

On Exemption in Unavoidable Situations: *An Adaptation of an Essay by
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Adapted by Rabbi Dovid Markel

The Talmud (Bava Kama 94b) recounts the background behind a clause that exempts certain thieves from returning their stolen property:

It once happened with a certain man who was desirous of making restitution, that his wife said to him: “Raca, if you are going to make restitution, even the girdle [you are wearing] would not remain yours,” and he thus refrained altogether from making repentance. It was at that time that it was declared that if robbers or usurers are prepared to make restitution it is not right to accept [the misappropriated articles] from them, and he who accepts from them does not obtain the approval of the Sages.

Come and hear: ‘For shepherds, tax collectors and revenue farmers it is difficult to make repentance, yet they must make restitution [of the articles in question] to all those whom they know [they have robbed]. — It may, however, [also here] be said that though they have to make restitution, it would not be accepted from them. If so, why have they to make restitution? — [To make it quite evident that out of their free will] they are prepared to fulfill their duty before Heaven. But if so, why should it be difficult for them to make repentance?’

The Talmud states that on one hand we do not accept the property that these thieves return and on the other that their repentance is difficult.

What is not clear is the meaning of the statement, “But if is so, why should it be difficult for them to make repentance?”

For, it seems abundantly clear why their “repentance is difficult,” for although they may have absolved their obligation towards man—to return the stolen object—they nevertheless have an obligation towards Heaven that they are unable to fulfill.

Half a Slave

In order to answer this question, another seemingly unconnected section of Talmud must be prefaced.

The Talmud (Gitin 41a) discusses a case where an individual is “half-slave and half-freeman.” Because of the awkward situation, which has certain limitations, his master is required to free him.

The Mishnah states:

¹ Adapted from Atvan Deoraita, Rule 13.

One who is half a slave and half free, works for his master and for himself alternate days. This was the ruling of Beth Hillel. Beth Shammai said: "You have made matters right for the master, but not for the slave. It is impossible for him to marry a female slave, because he is already half free. It is impossible for him to marry a free woman because he is half a slave. Shall he then remain unmarried? But was not the world only made to be populated, as it says (Yeshayau 45:18), 'He did not create it for a waste, He formed it to be inhabited?' To prevent abuses, his master is compelled to liberate him..." Beth Hillel thereupon retracted their opinion and ruled like Beth Shammai.

An individual who is half a slave cannot fulfil the commandment of inhabiting the world as because he is half a Jewish free man he cannot procreate with either a slave woman or a free woman. Because this is so, we force the master to free the slave so that he can procreate.

Tosafot's Comment

On this, the Tosafot (V.F Lisa) comments:

"It is impossible for him to marry a female slave." One may ask, even if he was able to marry a female slave, he does fulfill the command of "Be fruitful and multiply" [when he bears children with her]?...It is possible to answer, that were he able to fulfill the command (Yeshayahu 45:18) that "it be inhabited" in at least a minimal respect, we would not have forced his master to free him merely because of the command of (Bereishit 1:28) "Be fruitful and multiply," for that is something that is unavoidable.

The Tosafot is initially bothered by the formulation of the Mishna. The Mishna states that he is unable to marry a female slave *because* of the half of himself that is a free man and is prohibited from doing so.

Tosafot though points out, that even were he permitted to marry her, he would not fulfill the commandment of "Be fruitful and multiply," a *mitzvah* which is only fulfilled when a Jewish male has children from a Jewish female.

That being the case, Tosafot is bothered that his master should be forced to free him so that he can fulfill the commandment of "Be fruitful and multiply." Why does the Talmud infer that the master must free him only *after* it mentions the directive that the world "be inhabited" and not already from the onset so that the individual can fulfil the command of "be fruitful and multiply?"

He elucidates that because the individual is *unable* to fulfill the command of "Be fruitful and multiply," we would not have forced the master to free the individual, were it not for the additional command of the world being created so that "it be inhabited."

This is due to the clause (Talmud, Nedarim 27a) that something which is "unavoidably prevented, the Divine Law exempts." Being that the individual is *unable* to fulfill the command of "Be fruitful and multiply," Tosafot explains that he is therefore exempt from the command and therefore the master is not forced to free him.

The Question

However, this answer of Tosafot does not seem to make sense. For, as mentioned there are *two* commandments that the individual is unable to fulfill:

- A) The command expressed in Bereishit (1:28) “Be fruitful and multiply and fill the earth and subdue it, and rule over the fish of the sea and over the fowl of the sky and over all the beasts that tread upon the earth.”
- B) The directive intimated in Yeshayahu (45:18) “For, so said the Lord, the Creator of heaven, Who is G-d, Who formed the earth and made it, He established it; He did not create it for a waste, He formed it to be inhabited, I am the Lord and there is no other.”

Both of these directives are things that the individual is *unable* to fulfill because he is still half a slave. He cannot fulfill the former as that can only be fulfilled with a Jewish woman, and he cannot perform the latter as because he is half a Jewish free man he cannot procreate with either a slave woman or a free woman.

Now, according to the clause that something that “is unavoidably prevented, the Divine Law exempts,” there should be no difference between the two laws. Being that *both* are impossible to fulfill, he should be exempt from both.

Both of these laws are unable to be fulfilled due to the extraneous circumstance that the individual is half a slave.

That being the case: Why does Tosafot explain that only the commandment of “Be fruitful and multiply” is exempted because of this clause, and not the directive that “He formed it to be inhabited?”

What is the difference between the two laws, that explains why one is exempted when extraneous circumstances impede the fulfillment of the command, and the other is not exempted when the same extraneous circumstances hinder its fulfillment?

Defining the Exemption

As cited, the Talmud explains that when there are exceptional situations that impede the fulfillment of a commandment, the individual is exempt from its performance and for the repercussions of transgressing it.

The Talmud (Nedarim 27a) states: “a matter was unavoidably prevented, and the Divine Law exempts such, for it is written (Devarim 22:26), ‘Whereas to the girl, you shall do nothing’.”

Being that in the above circumstance, the maiden was coerced in a matter that was beyond her control, she is obviously not culpable for the sin. This though, is self-evident and does not need to be derived from a verse, as surely the Torah would not consider the girl blameworthy on a matter that she cannot be held responsible for.

However, it is possible that what is derived from this clause is not merely the absolution of punishment, but an absolution from the commandment itself. As there are two manners in which to view the statement, “a matter that was unavoidably prevented, the Divine Law exempts:”

- 1) From the onset, the Torah *absolves* the individual of his responsibility of the *commandment* in a situation that he is unable to fulfill it.

- 2) In theory, he should complete the duty, it is merely that he cannot be held accountable because of the extraneous circumstance. It is not that there is no command, but that the individual is not *punished* when he fails to achieve it.

While the difference seems negligible, there are practical implications as to manner in which this exemption is defined.

An example of the contrast is expressive in the following situation:

The Shulchan Aruch (Orach Chaim 93:4) states, that an individual who is involved in communal matters and has no time to pray, need not take a break from his communal work to pray. Additionally, there is a law (Orach Chaim 108:1) that if an individual by some mistake missed the appointed time of prayer, they pray the second prayer twice.

Accordingly can be appreciated the practical implication of these two manners in which to define the above exemption:

If the individual is completely absolved from his duty to pray in a situation where he is busy with communal affairs, then he need not *make up* the prayer at a later time. However, if he theoretically *must* pray, but is only not held accountable due to extraneous circumstances, then he most definitely would pray twice in the prayer following the one that he missed.

Indeed, this is a matter of debate amongst halachic decsiors, Rabbi Yehoshua Folk (Derisha, Tur, Yorah Deah 341) and Rabbi Dovid Segol (Taz, Orach Chaim 108:1): While the Derisha expresses that because the individual was exempt from the first prayer, he need not make it up in the second, the Taz expresses that he is considered an individual who had a duty to pray and therefore must make up the prayer when he has the chance.

With this in mind, it is possible to explain the difference between the commandment of “Be fruitful and multiply” and the directive that the world “be inhabited.”

In the former, the slave who is unable to fulfill the command is *completely* exempt from fulfilling it, while in the latter, although not responsible to fulfill it, the individual is not considered entirely exempt.

Two Types of Commandments

In general, the commandments can be divided into two categories: Commandments between man and G-d, and commandments between man and his fellow man.

Concerning *mitzvot* that are between man and G-d, logic dictates that since, as the Talmud (Avoda Zara 3a) states, “the Holy One, blessed be He, does not deal imperiously with His creatures,” He would not demand an individual fulfil a commandment that is beyond his capacity. Rather, when the individual is unable to fulfil the commandment due to extraneous circumstances, He *completely* absolves them of their duty.

However, in a situation where the responsibility is between man and his fellow, this is not the case. Even in a situation when the individual is not *subjectively* liable because of matters beyond his control, the *objective* responsibility is nevertheless extant.

For example, in a situation where someone has a debt to their fellow but is unable to pay, although the individual cannot pay due to the situation, the debt is not absolved.

One can theorize though, that this is not the case in *mitzvot* between man and G-d. Being that these *mizvot* are predicated on G-d's subjective will as opposed to an objective need, in a situation where the individual is unable to fulfil the command, there is no duty at all to fulfil the command.

Fruitful and Inhabitation

In regards to the *mitzvah* of having children, there are two aspects: one that is between man and G-d and the other that is a need of the world—between man and his fellow.

In the commandment to have children there are two verses formulated in two distinct manners:

- 1) The first verse (Bereishit 1:28) states: “Be fruitful and multiply and fill the earth and subdue it, and rule over the fish of the sea and over the fowl of the sky and over all the beasts that tread upon the earth.” This verse is formulated like any other positive command of “do such and such,” and is a *mitzvah* that G-d places on man and not between man and his fellow. As such, when the person is unable to fulfil this precept, he is absolved of its duty.
- 2) The second verse however, in Yeshayahu (45:18), states: “For, so said the Lord, the Creator of heaven, Who is G-d, Who formed the earth and made it, He established it; He did not create it for a waste, He formed it to be inhabited.” This verse expresses that there is a purpose in having children—that the world be inhabited instead of being wasted. It is clear that being that there is an objective in this commandment, even in a situation where it is impossible that the command to be fulfilled, it is nevertheless extant and that something is lacking if it is not done.

Accordingly can be answered the original question on Tosafot. Tosafot had asked why the master was forced to free the half-slave due because of the commandment of “it be inhabited” and not because of the commandment of “be fruitful and multiply.” While he answered that the half-slave would be exempt from the command of being fruitful, as he is unable to fulfil it, this same reasoning should have exempted him as well from the directive of inhabiting the earth.

However, now the difference between the two commandments is clear. Although the first is a complete discharge of duty, the second is not. As such, it is understood why the master must facilitate the half-slave and release him from his servitude so that he can fulfill this directive.

For the Sake of Heaven

This explains as well the original question at the beginning of the essay. At the start of the essay, it was asked regarding the meaning of the Talmud's query: “But if so, why should it be difficult for them to make repentance?”

The question revolved around a scenario where the individual has stolen so many objects, that due to the overwhelming situation in which he finds himself, in order not to deter such an individual from repenting, the Rabbis created a clause that the stolen objects not be accepted when returned.

In such a case, the Mishna intimated that their repentance was difficult. However, the Talmud asked why this is so, as it seems that it is therefore easy for them to repent.

It was asked though, that seemingly the reason that their repentance is difficult is clear, being that they need to return the objects “for the sake of Heaven,” but are unable to because of the rabbinic clause. It is thus understood why it is difficult for them to fully rectify their sin.

However, according to the above, both the Mishna’s comment and the Talmud’s question are clarified. Depending on the reason that they must return their repentance will be either difficult or easy.

Were the responsibility to return the money to be because in truth they owe the individuals that they stole from, it is understood why their repentance is difficult. For, although they were exempted from this responsibility, it is nevertheless an extant duty that they cannot fulfil.

However, being that the Talmud says that the returning of the monies is merely “to fulfill their duty before Heaven,” in a situation where they are unable, it is understood that they have *no* responsibility whatsoever—pursuant with the clause that G-d exempts an individual in such a situation.

It is therefore understood why the Talmud asks: “if so, why should it be difficult for them to make repentance?”

In Conclusion

There are two distinct manners to view the clause that “a matter was unavoidably prevented, and the Divine Law exempts.”

It can either be explained to mean that the entire duty is completely absolved, or that it is objectively the same, but that the individual cannot be held liable.

Rabbi Yosef Engel hypothesized that both manners of viewing the clause are true dependent on the scenario.

When the matter is between man and G-d the individual is completely absolved of his duty—as G-d does not ask of man more than he can do. However, in a matter that is between man and his fellow or for the benefit of the world, the duty does dissipate merely because the individual cannot fulfil it.

Using this theory Rabbi Yosef Engel resolves various seemingly problematic Talmudic statements.