



Center for Jewish Ethics

QUESTION - Does Jewish law require us to buy produce that is certified as being fairly traded, when it is available?*

**by Deborah Silver
American Jewish University, Los Angeles, CA**

RESPONSUM

The first thing required to address this issue is a working definition of 'fair trade'.

Introduction

The fair trade movement in the USA began in the 1940s with projects initiated by church groups to help refugees and other poverty-stricken groups by selling their handicrafts to the Northern market while giving them returns higher than those prevalent in the developing world at the time. In 1989 the world price of coffee descended sharply, prompting the creation, in the Netherlands, of the 'Max Havelaar' brand (named after a fictional Dutch character), which offered coffee manufacturers the opportunity to adopt a standardized system of fair trade criteria. The brand was bought in 1997 by TransFair USA, which is a member of the FLO.¹ TransFair has an audit system that tracks products from farm to finished product in order to verify compliance with fair trade criteria; a product so certified is clearly marked with a black and white logo stating that it satisfies the criteria for having been fairly traded. Fair Trade certification is currently available in the US for coffee, tea and herbs, cocoa and chocolate, fresh fruit, sugar, rice, vanilla and honey. It is available in Europe for additional products such as cotton, sports balls, wine and beer. In early 2008 the Tiffany Foundation made a \$100,000 grant available to Transfair to explore the possibility of certifying fairly traded diamonds.²

* This essay is dedicated to my beloved teacher, Professor Raphael Loewe, in honor of his 90th birthday.

1 Fairtrade Labelling Organizations International, an umbrella organization based in Bonn, Germany. It unites fair trade labelling initiatives, as well as three producer networks which represent producers from Latin America, Asia and Africa. It inspects and certifies producers from more than 50 countries.

2 Taken from the Trans Fair USA website - <http://www.transfairusa.org>. The multiple fair trade websites which can be found using the internet are remarkably consistent in their messages as to what fair trade is about and how it has developed over the past thirty years or so.

The impetus behind the fair trade movement is to counter various injustices suffered by small-scale farmers and their workers. For example, the movie *Black Gold* records that for every \$3 cup of coffee purchased in the USA, the Ethiopian farmer who produced it earns only 3 cents, with workers in the coffee industry in Ethiopia making about 50 cents a day.³ Furthermore, the production of such commodities as chocolate and coffee is often marked by extensive use of chemical fertilizers⁴ and compromised health and safety.⁵

Another factor is the vulnerability of farmers to fluctuations in the price of traded commodities. As an example, the price of coffee is determined not by the farmers who produce it, but by the New York and London stock markets. Coffee is the second most actively traded commodity on the world market. Figures for the total value of the coffee market vary, but it appears to be worth at least \$80 billion per annum. The price of coffee was once regulated by the International Coffee Agreement, but when this collapsed in 1989, the trade price of coffee began to drop as a result of the effect of the free market. By 1992 coffee was being traded at 70% less than prior to the collapse of the agreement, a 30-year low. The retail price did not change during this time, however: roasting, branding and packaging costs all went to maintain the shelf price of coffee at its previous levels. It was the farmers and the workers at point of origin who took the brunt of the drop in the price. This is apparently typical of situations where a given commodity is not fairly traded – representatives of the leading world conglomerates, who hold a significant economic advantage, bid at auctions for the product, driving the price down. Numerous middlemen then form a chain to bring the product to the consumer, inflating the price once again.⁶

Fair trade initiatives are aimed at guaranteeing farmers a set price for their products. This price guarantees their standard of living, the sustainability of their farming practices, their working

3 *Black Gold*, a movie which follows an Ethiopian coffee producer's attempts to get a fair price for his product (<http://www.youtube.com/watch?v=1DePOBjunXU>)

4 See e.g. the article at <http://www.organicguide.com/food-drink/beverages/organic-coffee>

5 See e.g. the article at www.usleap.org/usleap-initiatives/coffee-worker-justice-initiative/day-life-coffee-worker, which profiles a day in the life of a Guatemalan coffee worker, pointing out that there is no protective clothing issued, that chemicals are sprayed near dwelling houses and that sanitation on the plantation is compromised. A further injustice which deserves its own *teshuvah* is the use of child labor: for example the Global Exchange website suggests that 284,000 underage laborers are employed in the cocoa fields of West Africa.

6 The movie *Black Gold* (ibid.) suggests that linking the farmer directly to the coffee roaster (the next

standards (via democratically organized cooperatives and trade unions), and funds to purchase plant, machinery and healthcare and generally to develop their communities.⁷ A basic object of fair trade is for the farmers to interact with the consumer as directly as possible, eliminating unnecessary links in the chain. This means that sometimes – though not always – fairly traded produce is more expensive for the consumer.

It should be noted that fair trade is both a voluntary model and a market-based one: farmers only receive fair trade minimum prices and premiums if a buyer is willing to pay them. Both the farmer at one end of the scale and the consumer at the other can opt in or out of the system (though there is considerable enthusiasm for the system at the production end, with farmers and their workers strongly expressing the wish to join fair trade cooperatives even though some of their profit is ploughed back into them). The market for fair trade is growing – between 2005 and 2007 the market in fairly traded produce in the US grew by 41%,⁸ and while the market in certified coffee worldwide only represents some 2% of world coffee consumption, it is still the fastest growing segment of the industry.⁹

Fair trade and Jewish law

On the facts above alone, we might hazard a guess that Jewish law might require us to buy fairly traded produce. If nothing else, there would seem to be something of a claim of conscience that would impel us to choose it over the alternative. In fact, though, the situation turns out to be quite legally complex. This is largely to do with the way we consume: we are ultimate purchasers standing at the end of a long and complicated chain, which is hard to trace and rarely marked by accountability. I shall set out the halakhic principles that might be held to apply, and then analyze whether, in fact, they do create any kind of halakhic obligation.

step in coffee production) cuts out 60% of the supply chain.

7 Taken from the movie *Just Coffee*, written and produced by Luke Upchurch for Consumers International (<http://www.youtube.com/watch?v=Ou5wby3X9jU>). While there are other aspects of production which sometimes come under the rubric of 'fair trade' (such as environmental sustainability) which deserve to be explored, this *teshuvah* will restrict itself to the financial and social implications of buying produce which is certified as being fairly traded.

8 http://www.transfairusa.org/content/about/pr/pr_070731.php

9 <http://www.transfairusa.org/content/resources/faq-advanced.php>

A: *Ona'ah*

The best translation of this term is probably 'oppression'. The tradition has understood it to mean price gouging or overcharging. Insofar as there have been any responsa on fair trade at all, this is the principle most often cited.¹⁰

The source for the law is Leviticus 25:14:

When you sell a product to your colleague, or buy from your colleague's hand, you shall not oppress each other.

Elsewhere in Torah, the verbal root *aleph nun heh* is used generally to describe wronging a weaker party such as a widow, a stranger or an orphan¹¹ and the main mischief of an offence of *ona'ah* is understood to be that of exploitation of the already disadvantaged.

It would appear that *ona'ah* applies to both parties in any given transaction, the seller and the buyer:

It is forbidden to oppress, whether in buying or in selling; and whoever oppresses, whether buyer or seller, puts themselves in breach of a prohibition.¹²

When the offence is explored in the halakhic sources, the usual assumption is that the fault is on the part of the seller, who is exploiting the buyer's ignorance of market conditions. We can already see the difficulty of trying to apply this body of law to the fair trade scenario, since the position there is reversed, with the buyer – us – arguably exploiting the poorer and more vulnerable seller. Legally speaking, we are already swimming upstream. Nonetheless, let us press on with the analysis:

There are three different forms of *ona'ah*. The first (first-degree *ona'ah*) occurs when the

10 Rabbi Tony Bayfield, <http://www.eljc.org/mph/FairTrade-JewishEthics.html>

11 *Shemot* 22:20: *Leviticus* 19:33

12 *Shulhan Arukh Hoshen Mishpat* 227:1

discrepancy between the sale price and the market price is more than one-sixth. The remedy is that the plaintiff – the buyer – is entitled to rescind the sale.¹³ The second (second-degree *ona'ah*) occurs when the sale price differs from the market price by exactly one-sixth. The transaction remains binding, but the plaintiff is entitled to claim the price differential from the defendant.¹⁴ The third (third-degree *ona'ah*) occurs when the discrepancy between sale price and market price is less than one-sixth, and in that case the plaintiff is entitled neither to void the transaction nor to restitution of the price differential.¹⁵

The balance the law is attempting to strike is clear: the seller is entitled to a reasonable mark-up on his produce, quantified as being one-sixth over its market value. In other words, one is prohibited from knowingly concluding a transaction at a price more favorable than the competitive norm, since to do so is to prey on the other party's ignorance of market conditions.¹⁶

There is a significant logistical difficulty in establishing the competitive norm. It is clear that what is required is the actual market price of the commodity. Rabbi Aaron Levine points out that we live within a complex, multi-product, consumer-driven market, when manufacturers regularly discount their prices to gain a competitive advantage, but that any such discounted pricing cannot be used as a basis for calculation.¹⁷ We would have to argue that the tiny sums earned by farmers in contrast to the eventual retail price suggests that they must have been exploited in some way. Not only does this make for a weak argument, but the vagueness is so great as possibly to obviate establishing any offence at all.

There are two further significant problems in trying to apply the doctrine of *ona'ah* to a fair trade scenario:

13 BT *Bava Metzia* 50b, *Mishneh Torah*, *Mekhirah* 12:4, *Tur*, *Hoshen Mishpat* 227:6, *Shulhan Arukh*, *Hoshen Mishpat* 227:4, *Arukh Ha-Shulhan*, *Hoshen Mishpat* 227:3

14 BT *Bava Metzia* 50b, *Mishneh Torah*, *Mekhirah* 12:2, *Tur*, *Hoshen Mishpat* 227:3, *Shulhan Arukh*, *Hoshen Mishpat* 227:2, *Arukh Ha-Shulhan*, *Hoshen Mishpat* 227:3

15 BT *Bava Metzia* 50b, *Mishneh Torah*, *Mekhirah* 12:3, *Tur*, *Hoshen Mishpat* 227:4, *Shulhan Arukh*, *Hoshen Mishpat* 227:2, *Arukh Ha-Shulhan*, *Hoshen Mishpat* 227:3

16 Aaron Kirschenbaum, *Beyond Equity: Halakhic Aspirationism in Jewish Civil Law*, Ktav Publishing House and Yeshiva University Press, New York, 1991 p. 64

17 Aaron Levine, *Economics and Jewish Law: Halakhic Perspectives*, Ktav Publishing House Inc and Yeshiva University Press, New York, 1987 p. 67

Identifying the offender. Given the length of the supply chain, and the fact that the price of a commodity such as coffee or chocolate is inflated every time it passes through another pair of hands, against whom is the seller to claim? The idea that a farmer halfway across the world could conduct a multi-party action across multiple jurisdictions, even if he wished to, is absurd.

The inappropriateness of the remedy. While, as noted above, the element of exploitation is inherent in the offence of *ona'ah*, the only available remedy is one which is entirely pragmatic - the right, in certain circumstances, for the sale to be undone.¹⁸ But the farmers do not want their coffee back, they want to get a fair price for it!

Finally, there are time limits to a claim in *ona'ah*. The seller's right would be limited by the time it would take an expert to examine the product and ascertain its market value. Again, this is impracticable on any number of levels.

It follows that *ona'ah* cannot form the basis of a halakhic obligation to buy fairly traded produce; even if such a halakhic obligation could be established, which is itself doubtful, it would in practice be defeated by remoteness.

Abuse of workers

Another angle to take might be to consider the labor of the farmer. It is clear from the literature on fair trade that one of its main aims is to ensure that farmers and their workers are paid a fair price not only for what they produce but also for their labor in producing it. Can a duty be established on the basis that buying produce that is fairly traded (when the choice is available) amounts to fair treatment of workers, and that the inverse is also true?

Once again, the Torah is the source for the law: Leviticus 19:13:

¹⁸ The fact that the *Shulhan Arukh* lists *ona'ah* under the general category of *meqah ta'ut* [mistaken transaction] supports the understanding that, at least in its operation, *ona'ah* is a purely economic wrong.

You shall not abuse your neighbor and you shall not steal; the wages of a hired worker shall not remain with you until morning.

There is a further prohibition in Deuteronomy 24:14-15:

You shall not abuse a needy and destitute hired worker, whether he is one of your own or a stranger sojourning in your land and in your cities. You must pay his wages on the same day, before the sun sets, for he is needy and his life depends on it [lit. he lifts up his soul on it]; or he will cry out to God about you, and you will be the one in the wrong.

This second prohibition is explored in the Talmud:

...as it teaches, 'and his life depends upon it': Why does he ascend upon a ladder, suspend himself from a tree, and place his life at risk if not for his wages? Another interpretation of 'and his life depends on it' - One who withholds the pay of a worker, it is as if he has taken his spirit from him.¹⁹

Rambam specifically defines *oshek* as the withholding of wages and is very clear about why this is wrong:

Anyone who withholds a hired worker's wages, it is as if he killed him, as it says, "His life depends on it"; and the withholder disregards four prohibitions and is in breach of one imperative: he ignores, 'You shall not abuse' [Leviticus 19:3], 'You shall not steal' [ibid], 'The wages of a hired worker shall not remain' [ibid], 'Before the sun sets' [Deuteronomy 24:14-15], and flouts, 'You must pay his wages on the same day' [ibid]...²⁰

But once again there is a problem of remoteness. We are not the employer save in the most figurative sense. While it is clear that at least some of the monies received by fair trade co-operatives do go directly to improving worker conditions,²¹ it is impossible to tell how much of

19 BT *Bava Metzia* 112a

20 *Mishneh Torah, Hilkhot Sekhirah* 11:2

21 'Empowered by the economic stability provided by Fair Trade, members of the COSURCA coffee

what we pay is for labor and how much is for the product we consume. This is important because the principle of *oshek* does not apply to an ordinary economic transaction,²² so absent being able to establish that our purchase of a non-fair traded product amounts to withholding wages, there would be no claim.

A better argument might be to suggest that the purchase of non-fairly-traded produce means that farmers and their workers are rendered unable to control or improve their working conditions. Employers, certainly, are required by Torah law to protect their workers from injury, based on Deuteronomy 25:8 ('thou shalt not spill blood in thy house'), and HaRav Uzziel has ruled that while the employer has no responsibility for injuries suffered by the worker (save responsibilities imposed by custom), this rule means that workers must be protected from injury where possible (so, for example, it would seem that protective clothing must be provided).²³ Workers are also entitled, according to halakhah, to be members of a trade union, and even to strike,²⁴ so it would follow that an employer who prevents such action would be in breach of duty.

Again, though, the problem is that we are not the employer, we are the consumer. It is in practice impossible to establish the extent of our complicity with an employer who might be in breach of these rules, and moreover, it is impracticable for any claim of damages to be made against us by the injured party.

Once again we are faced with problems of remoteness and complexity that mitigate against any kind of direct halakhic obligation.

cooperative in Colombia successfully prevented the cultivation of more than 1,600 acres of coca and poppy, used for the production of illicit drugs. In Papua New Guinea, the AGOGA cooperative, is investing in a medical team to meet the healthcare needs of its isolated rural community. In the highlands of Guatemala, indigenous Tzutuhil Mayans in the La Voz cooperative are sending local kids to college for the first time. Near Lake Titicaca, in Peru, the CECOVASA cooperative is assisting members from Quechua and Aymara indigenous groups in raising coffee quality and transitioning to certified organic production.' <http://www.transfairusa.org/content/about/benefits.php>

22 Rabbi Meir Tamari, *With All Your Possessions*, Collier Macmillan, London 1987 p. 135

23 *Mishpetei Uzziel, Hoshen Mishpat* 3:4

24 extrapolated from BT *Bava Batra* 8b

Theft and handling of stolen produce

Another approach might be to argue that buying produce that is not fairly traded amounts to theft from the farmer, since the return on the product is so tiny.

The prohibition against theft is found in Leviticus 19:11:

You shall not steal, you shall not deny falsely and you shall not lie to each other.

Rambam extrapolates various other prohibitions from this:

Anyone who steals money of a perutah's worth or more is in breach of the prohibition against theft, as it says [Leviticus 19:11] 'You shall not steal.' He is not flogged for this since the offence is capable of being compensated, for the Torah requires the thief to repay. It is theft whether from a Jew, or a non-Jew, or whether the victim is legally an adult or a minor. [2] The Torah rule is that it is forbidden to steal anything: it is forbidden to steal for a joke, or to steal while intending to return the item, or to steal in order to pay - everything is forbidden, so that the thief does not acquire the habit of stealing.²⁵

There also appears to be a moral aspect:

It is forbidden to purchase a stolen object from a thief. It is a major offence to do so, since one is thereby constructively encouraging [lit. supporting the hands of] those who sin, and causing the thief to carry out further thefts – for he would not steal if he could find no customers. About this [case], it says: 'He who shares with the thief hates himself' [Proverbs 29:24].²⁶

However, in the same way as in section B above, our not buying fairly traded produce cannot amount to direct theft from its farmers – the consumer chain means that we are too remote. A more appropriate analogy is that of handling stolen property, and the *halakhah* here is interesting:

²⁵ *Mishneh Torah, Hilkhoh Geneivah 1:1-2, and similarly Shulhan Arukh, Hoshen Mishpat 345:1*

It is forbidden to purchase any item that is presumed to be stolen. This is the case also if the majority of the item is presumed stolen: it is forbidden to purchase it...²⁷

The 'majority' idea is helpful, since it saves us from trying to establish which, if any, of the particular coffee beans we purchase were stolen and which paid for. If we can argue that the 'majority' of our coffee was produced under conditions that amount to theft from the farmers, then we would indeed be handling stolen produce. But the problem, of course, is that some money will have been paid to the farmers, by somebody, somewhere along the chain, and in practice it is impossible for us, as consumers, to ascertain whether that money would be sufficient to vitiate a claim of theft. If the goods were not stolen at the outset, then there is no offence of handling them.

There is also a problem with the remedy. The remedy for theft is restitution, or, failing that, payment of damages to the value of the object. Restitution is likely to be impossible – the coffee will have been drunk – and therefore damages must be paid.²⁸ But both quantification of those damages – exactly what proportion of the value is to be deemed 'stolen', and what proportion must be paid by the handler as opposed to the original 'thief' if there is one, not to mention the logistics of getting the damages into the hands of the person who can claim them – is so problematic as to be unworkable.

It is clear from all of the above that trying to argue that we are obliged to buy fairly traded produce because if we do not we are in breach of specific prohibitions is not workable. Time and again we are defeated by complexity, by lack of evidence, by remoteness. Not only that, but the extent to which the prohibitions become complicated as we try to enforce them (if indeed they apply to begin with) is so inelegant as to bring the whole halakhic process into disrepute, which is entirely counterproductive.

Is it possible, instead, to argue that there is some other imperative that requires us to buy fairly

²⁶ *Mishneh Torah, Hilkhot Geneivah* 5:1, and similarly *Shulhan Arukh, Hoshen Mishpat* 356:1

²⁷ *Mishneh Torah Hilkhot Geneivah* 6:1, and similarly *Shulhan Arukh, Hoshen Mishpat* 358:1

²⁸ *Shulhan Arukh, Hoshen Mishpat* 350:1

traded produce?

A general imperative?

In the Rabbinical Assembly's *Hekhsher Tzedek Al Pi Din*, Rabbi Avram Reisner argues, "this matter of the treatment of the poor and those often exploited is most fundamentally a matter of righteousness."²⁹ The real aim of the various fair trade initiatives is to put some kind of check and balance on the facelessness of the consumer, and to tip the market back so that market freedom – which is not in itself contrary to *halakhah* – does not work in a way that exploits both the acquisitiveness of the consumer and the needs of the farmer.

This righteousness-driven attitude, the aim of which appears to be to counterbalance humankind's natural drive to be selfish, is a manifestation of some wider principles of Jewish business ethics. These, as Aaron Levine has pointed out, construe the insatiability of "economic lust" as being a manifestation of the *yetzer ha-ra* [the 'evil inclination'].³⁰ The *yetzer ha-ra* is to be countered by actively engaging the *yetzer ha-tov* [the 'good inclination'].³¹ The ideal appears to be not to eliminate the *yetzer ha-ra*, since this would be impossible,³² but instead to recognize that to a limited extent its promptings can be a positive feature,³³ and to exercise humankind's natural drive for profit in a contained way, for appropriate objectives.

An alternative approach, and one that takes us to an interesting place, is suggested by Professor Aaron Kirschenbaum:

'Roman law emphasizes the right to sue: the formula that embodies the cause of action is central. Anglo-American law is characterized as remedy-oriented; hence the law is conceived as that which exists in the courtroom. Jewish law, on the other hand, is duty-oriented and therefore addresses itself, principally, not to the judge and lawyer, but to the citizen. Duties and responsibilities, not rights and remedies, are the central questions of

²⁹ http://uscj.org/images/hekhsher_tzedek_al_pi_din.pdf

³⁰ Aaron Levine, *op.cit.* p. 6

³¹ See, for example, BT Berakhot 5a and 61a, BT Shabbat 105b, *Sifre* Deuteronomy 33.

³² Bereishit Rabba 9:7

³³ see *Bereishit Rabbah* 9:1

talmudic discussions. “What must I do?” - not “What are my rights in the matter?” or “What sanctions can be imposed upon me?”³⁴

Kirschenbaum points to a number of situations of legal enforcement of acts which in principle are of a voluntary nature as examples of the operation of equity in Jewish law:

‘Jewish legal literature blurs the line dividing obligations from meritorious permissions. Supererogatory acts of a positive nature, of benevolence, or of a negative nature, forbearances from exercising one’s legal rights, become a standard feature of Jewish *law* [author’s emphasis]. Many of them are enforceable – as we shall see – as legal norms. Many of them are the subject of societal pressures – religious (the curse) and psychological (emulative and elitist) – that are so powerful that their moral quality – of being truly voluntary – is seriously vitiated.’³⁵

We may add to this an element of conscience. In a useful discussion of the *mishpatim*, in which he argues that the civil, criminal and social framework of Torah form an indivisible whole with the *eidot* and *huqqim*,³⁶ Rabbi Meir Tamari argues that economic immorality is a sin against God as well as against other human beings:

‘The Torah expands the concepts of economic morality and business ethics far beyond the grasp of human intelligence. Furthermore, the Torah’s insistence upon Divine reward and punishment ensures that people know there is no possibility of the secret crimes or hidden actions that constitute white collar crime, injustice and exploitation.’³⁷

If we take all three of these elements together - economic morality, the precedence of duty and the claim of conscience - we might be able to point to an obligation in Jewish law to buy fairly traded produce. As will be explained below, these elements create a legal climate in which they are not merely aspirational but can in some instances be enforced.

34 Aaron Kirschenbaum, p. 2

35 Kirschenbaum, op. cit., p. 58

36 *Mishpatim* translates roughly as ‘laws’. *Eidot* are ‘testimonies’ and *huqqim* is normally translated as ‘statutes’. The difference between *mishpatim* and *huqqim* is normally understood as being that the former have an obvious rationale while the latter do not, but are to be observed nonetheless.

There are several principles that might be relevant to the case of fair trade.

D1: Behaving above suspicion

The Torah source for this is Numbers 32:22:

...and the land will have been subdued before God, after which you will come back and be guiltless [lit. 'clear'] before God and before Israel, and the land will be your inheritance before God.

The term in this verse is understood in various places in the Talmud as being a moral imperative. One instance is found below:

The [offering of the shekel] is taken up from the chamber in three baskets each of which has a three-seah capacity. Written on the baskets are the letters aleph, bet and gimmel. Rabbi Yishmael says that the letters are in Greek: alpha, beta and gamla [sic]. The person collecting the offering does not enter the chamber wearing a cloak with sleeves, or shoes, or sandals, or tefillin, or an amulet, in case he becomes poor [later] and people say of him that he became poor because of something he did wrong in the chamber; likewise, in case he becomes rich and people say of him that he became rich because of [the offering he collected from] the chamber. This is because people must give no cause for suspicion to other people in just the same way as they must not give cause for suspicion to the Omnipresent, as it says, [Numbers 32] 'You shall be clear to God and to Israel' and it also says, [Proverbs 3:4] 'You shall find favor and good understanding in the sight of God and of man.'³⁸

A further scenario can be found at BT *Pesahim* 13a:

It was taught: if charity overseers have no poor to whom to distribute the funds, they may not exchange the coins for their own money, they have to use other people's [copper coins were

37 Rabbi Meir Tamari, *Al Chet: Sins in the Marketplace*, Jason Aaronson Inc, Northvale, NJ, 1996, p.20

liable to tarnish and needed to be exchanged for silver]. A person in charge of a soup kitchen that has no poor to feed cannot purchase the soup themselves, they must sell it to other people, because it says, [Numbers 32] 'You shall be clear to God and to Israel.'

The rationale is expressed in a wider form elsewhere:

Loving the Omnipresent and loving people: *this teaches that a person must do their duty to other people in the same way as they do their duty to God, as it says, 'You shall be clear before God and Israel.'*³⁹

More recently the principle of *heyiytem neqi'im* has been invoked to support the exercise of judicial discretion in Israeli courts,⁴⁰ and also in considering the extent to which a charity *gabbai* must make full disclosure in his accounts.⁴¹

How could this apply to a fair trade scenario? The reasoning is a little creaky: we would have to argue that given the amount of readily available information about ordinary trade practice in, say, the coffee industry, it is reasonable to suspect workers might have been exploited and/or the law breached in providing the commodity to the consumer. Since suspicion itself is enough to trigger the duty to avoid it, in order to be 'seen to be doing' we would be required to buy fairly traded produce in preference to the alternative, regardless of whether we incur financial loss by doing so.

The problem, of course, is whether a principle that up until now has been understood as operative in the context of disclosure is capable of extrapolation to cover the case of fair trade. It is possible that this is stretching the law too far.

D2: *Lifnim mishurat ha-din* ('beyond the letter of the law')

The idea that a person can, and should, avoid pressing their legal entitlements to their extreme

38 *Mishnah Sheqalim* 3:2

39 *Massechet Kallah Rabati*, 5:2

40 *Mishpetei Uziel, Hoshen Mishpat* 1:1

limits is a long-established one in Judaism. The principle of *lifnim mishurat ha-din* was initially derived by Rabbi Joseph from Shemot 18:20:

Once, a woman showed a dinar to Rabbi Hiyya. He told her it was a good [not forged] dinar. But she came back later and said, 'I showed it to someone else who says that it is bad, and so I cannot use it. [Rabbi Hiyya] told Rav, 'Go and exchange it, and write it off in my books as a loss.' Why should [Rabbi Hiyya] be different from Dankho and Issur, who would not be liable in such a case, because they have expertise? Didn't Rabbi Hiyya also have expertise? It is because Rabbi Hiyya was acting beyond the letter of the law [lifnim mishurat ha-din] on the principle learnt by R. Joseph [from Exodus 18:20]: 'You shall show them' means, the source of their livelihood; 'the way' means deeds of lovingkindness; 'they must walk' means visiting the sick; 'in' means burial, 'and the work' means the law; 'which they must do' means, acting beyond the letter [lit. 'within the line of'] of the law.⁴²

The Rishonim are undecided as to whether *lifnim mishurat ha-din* is applicable to all people or only to *hassidim* - the extra-pious. Rambam holds the latter, arguing that compliance with the principle is entirely voluntary.⁴³ Ramban, however, understands the principle as applying to the ordinary man.⁴⁴ There is a similar conflict in the codes: the Shulhan Arukh posits that it is *tov veyashar* to act *lifnim mishurat ha-din*;⁴⁵ Rema suggests that any duty, if it exists, cannot be enforced but that "others disagree,"⁴⁶ and the BaH suggests not only that a duty exists but that a wealthy person can be enforced to comply with it.⁴⁷ Aaron Levine points out that it is the BaH and Ramban's view that became the normative one, since there are examples of Jewish courts ruling in ways which compelled litigants to act according to the principle.⁴⁸

The question of whether a discretion can, and should, translate into enforceable law is a thorny one, however. On the one hand there is the argument that a legal system is disrupted when supererogatory obligations are brought into the realm of legal duty, since the floodgates are

41 *Tzitz Eliezer*, 4:2

42 BT *Bava Kamma* 99b-100a

43 *Mishneh Torah*, *De'ot* 1:5 and *Gezeilah* 11:7

44 Ramban, commentary on Deuteronomy 6:18 and Leviticus 19:2

45 *Shulhan Arukh*, *Hoshen Mishpat* 259:5

46 Rema, *Shulhan Arukh*, *Hoshen Mishpat* 259:5

47 BaH, *Hoshen Mishpat* 12:4 and 304:1

then opened and it becomes extremely difficult to know where to draw the legal line. Is one performing a given act as a duty or as a discretion? If one does not, what are the penalties, and how should they be imposed? If the point of a supererogatory obligation is precisely to provide a forum for the exercise of individual discretion, it defeats the object to turn that obligation into a duty. All that said, though, it is noteworthy that so many within the tradition do argue for *lifnim mishurat ha-din* to be an enforceable duty, at least in certain sets of circumstances.⁴⁹

If we do join with the BaH, Rashi *et al* in holding that it is indeed incumbent upon us to act *lifnim mishurat ha-din*, how would that apply in the case of fair trade? The analysis of the Tosafot, whereby three separate types of case are identified, presents us with a challenge, since none of the categories is an exact fit with our scenario:⁵⁰

- If a person has a halakhically privileged status that is different from the norm, *lifnim mishurat ha-din* requires the person to waive his privilege and conform to the norm;
- In a case where everyone is halakhically exempt from a particular duty, *lifnim mishurat ha-din* operates to require that a person waive his exempt status if he can do so at no loss;
- If a person has a legal claim, *lifnim mishurat ha-din* recommends (but does not require) waiving that claim as an example of special piety.

The Meiri has an alternative formulation, whereby the duty devolves on different classes of people:

- If payment of money is required, *lifnim mishurat ha-din* conduct is morally obligatory for *talmidei hahamim* and *anshei ma'aseh*;
- If the only requirement is to forego one's honor, everybody is morally obliged to act *lifnim mishurat ha-din*;
- Where neither expenditure nor loss of honor is necessary, *lifnim mishurat ha-*

48 Tosafot, BT *Bava Metzia* 24b (d'h *lifnim mishurat ha-din*) cited in Levine, *op. cit.* p. 30

49 Kirschenbaum (*op. cit.* p. 135) points out that Rashi, among others, is one of the proponents of a wide definition of enforceable *lifnim mishurat ha-din*.

din conduct becomes a religious, albeit unenforceable, obligation for everyone.⁵¹

There are two other relevant factors:

The relative financial position of the parties to the transaction. This is dealt with by the BaH (see above) and also by his disciple, Rabbi Menahem Mendel Krochmal, who develops further the idea that a person may be coerced, by execution against property or by imposition of a *herem*, to act *lifnim mishurat ha-din*, but the same does not apply to a person who is poor when the other party to the transaction is rich.

Poverty. If one party to the transaction is poor, the other party is more obliged to act *lifnim mishurat ha-din*. Kirschenbaum brings the example of the ruling by Rabbi Hayyim Baer Rapoport of Ostrog, Russia, where through the fault of neither the employer nor the employee, a community was compelled to dispense with the services of its *shohet*. Rabbi Rapoport, stating explicitly that there was no law compelling the community to pay the salary he would have received, nevertheless ruled that the *shohet* should be paid *lifnim mishurat hadin* - for 'he is a poor man with dependents'.⁵²

Taking all of the above together, it would seem to follow from the Meiri's formulation that we are required to buy fairly traded produce when its price is no different from the alternative. If the price is higher, it would nonetheless be desirable, particularly if we are people with power and social standing (*anshei ma'aseh*). The BaH and Rabbi Krochmal require us to take our financial standing relative to the farmers into account (the differential is, of course, very marked), and Rabbi Rapoport would say that their poverty is a factor in and of itself.

D3: *Kofin al midat S'dom/zeh neheneh ve'zeh lo haser*

Midat S'dom is the term used by the tradition to describe the type of behavior where the strict

50 see Levine, op. cit. p. 26-27

51 Kirschenbaum, op. cit. p. 131

52 Rabbi Hayyim Baer Rapoport of Ostrog, Russia, *Responsa Mayim Hayyim, Orah Hayyim 6*, cited in Kirschenbaum, op. cit. p. 127.

letter of the law is observed with no regard to ethical or moral principles, even if the result is absurd. It constitutes the act of denying one's fellow a benefit even if it does not cost you anything – in other words, perversely sticking to the letter of the law just because it is the law. It comes to represent the epitome of speciously self-interested behavior, the kind of smugness that says, 'I am acting within the law, and that is all that matters.'

An alternative formulation of this concept is the wording *zeh neheneh ve'zeh lo haser* - 'one gets benefit and the other suffers no loss' - which is used, for example, to prevent a person claiming rent if another moves onto land that was not previously being used. Rashi says that both of these principles are essentially the same - that one is prevented from enforcing strict legal rights if no loss is involved.

The first source of the concept is probably *Mishnah Avot* 5:10:

There are four types of person. The one who says, 'mine is mine and yours is yours' is the average type, which some call the S'dom type. The one who says 'mine is yours and yours is mine' is being silly. The one who says 'mine is yours, and yours is yours' is pious. The one who says 'mine is mine and yours is mine' is wicked.

The idea is further developed in the Talmud:

There were four judges in S'dom who were called Liar, Big Liar, Forger and Twister...if a poor man came to S'dom, everyone took a dinar, wrote their own name on it and gave it to the poor man. But they didn't give the poor man any bread. When the poor man died, they each came and took their own dinar back...one serving girl gave some bread to a poor man by hiding it in a pitcher. When this became known, they daubed her with honey and put her up on the city wall, and the bees came and ate her up.⁵³

Courts are entitled to enforce in a situation where to do so will prevent *midat S'dom*.

53 BT *Sanhedrin* 109b

A certain man bought a field next to his father-in-law's estate. When [his father in law died and] the estate was being divided, he said: 'Give me the land next to the field I already own'. Rava says the court should enforce to prevent midat S'dom [ie the court should prevent the rest of the beneficiaries from refusing the man's request since it would cost them nothing to comply]. Rav Yosef disagrees and says, the beneficiaries could argue the land is particularly valuable, like that of Bar Meiron [it would cost them to comply with any court ruling, so the court should not rule that way]. The law follows Rav Yosef. If [a father leaves two sons] two fields, with two channels running alongside them, Rava says, the court should enforce to prevent midat S'dom [since one brother could ask for the field next to other land he already owns at no cost to the other]. Rav Yosef disagrees and says, one channel might dry up while the other continues to run [and therefore the two portions of land are not equivalent, and the court should not enforce]. The law follows Rav Yosef. But if both fields are alongside a single channel, Rav Yosef would rule that the court should enforce to prevent midat S'dom. Abaye disagrees and argues, it is my desire to have more guards [if the two fields are not contiguous, one would need more guarding and therefore the two fields are not equivalent] but the law follows Rabbi Yosef, who holds that the number of guards is irrelevant.⁵⁴

While *midat S'dom* started life as a property doctrine, and seems still to be applied to property cases (in the Israeli courts, at least),⁵⁵ it is the underlying principle and logic, and the alternative exposition of the doctrine - *zeh neheneh ve'zeh lo haser* - that is relevant in the case of fair trade. If we can buy fairly traded produce at no expense to us, goes the logic, then we should, since the benefit to farmers is clear. Conversely, by not purchasing it, we are acting perversely in denying them that benefit while ourselves incurring no loss - and that would be *midat S'dom*.

Of course, this doctrine cannot apply if there is a premium to be paid for fairly traded produce: for that, we require an alternative approach, set out below.

⁵⁴ BT *Bava Batra* 12b, and also *Mishneh Torah, Kinyan, Shekhenim* 12:1, 3

⁵⁵ *Piskei Din Yerushalayim Dinei Mamonot u'virurei yahadut* 5:151 and elsewhere

D4: Supporting the poor

We know that Jewish law provides for a community obligation to support the poor, but it might be enlightening to look at the other side of that equation – the extent to which private, individual support of the poor is regarded as voluntary, or otherwise.

The highest level of charitable giving is to prevent a person falling into the throes of poverty, since this acts not only to help the recipient but also to support his self-esteem.⁵⁶ The source for this obligation is found in Deuteronomy 15:7-10:

If one of your brethren is in need within any community of yours within your country that the Lord your God is giving you, you must not harden your heart nor close your hand against your needy brother. Instead, you must open your hand to him and freely lend him enough to meet his needs. Beware of having the unworthy thought that 'the seventh, shemittah year is approaching', making you resentful towards your poor brother so that you refuse to give to him – that is wrong. You must surely give to him, with no resentment, for because of what you do the Lord your God will bless everything you do and all the produce of your hands.

The later tradition learns from this verse that the aid can take various forms – giving a gift, extending a loan, entering a partnership with the poor person or creating a job for him.⁵⁷ We should note the range that is available here, bearing in mind that the general aim of fair trade is to stabilize the farmer's existence and preserve his dignity. Rabbi Haim Luzatto argues that concealing one's own charitable motive, and allowing the recipient of the charity to believe that their success is due entirely to their own efforts, constitutes the very highest form of *imitatio Dei* and is to be encouraged.⁵⁸ This alone provides a compelling argument for us to elect to pay a premium for fairly traded produce if none is available at an equivalent price to the alternative.

Once again we have issues as to whether the duty is supererogatory or mandatory. Aaron Levine points to an early source on the verse – Rabbi Isaac of Dampierre (c.1120-1200) – who

⁵⁶ following Aaron Levine's analysis: Levine, op. cit. p. 115

⁵⁷ *Mishneh Torah, Matanot Le'Aniyyim* 10:7, *Tur Yoreh Deah* 249:7, *SA Yoreh Deah* 249:6, *Arukh Ha-Shulhan Hoshen Mishpat* 249:15

argues that since the verse contains both a prohibition ('you shall not harden your heart') and an imperative ('you shall open your hand'), judicial coercion can in fact be applied to the individual to meet his or her philanthropic obligations.⁵⁹ By contrast, Rabbi Hayyim Soloveitchik understands this verse as being the origin of the individual's (as opposed to the community's) responsibility to support the poor. He points out that it is not possible to coerce the exercise of this responsibility, since the verse in Deuteronomy (verse 10) mentions a reward.⁶⁰

Even though we have only limited evidence that the duty can be coerced, though, it seems clear that it is more than desirable to exercise one's individual prerogative of choice in order to support the poor. While there are established priorities in giving,⁶¹ the order of precedence does not exclude the 'distant poor', whom the individual should nonetheless be supporting:

...and therefore it seems, in my humble opinion, that the position is as follows. Any owner of property or wealthy individual who is giving charity is legally obliged to give some proportion to the distant poor, but should give a greater proportion to those who are close than to those who are not, and so on. And as for the fact that it states that one's own livelihood should take precedence; if we take that at face value it would mean that most homeowners would not be required to give charity save for one-third of a shekel per annum; and would that the majority of Jews had enough to do that, even! If that were the case, nobody would be obliged to give to charity but the exceptionally wealthy, and in places where there were none, the poor would die of hunger. How can we say such a thing?! And custom does not support it either.⁶²

Relieving the suffering of the poor is also understood to be proportional to one's wealth.⁶³ The items that are fairly traded in the USA tend to be luxury items (coffee, chocolate etc). If we can afford these products at all, it can be argued, we are brought within a greater obligation to relieve the poor, and that is another justification for paying a premium to buy them.

58 Aaron Levine, op. cit. p. 114

59 Tosafot *Bava Batra* 8b

60 Aaron Levine, op. cit. p. 127

61 *Mishneh Torah, Matanot Le'Aniyyim* 7:13, Tur, *Yoreh De'ah* 251:4, Rema, *Yoreh De'ah* 251:3, *Arukh Ha-Shulhan, Yoreh De'ah* 251:3

62 *Arukh Ha-Shulhan, Yoreh De'ah* 251:4

63 *Rashba Responsa* 3:380 cited in *Bet Yosef to the Tur, Hoshen Mishpat* 250:5, *Shulhan Arukh, Rema* 250:5

E: Non-Jews

Finally, and generally: what do we do about the fact that the poor whose suffering is being relieved by our consumer choices are not Jewish?

There are several possible halakhic options here, and the three most relevant are listed below. For the sake of brevity, only selected examples have been brought.

E1: *Mipnei darkhei shalom*

It is almost a halakhic “given” that we support the non-Jewish poor “for the sake of peace.”⁶⁴ From its original sources, the obligation stems from the Rema:

*We are not required to support or to lend to anyone who is in breach of any of the commandments of the Torah who has not repented. [Rema] But we support the non-Jewish poor along with the Jewish poor, for the sake of peace.*⁶⁵

The principle is widely attested and still applicable.

E2: To prevent *hillul Hashem*

The principle here is really the inverse of the invoking of the *yetzer ha-tov* outlined above. The logic is that if we do not act according to higher standards, this will constitute a public desecration of God’s name. Again, the sources are numerous, and what follows is only an example:

Yitzhak of the house of Rabbi Yannai says: There is *hillul Hashem* in any situation where a person’s companions are embarrassed by his reputation...Abaye says, as it is taught [in a Baraita] “You shall love the Lord your God” - that the name of Heaven should become beloved

⁶⁴ *Mishnah, Gittin* 5:8

by you [lit. by your hand], that one should read, and learn, and support *talmidei hahamim*, and one's business should be conducted pleasantly with people, so that they say, "Happy is his father who taught him Torah, and his teacher who taught him Torah. How unfortunate are those who have never learned Torah, for see how pleasant his ways are, and how sweet his deeds...but if one reads, and learns, and supports *talmidei hahamim* but fails to conduct one's business honestly with people, and does not speak pleasantly to them, then people say, 'How unfortunate that so-and-so learned Torah, how unfortunate his father who taught him Torah, and his teacher who taught him Torah. That person who has learned Torah, see how perverted his deeds are, and how ugly his ways are...'"⁶⁶

Similar reasoning is found in the *Sefer Mitzvot Gedolot*:

*It is similarly forbidden to mislead non-Jews in financial transactions: rather, one should be precise, as it says, 'You shall calculate with his buyer even if he has been conquered by you' - how much more so in the case of a non-Jew, who has not been conquered; the text states that 'anyone who does this, **who does injustice** [my emphasis], is an abomination to the Lord your God.'*⁶⁷

It would appear that for Jews publicly to be perceived to be doing injustice – which, in the case of fairly traded produce would here constitute a Jew refusing to buy such produce because the ultimate beneficiaries from such a purchase are not other Jews – constitutes a *hillul HaShem*.

E3: Midat hassidut

Midat hassidut - the quality of saintliness - constitutes a further supererogatory category in Jewish law that constitutes additional support for buying fairly traded produce generally. It is also particularly relevant to the context of non-Jews:

A Canaanite slave may be worked excessively, but even though the law provides this, it is midat

⁶⁵ *Shulhan Arukh, Yoreh De'ah 251:1*

⁶⁶ BT *Yoma* 86a

⁶⁷ *Sefer Mitzvot Gedolot*, negatives, 152b

*hassidut and plain good sense that a person should be compassionate and pursue justice and not make his slave's yoke heavy, nor hurt him, and that he should feed him and give him to drink from all kinds of food and drink...*⁶⁸

Further, there is an overlap between the exercise of *midat hassidut* and the prevention of *hillul Hashem*:

Maimonides...declares that if a sage does something that is ordinarily permitted but unworthy of a man of his stature or if he fails to perform an act of *hessed* which is expected more of him than of others - such behavior constitutes nothing less than *hillul ha-shem*.⁶⁹

It would appear, then, that even if there is no actual legal duty to support the non-Jewish poor, this should be done as a matter of personal choice.

Summary

In the early part of this *teshuvah* we noted how difficult it is to establish a halakhic obligation to buy fairly traded produce based on particular prohibitions in the law. The complexity and practical difficulties of trying to apply these prohibitions to a fair trade scenario would, it is suggested, bring halakhah into disrepute. Further, it has long been established that there is no point in legislating halakhic obligations that the public is unable to abide by,⁷⁰ and this would seem to be just such a case.

Conversely, a consideration of some of the imperatives that occupy the middle ground between law and ethics shows that at least some form of duty does exist, at least in circumstances where fairly traded produce is competitively priced. Further, a model that has some element of individual discretion fits much better with the way we live and purchase today than a blanket halakhic obligation.

⁶⁸ *Mishneh Torah, Hilkhot Avadim* 9:8

⁶⁹ Maimonides *Iggeret Ha-Shemad* and *Mishneh Torah, De'ot, Yesodei HaTorah* 5:11, cited in Kirschenbaum, op. cit. p. 194

Of course, this is not the end of the story. Of the questions that now arise, here is a small sample, each of which deserves further exploration:

- What about farmers' markets? Should we purchase there rather than at supermarkets?
- What if there is a choice between buying fairly traded produce and organic produce?
- What if we can buy fairly traded produce but to do so means we do not patronize our local store?

But for the moment, we can come to the following conclusions:

CONCLUSIONS:

- Failure to buy fairly traded produce does not transgress any halakhic prohibition.
- If fairly traded produce is priced equivalent to the non-fairly traded alternative, we are obliged to buy it, in order to avoid *midat S'dom* and to comply with the requirement to act *lifnim mishurat ha-din*.
- If fairly traded produce costs more than the non-fairly traded alternative, then it is a matter of individual conscience. However, Jewish ethical principles strongly support such a purchase.

⁷⁰ See eg BT *Avodah Zarah* 2, *Mishneh Torah*, *Hilkhot Mamrim* 2:7

Postscript

What we have here is the beginning of a halakhic approach to the whole question of consumer choice. As we have seen, not only does halakhah address itself to this issue, but it has a good deal to say about it as well.

In the case of fair trade, as we have seen, halakhah goes further than providing for supererogatory acts of "righteousness." Our obligation is more concrete than simply - if one can say such a thing - "doing the right and the good." It is as if halakhah has always realized the power of the 'choices' we make as consumers, impelling us toward a standard of correct behavior that goes above and beyond free market economics.

This standard overflows the strict boundaries of the law in a way that is exceptionally well suited to the lives we live and the long chains of supply and demand of which we form a part. The consumer choices we make today are complex, requiring the sifting of information, consideration, evaluation, intuition, a sense of responsibility. Halakhah's response is equally complex: rather than saying, 'This is the law, you must/can't do specific action X,' it guides us towards what we might call the ethical penumbra of the law, the area in which ethics and law shade into each other. In that penumbra, the emphasis is on the individual. Choices have consequences; morals matter; and while we modern creatures place a huge value on our autonomy and our freedom, it is both surprising and reassuring that halakhah can speak to those aspects of our lives just as eloquently as it has been speaking, all these years, to our predecessors.

Bibliography

Given the scope of this *teshuvah*, I have been heavily reliant on the secondary sources listed below and wish to point out that even when they are not cited in footnotes, the expertise of their authors has often guided my reasoning, whether I have been aware of this or not:

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