system here?

Part II – Dead Man Falling.

And now, on a totally different note we shall shift philosophical focus to another dimension of *Ma'ake*. This too, however is a rather thought-provoking and even a troubling topic.

We begin with a remarkable comment by Rashi. Rashi is bothered by the unusual wording of the passuk here: "*ki yipol hanofel*." This phrase refers to the person who tragically falls off a roof which does not have a railing. The phrase talks about: "when the faller falls." Why does it not say: "when a person falls"?

Rashi comments:

"He deserved to fall. However, despite this, you should not be the one to cause his death; for good things are brought about by the agency of the innocent, and bad things are brought about by the guilty."

Now Rashi is saying something quite remarkable. Why is the person who falls from the roof described as "the faller?" - Because he was destined to fall. He is a guilty! And you should be careful not to bring about his death even if he deserves it.

AN "ACCIDENTAL" MURDER?

Rashi expresses a similar view in his comments to Shemot. There, the passuk is talking about a situation of an accidental murder. The verse states:

"He who fatally strikes a man shall be put to death. If he did not do it by design, but God forced his hand, I will assign you a place to which he can flee" (21:12-13)

Clearly, these pesukim talk about accidental murder and even hint at the institution of the refuge cities.

Rashi is moved to explain the unusual phrase here: God forced his hand. This is what he says:

“God forced his hand: He arranged that it would fall into his hands... And why should this act emerge from him? This is what the Biblical David refers to (Shmuel I 24:13) ‘As the ancient proverb states: from the wicked will come evil.’ That “ancient proverb” is the Torah... and where does the Torah state this? - ‘and God forced his hand.’ What is the verse referring to? There are two individuals. One killed accidentally and another murdered in cold blood. There were no witnesses for either act, and hence this one was not exiled (to the refuge city) and the other was not put to death. God arranges that they both convene at a particular venue. The accidental murderer is climbing up a ladder, and the deliberate murderer is sitting underneath it. The man on the ladder falls down and kills the man underneath; people witness the event, and hence the man on the ladder is sent to exile. He who killed by accident goes to exile, and he who was the cold-blooded killer is killed.”

Now, this view of divine justice is quite difficult. Is Rashi claiming that each and every murder is truly part of a divine chain of punishment? Is it possible that every fatal work accident, every death, is a direct act of God?

I think that this is precisely what Rashi is saying - that every death is destined. Every accidental death is not accidental at all.

If we accept this point of view, just one question remains, and this is the question raised by the roof and the parapet. This person who falls is already sentenced to death. That is why he is called a “*nophel*” – the falling one. When the person falls, it is because he was destined to fall. But the question is – who is going to be the killer? Who is going to be the person to cause his death. The Torah says; it should not be you! Or in R. Hoffman’s words:

“We may not cause the death of any man, even if God has decreed it, due to his sins”

This is raised in a famous Mishna about Hillel in Pirkei Avot:

“He saw a skull floating upon the water (of a river?) He said to it: Because you drowned somebody, you were drowned; and the person who drowned you, will find his end by being drowned.” (2:7)

Once again, the philosophy works in the following way. You are responsible for your actions. You are forbidden to do an un-ethical act EVEN IF you are absolutely certain that a certain person “deserves” it. You must keep the law. God will worry about sorting out the system

so that everybody receives his or her just desserts, his reward or punishment.

SOME CONCLUDING COMMENTS.

I have always found this Mishna, and these other sources quoted here, rather thought provoking. Is the world so perfectly run? Don’t we feel that there are many unjustified deaths? Is it true that every person leaves the world at precisely the right time? It is not impossible to say that this is indeed the case. But the age-old question of “*Tzaddik v’Ra Lo*”, the philosophical discussion of theodicy, is a reflection of the fact that from our human perspective, the world (- God?) at times seems grossly unfair and sometimes, brutally cruel.

But from the positive side, these sources have always boosted the side of moral integrity in certain moments of pressure. This mitzva teaches us that we have to watch our actions irrespective of the excuses. We have to retain our sense of morality and act ethically because we know that this is what is right, that which God demands from us. This, even if the environment in which we find ourselves seems grossly unfair. We bear a heavy load of moral responsibility.

Shabbat Shalom.

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