**YESHIVAT HAR ETZION**

**ISRAEL KOSCHITZKY VIRTUAL BEIT MIDRASH (VBM)**

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**YHE-HALAKHA: TOPICS IN HALAKHA**

**VALUE CONFLICTS IN JEWISH BUSINESS ETHICS**

**Social Vs. Fiduciary Responsibility - Part 1 of 2**

**by Rav Asher Meir**

Social Responsibility in the Marketplace

 The Torah mandates many familiar, ritual laws, but it also promulgates many social commandments. In particular, there are numerous detailed halakhot which regulate commerce. These regulations are in keeping with the general principle that the elevating influence of Torah should extend to every area of human endeavor.

 Beyond the mandatory halakhot, there are certain standards of exemplary conduct which were outlined by Chazal and the Rishonim and which a conscientious business person should consider binding, even though in general they are not enforceable in beit din.[[1]](#footnote-1) And of course, conduct of business is not exempt from the general commandment to sanctify God's name by dignified conduct in all our social interactions.

 There is an important distinction between Torah business ethics and those standards of proper conduct which are set out by the business world itself. The guiding principle of secular business ethics is "doing well by doing good," and is meant to distinguish the "enlightened" businessman who recognizes that fairness pays dividends in improved community relations, employee good will and so on, from the "primitive" profit seeker who will stop at nothing for an extra dollar. On the other hand, the Torah-observant businessman views his business dealings as an additional field of endeavor in which he can carry out God's commandments. For him, the interface between Torah and business is defined by "doing good by doing well," success in business providing an added opportunity to improve society and sanctify God's name.

 Ethical conflicts which arise in business need to be resolved by conscientious application of specifically Jewish standards, as well as careful attention to general principles of ethics. Narrow conformity with the demands of the Shulchan Arukh will not always lead to behavior which is Torah-true.[[2]](#footnote-2)

Business Ethics and Fiduciary Responsibility

 A common ethical dilemma involves the manager of a corporation. The manager's initial responsibility is his fiduciary duty to act in the interest of the investors. Insofar as the investors are interested in maximizing returns, this responsibility can obviously conflict with the business manager's broader social responsibility. The question then arises whether "exemplary" conduct is called for even at someone else's expense.

 Perhaps Jewish business ethics must distinguish between standards appropriate for owner/proprietors and those appropriate for employed managers.[[3]](#footnote-3) Where indeed should the line be drawn between excessive largesse on the one hand and inhumanity on the other?

 A relativist code of ethics could conclude that there is no clear demarcation. Indeed, a prominent book on economic aspects of secular law legitimizes even criminal activity in defending shareholders' interests! "An important question about the social responsibility of corporations is whether the corporation should always obey the law or just do so when the expected punishment costs outweigh the benefits of violation... If those costs are set at too low a level, the corporation has an ethical dilemma."[[4]](#footnote-4)

 It should be clear that a Torah point of view cannot legitimize this kind of "ethical dilemma." A principle of Jewish law is "ein shaliach li-devar aveira" - "transgression cannot be delegated," (Bava Metzia 6a a.f.) and just as the shareholders are forbidden to act improperly, it is forbidden for their agent to so act on their behalf.[[5]](#footnote-5)

 At the opposite extreme, it is evident that excessive largesse in pursuit of social goals constitutes irresponsible use of the shareholders' investment, which are a deposit in the hands of the manager.[[6]](#footnote-6) As the Shulchan Arukh determines, "A person cannot give what does not belong to him" (Choshen Mishpat 235:26).

 It seems that the locus of the dilemma for the conscientious businessman is in those areas of conduct which are neither mandatory nor prodigal.

Disclosure as a Solution

 It has been suggested that the entire problem could be circumvented by adequate disclosure: as long as the company's policy is open and revealed, it may be presumed to have the shareholders' consent. However, such openness, while important, could not excuse a policy which otherwise would be considered irresponsible. The modern publicly held company, with thousands or even millions of shareholders, cannot adequately consult with its owners on even major points of policy, and their silence cannot be construed as assent.[[7]](#footnote-7)

 Of course, in the case where a policy is part of the corporate charter, all partners in the enterprise - including all shareholders - are partners in furthering this policy. Just as a corporation can be formed solely for furthering social goals - such as a non-profit organization - a corporation can be formed to do business with particular social goals in mind.

Halakhic Status of a Corporate Manager

 The first step to achieving a halakhic resolution of the dilemma facing the corporate manager is to adequately define the halakhic role he fulfills.[[8]](#footnote-8) A manager is, on the one hand, not (necessarily) an owner; on the other hand, he is authorized to carry out all executive functions of the company - such as effecting acquisitions and entering into contracts. Four obvious candidates for halakhic analogy spring to mind:

1. Partner (Shutaf): Like a partner, a manager has authority to deal in the assets of the business even though there is someone else with a stake in its assets. But this is a poor characterization of a manager. The manager's status falls short of that of partner in the sense that he has no ownership interest per se; on the other hand, it exceeds that of a partner since his executive power is unrestricted by the owners.

2. Agent (Shaliach): The manager is certainly an agent of the investors, but his status differs significantly from the usual case. In general, authority is DELEGATED (that is, extended) to an agent, the primary authority remaining with the principal; but to a manager, authority is **transferred** - the owners of a company have no ability to act on its behalf.

3. Employee (Po'el): For the same reason, it seems that the concept of employee, while appropriate, is insufficient to capture the unique powers of the business manager. It is true that the employee has independent ability to act on behalf of the employer - "yad po'el ke-yad ba'al ha-bayit" (the hand of the worker is like that of the employer) (Kiddushin 41b), but his ability is subordinate to that of the employer rather than superseding it.

4. Custodian (Apotropos): The term apotropos in the Gemara refers to a guardian and administrator of someone else's assets. Most commonly it refers to an administrator of the assets of minor orphans, appointed either by the deceased parent or by the court; but the term can apply also to an administrator in the case of some disability other than minority, such as insanity or absence.

 It seems that the concept of apotropos best captures the main features of the investor/manager relationship:

 Like the manager, the apotropos "acquires and distributes, builds and destroys, plants and sows and does whatever he considers to be in the interest of the orphans."[[9]](#footnote-9)

\* The apotropos, like the manager, is the sole executor; the actual owners are generally disabled from active involvement in the management of the assets. In the case of the apotropos, the disability is minority or incapacity; in the case of the corporation, it is due to the separation of ownership and control which is the essential characteristic of corporate structure.[[10]](#footnote-10)

 The owners, while not exercising day-to-day control, determine who in fact the executor is. The orphans, when they are grown, do not exercise control jointly with the apotropos; they can, however, withdraw their assets or choose a new apotropos.[[11]](#footnote-11)

 The article will assume that the manager is considered an apotropos. Though this assumption will not be a critical determinant of the conclusions, it will help to focus the discussion.

From Custodian to Fiduciary

 Direct application of the rules governing an apotropos of orphans would indeed give us a clear answer to our question. Such a custodian is at the tight-fisted extreme of our hypothesized ethical spectrum, and is legally prohibited from any use of the orphans' assets which is not directly intended for their monetary benefit. He may not give charity from these assets, and is even allowed to lend them out in ways which would normally be considered usurious exploitation of the borrower (Choshen Mishpat 290:8). These restrictions are relaxed only to allow "doing well by doing good," that is, when the orphans stand to gain monetarily.[[12]](#footnote-12)

 It might occur to us that the fiduciary relationship itself compels these restrictions: since the assets do not belong to the fiduciary, and since the owner cannot be consulted (because of the disability which necessitates the fiduciary relationship), the only safe solution is a Scroogeian parsimony.

 Yet the usual rule which governs agency is not RESTRAINT but rather ASSESSMENT - "umdana." That is, the agent does not expend the minimum possible amount of the owner's assets, but rather what he guesses would be the owner's expenditure were the owner handling his own assets. In the absence of a basis for appraisal, he would spend the average or usual expenditure. This is the rule for an agent who gives tithes (Terumot 4:4); and more importantly, seems to be the rule for an apotropos of an incapacitated adult.[[13]](#footnote-13)

 Evidently, the stifling restrictions on a custodian for minors are unique to this particular case. According to the Maharit, the justification for these restrictions is not the disability per se, but rather the temporary nature of this disability - in a short time the orphans will be able to express their own desires and it is unnecessary to "jump the gun."[[14]](#footnote-14)

 It is clear at any rate that the business executive does not have a mandate to act in an excessively tight-fisted manner by virtue of his fiduciary responsibility, nor does he have license for such behavior. A reasonable assessment of the average investor's degree of liberality, subject to his legal obligations, define a minimum level for the degree of enlightenment the manager should display in his business relationships.

 We will continue examining this issue next week

For part 2 of this shiur [click here](http://etzion.org.il/en/value-conflicts-jewish-business-ethics-part-2).

1. When the strict rule of law seems inequitable. An example would be granting an exemption from liability when there is no actual negligence (Bava Metzia 83a, Yerushalmi Bava Metzia 6:6), or waiving an exemption in the case where the details of the case do not clearly justify it (Bava Metzia 24b, Bava Metzia 30b, Bava Kama 99b). In some places batei din have enforced these standards of "lifnim mi-shurat ha-din" - "beyond the letter of the law." An excellent summary (which advocates a lenient approach to such obligations) is Shmuel Shilo, "On One Aspect of Law and Morals in Jewish Law: Lifnim Mishurat Hadin" in Israel Law Review, vol. 13 no. 3, July 1978. [↑](#footnote-ref-1)
2. For example, certain kinds of income tax evasion seem superficially to find halakhic license. Torah leaders have prominently decried such self-serving interpretations of the law. [↑](#footnote-ref-2)
3. Indeed, in ritual law we find many cases where the Torah is lenient not only beyond the letter of the law, but even in the letter of the law itself so as not to shortchange the employer. For instance, the employee who is paid by the hour recites a shortened version of the grace after meals, is permitted to pray in circumstances not generally suitable for Shemoneh Esrei, and in some cases is called upon to abbreviate his prayers - all in order not to deprive the employer of the full value of his wage. [↑](#footnote-ref-3)
4. ) Richard A. Posner, Economic Analysis of Law (Fourth Edition; Boston; Little, Brown & Co., 1992), p. 421. It is interesting, and perhaps dismaying, that the author is a Federal judge. [↑](#footnote-ref-4)
5. See Meir Tamari, Kesef Kasher (Jerusalem, Reuven Mass, 1994), p. 173. [↑](#footnote-ref-5)
6. A possible candidate for such an indictment would be a prominent data-processing firm which through the mid-80's invested huge sums in truly wonderful social programs (especially aggressive affirmative action) which had no foreseeable benefits for their business, at a time when their grip on the market was slipping precipitously. [↑](#footnote-ref-6)
7. It is true that anyone who buys shares after a policy is revealed considers himself to be getting his money's worth under such a policy. But the manager is employed by current, and not future, shareholders. [↑](#footnote-ref-7)
8. There is an extensive literature discussing the halakhic status of a limited liability corporation. Some authorities consider the corporation to be an independent halakhic "actor," as it is a "legal person" in the eyes of the civil law (Rabbi Dichovsky, Piskei Din Rabaniim 10:273). Most seem to view it as a partnership of the familiar variety. In the words of Rabbi Menashe Klein, "A limited liability corporation is considered a partnership like any other" (cited in Meir Tamari, Kesef Kasher, 172). This is also the opinion of R. Chaim Zimbalist in the Rabbinical court decision just cited and of R. Moshe Feinstein Orach Chaim I, no. 90. Our concern is not the halakhic status of the company itself, but that of the employees who manage it. [↑](#footnote-ref-8)
9. Rambam, Hilkhot Nachalot 11:4; Shulchan Arukh, Choshen Mishpat 290:7. [↑](#footnote-ref-9)
10. If we accept that a corporation is a legal person, it has an inherent incapacity similar to that of a minor. [↑](#footnote-ref-10)
11. Responsa of Mabit 1:335 demonstrates conclusively that in the case where the donor specifically appoints an apotropos for grown children, they have no control of the assets. This is also evident from Choshen Mishpat 290:26. The Rema there, referring to the case where there was no specific instruction to extend the custodianship past majority, rules that the grown children can dissolve it; the evident implication is that until they do so, sole authority resides in the custodian. [↑](#footnote-ref-11)
12. For instance, the apotropos is allowed to give charity from the orphan's assets if this will improve their public stature, helping them in their business and personal endeavors - Bava Batra 8a, Choshen Mishpat 290:15. And he is allowed to make a compromise with legal rivals if this will save money by eliminating litigation costs - Choshen Mishpat 12:3, based on Bava Kama 21a. [↑](#footnote-ref-12)
13. In such a case the apotropos is bidden to assess what the owner would have done in such a situation - Responsa Maharit 127, based on Ketubot 48a. In particular, the gemara there rules that an apotropos for a grown person gives charity; see Rambam Nachalot 11:11. [↑](#footnote-ref-13)
14. Responsa Maharit 1:127 justifies exceeding the restrictions in a case where the minor is in danger, exclaiming "If not now, when?!" According to this hypothesis, a custodian for a prisoner or fugitive (see Choshen Mishpat 285:2) could also be subject to such restrictions; possibly there is an additional factor in the case of orphans, that we have no prior basis on which to impute their desires. [↑](#footnote-ref-14)