

Rather; what is different by - שיש בהן צד חמור - the צד השוה is that they have a stringent aspect

OVERVIEW

The רבנן (who argue with ר"י) and maintain that a מצוה אין לוקין עליו (לאו שאין בו מעשה) from וע"ז that a מצוה ר"י (לאו שאין בו מעשה) because the צד השוה has a צד חמור (which תוספות will point out), therefore since the צד השוה has a צד חמור we cannot derive it by other איסורים, which do not have a צד חמור.

צד השוה explains the stringency of the תוספות:

זה אין צריך התראה וזה לוקה ומשלם -

This one (עדים זוממין) does not require a warning (to receive punishment), and this one (מצוה ר"י) receives מלקות and pays. This is what is meant by a צד חמור.

תוספות asks:

ותימה דהא אין זה פירכא שוה¹ -

And this is astounding! For the refutation is not the same for both cases of the צד השוה.

תוספות answers:

ופירש רבינו יצחק דפריך שכן הם משונים ביותר משאר מלקיות -

And the ר"י explained that the question of צד חמור is that וע"ז ומצוה ר"י are extremely different from the rest of מלקיות -

שאין צריך התראה² מה שאין כן בשאר מלקיות³ -

For they (the וע"ז) do not require a warning [and (a מצוה ר"י) is ומשלם], which is not the case by the rest of מלקיות.

¹ When we wish to derive a new rule (the למד) through a צד השוה (the [מלמד]ים); it is because there is always a חומרא by each מלמד which the למד does not have. Nevertheless since the חומרא of one מלמד is different from the חומרא of the other מלמד we say that we can derive the למד from these two מלמדים through a צד השוה (a commonality that all three [the two מלמדים and the למד] have), despite the different individual חומרות that each מלמד has. However, here we are saying that even though the חומרות of the two מלמדים are different, we nevertheless cannot derive the למד from the חומרות because the מלמדים are חמור, but this goes against the entire idea of a צד השוה. According to this reasoning (of צד חמור) we can never derive anything through a צד השוה because the צד השוה has a צד חמור!!

² The ר"י amends this to read התראה ולוקה ומשלם מה (instead of מה). (התראה מה).

³ The חומרות of מצוה ר"י are not limited to a particular detail but rather it goes against the entire structure of חייבי מלקות. There is a general rule that אין עונשין א"כ מזהירין and nevertheless by וע"ז they receive מלקות without a התראה. There is a general rule that אין לוקין ומשלמין and nevertheless by מצוה ר"י he is ומשלם. Such unusual חומרות qualify to reject the צד השוה, for even though the חומרות are different, nevertheless we cannot derive anything from these two since the תורה gave them exceptional חומרות.

צד חמור offers an alternate explanation of תוספות:

ועוד יש לומר שכן יש בהם צד חמור שהן לוקין על דיבורם שלא עו אלא במוצא פיהם⁴ -
And furthermore one can say; that the meaning of צד חמור is that
the receive מלקות for their statement alone, for they did not sin except with
what came out of their mouths, nothing really happened.

תוספות supports this contention:

דהכי נמי פריך בירושלמי⁵ לעיל גבי ההיא דגמרינן ממוציא שם רע -
For this is also what the תלמוד ירושלמי asks regarding that which was
mentioned previously (in our גמרא) that ר"מ derives from מוצש"ר -
ופריך מה למוציא שם רע שכן דיבור הוא⁶ -

לוקה ומשלם that he rule should be מוצש"ר **Where the רבנן refute**
this derivation from מוצש"ר that he rule should be מוצש"ר
in all cases; saying that you know why מוצש"ר is מוצש"ר because it is only
speech, however by all other איסורים we require something tangible to be effected –

תוספות responds to an anticipated difficulty:⁷

ור' יהודה סבר⁸ צד חמור לא פריך לפירוש דירושלמי דעדים זוממין בדיבורן⁹ איתעביד מעשה:
And ר' who maintains צד חמור לא פריך, he will explain according to the פי' of
the ירושלמי, that by ע"ז an action was done through their words. בי"ד ruled that
the accused is guilty; the ruling of בי"ד is considered a מעשה.

SUMMARY

⁴ In other cases of מעשה (for instance נותר), granted that the transgressor (the מותיר) did not do anything, but nevertheless it caused the קרבן to become נותר and פסול. However here even after the עדים testified and the מוצש"ר made his accusation, nothing really happened since the עדים are זוממין and the מוצש"ר was disproven; no one was adversely affected by their statements, and nevertheless the תורה gives them מלקות. We cannot derive from this strict ruling to anywhere else in the תורה, where there is a punishment of מלקות only if the violation of the לאו (even without a מעשה) had a real adverse effect. The ע"ז of לאוין and מוצש"ר are so unusually strict (צד חמור) in that a punishment is meted out even though there were no adverse effects, that we cannot derive from them that elsewhere (where the איסור is not that strict [for it is forbidden only when there is an adverse effect]) one should also be חייב for a מעשה (as ע"ז ומוצש"ר are).

⁵ כתובות פ"ג ה"א and in פ"ז דתרומות ה"א ירושלמי.

⁶ The פירא of the רבנן, not to derive other cases from מוצש"ר, is as was explained in footnote # 4.

⁷ According to תוספות first answer that the חומרות of ע"ז ומוצש"ר are different, it is understood why ר' יהודה does not accept צד חמור because we can only refute a צד השוה if we find a common חומרא among both מלמדים (see footnote # 1). However according to תוספות second explanation that the צד חמור is that by both of them there is only 'talk' no adverse reaction, why indeed does not ר"י agree that it is a valid פירא?

⁸ The הגהות הב"ח amends this to read סבר (instead of סבר).

⁹ It is only by מוצש"ר that we can say שכן דיבור הוא (because it was merely 'talk'), therefore the ירושלמי properly states that regarding מוצש"ר it is only דיבור; however, by ע"ז there was a ruling of בי"ד (which is considered a מעשה) based on their testimony, so there is no צד חמור by both מוצש"ר and ע"ז (only by מוצש"ר). Therefore we can derive through a ע"ז we will respond מה למוצש"ר שכן דיבור for if we will say שכן דיבור ע"ז that מוצש"ר צד השוה and מוצש"ר צד השוה יוכיח that it is מעשה and nevertheless they are לוקה on a מעשה. See 'Thinking it over'.

צד חמור means either that the חומרות of ע"ז (even though they are different) are so unusual that we cannot derive other איסורים from them, or that they have a common צד חמור that it was only דיבור without an adverse effect (while ר"י claims that a פסק בי"ד is not considered merely דיבור).

THINKING IT OVER

How can we reconcile that on one hand ר"י maintains that by ע"ז it is not considered merely דיבור, but rather איתעביד מעשה,¹⁰ and on the other hand we derive from ע"ז (together with ר"י) that a מעשה לוקין עליו? Which way is it; is לאו שאין בו מעשה or it is considered a מעשה a עדים זוממין?

¹⁰ See footnote # 9.