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IS ALL REALLY SAID AND DONE? THE NATURE OF הלכה למשה מסיני

To frame our discussion of הלכה למשה מסיני,[1] it would be worthwhile to first look at an important גמרא.[2] As משה רבינו was in שמים about to receive the תורה, he saw הקב"ה tying crowns on the letters. Being that these crowns seemed quite unnecessary, הקב"ה explained that in the future, רבי עקיבא would learn various הלכות from them. Rav Hershel Schachter שליט"א often explains that this is a manifestation of the famous concept of אלו ואלו דברי אלקים חיים, a concept which we will אי"ה investigate at a later point. רב משה פיינשטיין explains[3] that the לשון of כתרים signifies that the letters were in and of themselves "kingly", as they would be the be all and end all for halachic decision making. While this would lead to many potential מחלוקתים and mistakes being made, the purpose of this was להגדיל תורה ולהאדירה, to glorify the תורה by having people engage in debates and break their teeth to figure out דבר ה'. The גמרא continues that משה רבינו then sat in רבי עקיבא's שיעור and did not understand anything that was going on. This gave him a חלישת הדעת. Once he heard רבי עקיבא say that everything was based on הלכה למשה מסיני, that calmed him down. How are we to understand this strange אגדתא? Rav Dessler writes[4] that this level of analysis through connecting different parts of תורה, some of which משה had not yet received, was foreign to משה רבינו. He thought this was a corruption of תורה. What changed was that he realized that everything stems back from הר סיני, and all תורה is learned באמת and through the מסורה we receive through our rebbeim. By exploring the nature of הלכה למשה מסיני, we can better understand why this is indeed the case.

In order to do so, we need to get a bit of background into the issue. The משנה introduces[5] the ד' אבות נזיקין, and the ensuing גמרא tells us that there must be תולדות. When trying to determine the nature of the תולדות in relation to the אבות, we ultimately conclude[6] that most תולדות דנזיקין are similar to the אבות, except for that of צרורות. When an animal kicks a pebble and causes damage to an object indirectly, a הלכה למשה מסיני teaches[7] that we pay חצי נזק, as opposed to נזק שלם. This payment of חצי נזק is actually subject to מחלוקת, as סומכוס holds[8] one indeed pays נזק שלם on צרורות, and the only נפק"מ between צרורות and other, more direct forms of damage, is that the payment of צרורות can include the remaining value of the damaged carcass (מגופו), as opposed to the מזיק exclusively paying from his best land (מן העלייה). In order to figure out the rationale behind this מחלוקת between סומכוס and the רבנן, the גמרא suggests that סומכוס holds כחו כגופו דמי, meaning that indirect damage caused by the force an animal creates is equivalent to if the animal damaged directly with its body. However, for the רבנן, it wouldn't make sense to say כחו כגופו (because it would result in paying נזק שלם) nor כחו לאו כגופו (being that seemingly one shouldn't be obligated to pay at all, since the force is indirect). Seeing that as an untenable solution, רבא concludes that everyone holds כחו כגופו, and the reduction to חצי נזק for the רבנן is a הלכה למשה מסיני. After seeing this גמרא, a few questions come to mind: What was the motivation behind רבא's answer? Was this answer "forced", or was this

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[1] Primarily based on שיעורים heard from Rabbis Yehuda Turetsky and Aryeh Lebowitz

[2] מנחות כט:

[3] הקדמה לספר אגרות משה

[4] מכתב מאליהו ח"ג עמ' 223

[5] בבא קמא ב.

[6] שם ג:

[7] ע"פ רש"י שם ד"ה "בחצי נזק צרורות"

[8] שם יז:

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הלכה למשה מסיני more of a pre-existing מסורה? If that is indeed the case, what caused סומכוס to argue? Did he have a different version of the מסורה?

There is a rule brought down that whenever we have a הלכה למשה מסיני, it always come to teach a קולא.[9] This is learned from the סוכה. There is a מחלוקת if the requirement is to have 3 walls or 4, but everyone agrees that the last wall does not have to have the full dimensions. [10] The fact that we can make the wall smaller is a הלכה למשה מסיני, as all laws of שיעורים and מחיצין are הלכה למשה מסיני.[11] Therefore, to explain the question of the גמרא on the רבנן, it would make sense to say that the הלכה למשה מסיני gives us a קולא to pay חצי נזק for צרורות, meaning had we not had the הלכה we would have to pay נזק שלם. This must be the case, as the only other option would be to say we would pay nothing at all (i.e. כחו לאו כגופו דמי). If we did say that, the payment of חצי נזק would be a חומרא, which is against the rule that a הלכה למשה מסיני always goes לקולא![12] Additionally, if we would say לחומרא, that would make the payment of חצי נזק צרורות a קנס. Even though we normally hold by שור תם that נזקא נזקא קנסא פלגא,[13] the הלכה למשה מסיני specifically tells us that the payment of חצי נזק צרורות is ממון.[14]

The major question in the סוגיא that has still not been answered is how סומכוס can seemingly argue on a הלכה למשה מסיני. Is it not an ironclad מסורה transmitted throughout the generations? The question is even stronger when you consider the שיטת הרמב"ם. The רמב"ם says[15] that the tell-tale sign of knowing if something is a הלכה למשה מסיני or not is if there is מחלוקת. According to the רמב"ם, a הלכה למשה מסיני is not subject to any מחלוקת whatsoever. To answer the question on the רמב"ם within his own שיטה, the רמב"ם holds (contrary to רש"י and most ראשונים) that the line in the גמרא of הלכתא גמירי לה does NOT mean הלכה למשה מסיני. However, we will not go into the רמב"ם now. Within the view of most ראשונים, we still have a major question on סומכוס.[16] One answer given is that when there is מחלוקת, it is only within the details of the הלכה למשה מסיני, but not about the existence of the דין.[17] In our case, everyone agrees about the עיקר דין of צרורות. Within צרורות, there is a מחלוקת if the payment is חצי נזק, or נזק שלם. Thus, there is no problem for סומכוס to argue.

Alternatively, we can suggest that the problem of arguing on a הלכה למשה מסיני is more limited than we may have thought. One of the מצוות התלויות בארץ is ערלה. For the first three years of a tree's life, you cannot eat its fruit. Even though this is a מצוה התלויה בארץ, a הלכה למשה מסיני tells us that it applies even in חוץ לארץ. After the three years are up, the fourth year has a דין of נטע רבעי, which entails taking the fruit to ירושלים to eat there (similar to מעשר שני). There is a מחלוקת whether נטע רבעי applies in חוץ לארץ as well. On one hand, it seemingly shouldn't, as there is a גזירה שוה connecting מעשר שני and נטע רבעי, which definitely does NOT apply in חוץ לארץ. On the other hand, maybe it

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[9] רמ"ש נבא קמא ב.ב
[10] עיין סוכה ו:
[11] לעיל ה:
[12] פלפולא חריפתא (על הרמ"ש) נבא קמא ב.כ
[13] עיין נבא קמא טו:
[14] שיטה מקובצת נבא קמא יז: נמס הר"ש
[15] רמב"ס הלכות ממרים ח.ג, וע"ע בהריכות בהקדמת הרמב"ס לפירוש המשניות
[16] עיין שו"ת חוות יאיר קנב
[17] מהר"ץ חיות מאמר תורה שבע"פ

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should apply, as ערלה applies in חוץ לארץ, and they seem to be connected. While the רמב"ם holds[18] that נטע רבעי does NOT apply in חוץ לארץ, there are some גאונים (such as בה"ג and שאילתות דרב אחאי גאון) who maintain that נטע רבעי DOES apply in חוץ לארץ. What is behind this מחלוקת? In reality, as רב חיים סאלאוויצ'יק writes,[19] there are two types of הלכה למשה מסיני. The first type is referred to as a הלכה מפורשת. This means that there is basis for the הלכה למשה מסיני in the תורה. For example, there is a הלכה למשה מסיני that the תפילין need to be black. While there is no source for that in the תורה, the תורה does tell us about the concept of תפילין. The second type is a הלכה מחודשת. This type of הלכה למשה מסיני has no basis in the פסוקים. An example of this might be the ניסוך המים. If you assume that ניסוך המים is a הלכה למשה מסיני, albeit it may be alluded to in the פסוקים, but it is definitely not written explicitly. This explains the מחלוקת of נטע רבעי. According to the גאונים, the דין of ערלת חוץ לארץ is based off the דין of ערלת ארץ ישראל, meaning it is מפורשת. Therefore, since there is a היקש between ערלה and נטע רבעי, and ערלת חו"ל is in the תורה, it follows that נטע רבעי of חו"ל also stems from the פסוקים. On the other hand, the רמב"ם holds that ערלת חו"ל is NOT connected to the דין דאורייתא of ערלת א"י. Therefore, there is no היקש to include ערלת חו"ל.

This חקירה in understanding הלכה למשה מסיני chaps another נפק"מ, this one more general. We know (seemingly מסברא) that we cannot apply logic to a הלכה למשה מסיני. One application of this is learning things related to הלכה למשה מסיני through a קל וחומר.[20] Similarly, we cannot learn punishments through a קל וחומר. This is the famous principle known as אין עונשין מן הדין.[21] The סברא to say אין עונשין מן הדין is twofold. On the one hand, if a certain עבירה requires a certain punishment, then a more severe עבירה should require a more severe punishment, since the punishment must fit the crime. However, we cannot do that, as we have a rule governing learning a קל וחומר called דיו לבא מן הדין להיות כנדון (or דיו for short).[22] This means that the דין in the extrapolated case can only be level with the דין from the base case. Another way to say basically the same thing is that an עונש brings about כפרה, and the כפרה of the light case wouldn't necessarily be enough for the more severe case, but obviously we can't go any higher.[23] The second reason we say אין עונשין מן הדין is as follows: logic is prone to human fallacy. If I suggest something, you can suggest more logically compelling to refute me. If one were to punish based on his own logic, maybe someone else's logic disproves the judge's logic, and it turns out the judge meted out an erroneous punishment![24] To bring this back to הלכה למשה מסיני, we assume that the איסור of העברת ד' אמות ברה"ר is a תולדה of the איסור הוצאה שבת. This is a הלכה למשה מסיני.[25] The fact that we can punish someone for העברת ד' אמות is solely because it is connected to the איסור דאורייתא of הוצאה מרשות לרשות.[26] This means that the הלכה למשה מסיני of העברת ד' אמות ברה"ר is a **מפורשת** הלכה. According to the ר"ן, one would NOT be able to be punished for violating a הלכה למשה מסיני if it is **מחודשת**.

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[18] רמב"ם הלכות מאכלות אסורות י.טו
[19] מידות רבינו חיים הלוי פס
[20] עיין תוספות פבת כח. ד"ה "מה לשרצים"
[21] מכות ה:
[22] עיין בבא קמא כה:
[23] מהרש"א סנהדרין סד:
[24] קרבן אהרן (על ספרא) (הובא באמצעות דאורייתא כלל כה)
[25] עיין שבת נו:
[26] ר"ן שבת לא: בדפי הרי"ף ד"ה "המוליא מרשות לרשות"

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To tie everything back to the סוגיא of צרורות, with this מהלך, perhaps one can suggest that the חצי נזק צרורות is a הלכה מפורשת if the הלכה למשה מסיני of רבנן and the סומכוס between מחלוקת or מחודשת. This is actually מדוייק in the words of the גמרא themselves. When analyzing the מחלוקת between סומכוס and the רבנן, the גמרא says that סומכוס must hold כחו כגופו דמי. This would mean that the הלכה למשה מסיני of צרורות is connected to the דין דאורייתא of נזיקין, making it a הלכה מפורשת. Yet, the רבנן were assumed to be saying that if כחו לאו כגופו דמי, making צרורות a הלכה מחודשת, they shouldn't be paying at all. Even though we normally say that we can be עונש ממון מן הדין, since this would actually be a קנס (as we established from the מהר"ץ חיות), that would fall under the umbrella of אין עונשין מן הדין. Therefore, the only way the רבנן can allow a payment of חצי נזק would be to say that the הלכה is מפורשת, which is why רבא answered that even the רבנן hold כחו כגופו דמי.