

ממאי דמותרת לדבר חמור הוי מותרת לדבר הקל דלמא לא הוי -

From where do we know that being warned for a stringent matter is considered being warned for a lenient matter, perhaps he is not

Overview

The גמרא derives that by a חובל, he is משלם ואינו לוקה (even if there was התראה), from the פסוקים regarding ונגפו אשה הרה (where he was warned not to kill her), and if he wounds her, he is משלם ואינו לוקה (even though he was warned למיתה) and we will assume that one who was warned for a stringent punishment (in this case מיתה) is considered warned for a lesser punishment (מלקות). The גמרא challenges this assumption; perhaps a מותרת לדבר חמור is not מותרת לדבר הקל. Our תוספות discusses the logic of such a claim.¹

אין לומר דטעמא משום דאהריגה הוא דקיבל התראה² -

One cannot say that the reason a מותרת לדבר החמור is not מותרת לדבר הקל, is because he accepted the warning that he will be killed -

דניחא ליה ליהרג על מנת שיהרוג שונאו דתמות נפשי עם פלשתים³ הוא דקאמר -

For it is agreeable to him that he be killed as long as his enemy is killed; he is saying, 'my soul should die with together with the פלשתים' -

אבל לא ניחא ליה להכות את חבירו על מנת שילקוהו⁴ -

However, it is not agreeable for him to hit his friend and he himself will be flogged; תוספות rejects this reasoning -

דהא אמתניתין דפרק הנשרפין (סנהדרין דף עט,ב) דקתני דחייבי מיתות שנתערבו ידונו בקלה⁵ -

Because regarding the פרק הנשרפין in משנה, which states, 'people who are

¹ The purpose of the warning is to determine that this person is willingly transgressing an איסור, knowing that he will be punished. If he is willing to transgress an איסור, when there is a severe punishment, he is (seemingly) surely willing to transgress an איסור if there is only a lesser punishment. Seemingly if the person was warned that if you will transgress, and (in our case) your actions will kill the woman, you will be killed, and despite the warning he went ahead and attacked the woman, but did not kill her, where there is only a מלקות punishment, should that not be a sufficient warning. What is the logic to argue that מותרת לדבר החמור is not מותרת לדבר הקל?!

² 'Accepted the warning', means that he understood that if he transgresses, he will be put to death and nevertheless he is prepared to transgress and die. See footnote # 7.

³ This is the statement שמשון said (in שופטים טז,ל) when he pulled down the pillars of the building and killed many פלשתים, and he himself also perished. A person may be willing to die if at least his enemy will die.

⁴ If his 'friend' (enemy) will only be hurt (not killed) it is not 'worth it' for him, if he will also be flogged. The flogging he receives may (even) be worse than the victim's wound.

⁵ This means one who was מחוייב סקילה (the most severe death penalty) became mixed up with another who was מחוייב חנק (the most lenient death penalty), and we cannot distinguish between them, who receives which death penalty. We give them both חנק. We 'obviously' cannot give סקילה to both of them, since the one who was מחוייב חנק, was only warned that he would receive חנק, so we cannot give him סקילה.

condemned to die (with different types of death penalty) that became intermingled, they should be punished with the more lenient death penalty'; this concludes the משנה -

וקאמר בגמרא (שם דף פב) שמע מינה מותרה לדבר חמור **הוי מותרה לדבר הקל**⁶ -

So the גמרא comments on this משנה, 'we can derive from this that a **מותרה לדבר** is חמור -

והתם פשיטא דכיון דהתרו בו לסקילה וקבל⁷ -

And there it is obvious, for since they warned him regarding סקילה and he accepted it -

כל שכן שאם התרו בו חנק על אותו דבר עצמו שהיה מקבל -

So certainly, if they would have warned him for חנק for that same offence that he would have accepted it, and transgressed -

ואפילו הכי בעי למימר דמותרה לדבר חמור לא הוי מותרה לדבר הקל⁸ -

And nevertheless, the גמרא there wants to say that **מותרה לדבר חמור** is not מותרה לדבר הקל -

אלא יש לומר דגזירת הכתוב הוא⁹ דבעינן שיתיר עצמו לאותה מיתה בין קלה בין חמורה:

Rather one can say that it is a גזירת הכתוב that we require that he should accept on himself that specific death penalty, whether lenient or severe.

Summary

There is no logic why מותרה לדבר חמור should not be מותרה לדבר הקל, rather it may be a גזירת הכתוב.

Thinking it over

Does answer of גזירה"כ (where it states מיתה ומיתה), but not to מלקות ומלקות, or does the גזירה"כ apply to all cases (even by מיתה ומלקות)?

⁶ We give חנק to both of them even though one is מחוייב סקילה, and was not warned regarding חנק. This proves that if he did not heed the warning for a more stringent punishment, he is surely warned for a lighter punishment for he certainly would have committed the same crime for a lesser punishment.

⁷ See footnote # 2.

⁸ The גמרא there rejects the proof from the משנה that מותרה לדבר חמור מותרה לדבר הקל, for perhaps he is not מותרה, and the משנה is discussing a case where the witnesses did not specify which מיתה he will receive, עיי"ש. In any even we cannot apply the reasoning תוספות offered initially, because in this case there is a death penalty either way.

⁹ See סנהדרין מא,א that we derive from the פסוק יז, in (שופטים) that יומת המת requires that עד שיתיר עצמו למיתה and as (מב, ד"ה התיר) that **על מנת כן אני** (עושה דאם לא הפקיר עצמו אינו נהרג כדלקמן (דף מא).