

Mitzvot 76, 77 and 78: Majority Rules

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SEFER HACHINUCH MITZVA 78

מצות הטיה אחרי רבים - לנטות אחרי רבים, והוא כשיפל מחלקת בין החכמים בדין מדיני התורה כלה, כשתהיה המחלקת בין דיני עירם שקצתם דנין לחיוב וקצתם לפטור, לנטות אחר הרב לעולם, שנאמר (שמות כג, ב) אחרי רבים להטות ובחירת רב זה לפי הדומה הוא בששתי הכתות החולקות יודעות בחכמת התורה בשוה, שאין לומר שכת חכמים מעטת לא תכריע כת בורים מרבה ואפילו כיוצאי מצרים, אבל בהשוות החכמה בקרוב, הודיעתנו התורה שרובי הדעות יסכימו לעולם אל האמת יותר מן המעוט.

The commandment of inclining towards the many: To incline towards the many, and that is when there arise a disagreement among the sages in a law of all the Torah laws when there would be a disagreement between the judges of their city, that some of them rule guilty and some rule innocent, to always go after the majority; as it is stated (Exodus 32:2), "to incline towards the many." And this choice of the majority appears to be when the two opposing groups are equally known for their Torah wisdom - as it cannot be said that a small group of sages would not be decisive against a great group of ignoramuses, and even like [the number] that went out from Egypt. But with approximately equal wisdom, the Torah informed us that the many opinions will always conform to the truth more than the minority. ... And that which I say that the choice of the majority is always with two groups that disagree that are equal in the wisdom of truth is said so about every place except for the Sanhedrin. As with them, we are not exacting when they disagree as to which group knows more; but rather we always do like the words of their majority. And the reason is because they had an obligatory number [of people] by writ of the Torah; and it is as if the Torah explicitly commanded, "Do all of your matters according to the majority of these" - and also as they were all great sages.

It is from the roots of the commandment that we were commanded through this to strengthen the fulfillment of our religion. As if we were commanded, "Keep the Torah, according to how you are able to understand its intended truth," each and every one in Israel would say, "It follows from my opinion that the truth of matter x is such." And [so,] even if the whole world would say its opposite, he would not be allowed to do the matter contrary to the truth, according to his opinion. And destruction would come from this, as the Torah would turn into many Torahs - since every one would judge according to the poverty of his [own] opinion. But now that we have been explicitly commanded to accept the opinion of the sages about it, there is one Torah for all of us, and its performance is great through this. And we may not budge from their opinion, whatever the case. And so, in our doing their commandments, we are executing the commandments of God. And even if the sages sometimes do not reach [come to] the truth - God forbid - the sin will be upon them and not upon us.

JOHN STUART MILL, ON LIBERTY: It was now perceived that such phrases as "self-government," and "the power of the people over themselves," do not express the true state of the case. The "people" who exercise the power are not always the same people with those over whom it is exercised; and the "self-government" spoken of is not the government of each by himself, but of each by all the rest. The will of the people, moreover, practically means the will of the most numerous or the most active part of the people; the majority, or those who succeed in making themselves accepted as the majority; the people, consequently, may desire to oppress a part of their number; and precautions are as much needed against this as against any other abuse of power. ... and in political speculations "the tyranny of the majority" is now generally included among the evils against which society requires to be on its guard.

EDMUND BURKE, TRUSTEE DEMOCRACY: "... his unbiased opinion, his mature judgment, his enlightened conscience, he ought not to sacrifice to you, to any man, or to any set of men living. ... Your representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion ... a trustee considers an issue and, after hearing all sides of the debate, exercises their own judgment in making decisions about what should be done. You choose a member, indeed; but when you have chosen him, he is not member of Bristol, but he is a member of Parliament"

MISHNEH TORAH, HILCHOT SANHEDRIN, CHAPTER 2, HALACHOT 1, 3,

We appoint to a Sanhedrin - both to the Supreme Sanhedrin and to a minor Sanhedrin - only men of wisdom and understanding, of unique distinction in their knowledge of the Torah and who possess a broad intellectual potential. They should also have some knowledge concerning other intellectual disciplines, e.g., medicine, mathematics, the fixation of the calendar, astronomy, astrology, and also the practices of fortune-telling, magic, sorcery, and the hollow teachings of idolatry, so that they will know how to judge them.

We should not appoint to a Sanhedrin a man of very old age or one who is a saris, for they possess the trait of cruelty, nor a man who is childless, so that the judges should be merciful.

וטעם האכזריות בזקן פירש"י ששנח כבר צער גידול בנים

We are not careful to demand that a judge for a court of three possess all these qualities. He must, however, possess seven attributes: wisdom, humility, the fear of God, a loathing for money, a love for truth; he must be beloved by people at large, and must have a good reputation. All of these qualities are mentioned explicitly in the Torah.

Our Sages relate: From the Supreme Sanhedrin, they would send emissaries throughout the entire land of Israel to seek out judges. Whenever they found a person who was wise, sin-fearing, humble, modest, with a good reputation, and beloved by people at large, they have him appointed as a judge in his own city. From there, they promote him to the court which holds sessions at the entrance to the Temple Mount. From there, he is promoted to the court which holds sessions at the entrance to the Temple Courtyard, and from there, to the Supreme Sanhedrin.

RAN, DRASHOT, NUMBER 3

But our sages of blessed memory see this ["for you"] as intimating that this mitzvah [of establishing the time of the new moon] is relegated to beth din, and that anyone who takes issue with them over anything they have decided — though they [the sages] may have erred in their decision — is in disagreement with the Torah. For the Torah commanded us to follow the ruling of the sages of the generation — even if it is the opposite of the truth — precisely because it is their consensus and their view.

And this is the intent of (Chagigah 3b): "He expounded further (Kohleth 12:11): 'The words of the wise are as goads' — just as a goad directs an ox along its furrow to bring life to the world, in the same way words of Torah direct the hearts of those who study it from the paths of death to those of life ...which provides the true knowledge whereby a man may attain his goal.

And they stated further (Chagigah 3b): "'the people of the gatherings' (Kohleth 12:11) — these are the Torah scholars, who sit in groups and study Torah. These pronounce unclean and these pronounce clean. Lest you say, this being the case... how can I study Torah from now on [in the face of this variance in the rulings of the Torah scholars]? Scripture tells us that they were all 'given by one shepherd.' All the words of Torah were stated by one leader [Moses] from the mouth of the Omnipotent One, as it is written (Exodus 21:1): 'And G d spoke all of these words, saying...'" They expound the word "all" as implying that even the words of those who did not attain to the truth were stated to Moses on Sinai.

Now this, indeed, must be understood. How can it be said that both rulings in a halachic dispute were stated to Moses by the Omnipotent One! Shammai says (Iddyoth 1:2) that the requirement for chalah begins from a kav; Hillel says that it begins from two kavim. Only one of these can be true; the other must be untrue. How can it be expounded, then, that something untrue issued forth from the mouth of the Omnipotent One?

The understanding is as follows: All of the Torah — both the written and the oral — was given to Moses on Sinai, as our sages have stated (Megillah 19b): "R. Chiyya b. Avin said in the name of R. Yochanan: 'From the verse (Deuteronomy 9:13) "...and upon them according to all the words..." we infer that the Holy One Blessed be He showed Moses all of the Torah's deductions and all of the scribes' deductions ... The scribes' deductions are the disputes and differences of view among the Torah scholars — and all of them were taught to Moses our teacher by the Omnipotent One with the provision that the decision be according to the consensus of the sages of the respective generations. And this underlies the episode of R. Eliezer Haganadol and his dispute concerning which we

are told (Bava Metzia 59b) that R. Yehoshua arose and declared (Deuteronomy 30:12): "It is not in the heavens!" What is the intent of "It is not in the heavens"? It has already been given to Moses on Mount Sinai, and in it is written (Exodus 23:2): "After the multitude to incline [judgment]." Now it was clear to all that R. Eliezer was closer to the truth than they, that all of his signs were truthful and righteous, and that heaven itself had ruled him correct — in spite of which they acted according to their consensus. Since their judgment inclined to "unclean," though they knew that their consensus was at variance with the truth, they did not wish to pronounce it clean. What is more, had they pronounced it clean they would have been transgressing against their reason, which inclined to "unclean," the decision having been relegated to the sages of the generations.

And because this mitzvah is the beginning of the Torah it is intimated in this parshah, just as the root of reward and punishment is herein intimated. For, this mitzvah, being the beginning of the Torah, it is fitting that there be alluded to in it the rationale of the mitzvah. And we are herein shown that in performing the Blessed One's commandment we are saved from harm — just as this mitzvah [of the Paschal lamb] was seen to have saved them from the plague in Egypt. All this to enforce the belief that the keeper of the mitzvah is above nature and not subservient to the galaxy and its forces. This is the intent of (Moed Katan 16b): "I rule man, and who rules Me? The righteous man; for I make a decree and he annuls it." That is, I have not made him subservient to nature.

SEFER HACHINUCH MITZVA 76

שלא לנטות אחרי רבים בדיני נפשות בשביל אחד - שלא ילך הדין אחר דעת הרב בדיני נפשות כשיהיה התוספת איש אחד לבד. וביאור זה כי כשתהיה מחלקת בין הדינים בדין אדם אחד ויאמרו קצתם שהוא חייב מיתה וקצתם שאינו חייב, והיו המחיבין יותר על המזכין אחד, שלא יעשה הדין בחוטא כדברי המחיבין, שנאמר (שמות כג ב) לא תהיה אחרי רבים לרעת.

Not to incline after the many in capital punishments because of one: That a judge should not go after the opinion of the majority in capital punishments when the difference will only be one. And the elucidation of this is that when there is a disagreement among the judges about the case of a man, and some say that he is liable for the death penalty and some say that he is not liable - and those who [would] make him liable are one more than those who [would] make him innocent - that the judge should not do with the [suspected] sinner according to the words of those who make him liable; as it is stated (Exodus 23:2), "Do not be after the many to do bad" - meaning to say, do not go after the majority that would result in concluding a verdict of death. And this is the expression stated in the Scripture, "to do bad" - meaning to say, to a liability for the death penalty. And that is when there is an exact majority, meaning to say that the decision is only because of one person. But if the decision is with two, we follow their words, even 'to do bad.' And in the Mekhilta d'Rabbi Yishmael 23:2, "Leaning to the good is according to one, but to the bad is according to two."

It is from the roots of this commandment [that it is] since we have been commanded to resemble the characteristics of God, blessed be He, in our actions. And among His traits is that He is of great kindness, meaning that He goes beyond the letter of the law with people. And [so] we too are commanded about this, that innocence be greater than liability in capital cases, as it is something that has no repayment.

BAVA METZIA 30B

the Gemara relates: Rabbi Yishmael, son of Rabbi Yosei, was walking on the road. A certain man encountered him, and that man was carrying a burden that consisted of sticks of wood. He set down the wood and was resting. The man said to him: Lift them for me and place them upon me. Since it was not in keeping with the dignity of Rabbi Yishmael, son of Rabbi Yosei, to lift the wood, Rabbi Yishmael said to him: How much are they worth? The man said to him: A half-dinar. Rabbi Yishmael, son of Rabbi Yosei, gave him a half-dinar, took possession of the wood, and declared the wood ownerless. ... The Gemara asks: But wasn't Rabbi Yishmael, son of Rabbi Yosei, an elderly person and it was not in keeping with his dignity to tend to the item? Why did he purchase the wood and render it ownerless in order to absolve himself of the obligation to lift the burden if he had no obligation to do so in the first place? The Gemara answers: In the case of Rabbi Yishmael, son of Rabbi Yosei, he conducted himself beyond the letter of the law, and he could have simply refused the request for help. ... "That they must perform"; that is referring to acting beyond the letter of the law, as Rabbi Yohanan says: Jerusalem was destroyed only for the fact that they adjudicated cases on the basis of Torah law in the city. The Gemara asks: Rather, what else should they

have done? Should they rather have adjudicated cases on the basis of arbitrary decisions [demagizeta]? Rather, say: That they established their rulings on the basis of Torah law and did not go beyond the letter of the law.

SEFER HACHINUCH MITZVA 77

שלא ילמד חובה מי שלמד זכות תחלה בדיני נפשות - שלא ילך אחד מן הדינים אחר דעת דין אחד גדול או אפילו אחר דעת הרב על צד שיאמינהו לחיוב או לזכו מבלי שיהיה הדבר מובן אצלו בשכלו, ואם הוא דין התלוי בגזרת הכתוב או מצד גזרה שוה או הקש שיהא יודע אותו הוא, ולא יסמך ויבטח על אחד מן הדינים, ולא על הרב, שנאמר (שמות כג ב) ולא תענה על ריב לנטת, רוצה לומר לא תאמר על הריב דבר לנטות, כלומר מצד הנטיה לבד, אחר דברי דין אחד גדול או אחר הרב ולא מצד הבנתך

... as it is stated (Exodus 23:2), "and you shall not answer about a dispute to incline."

From the roots of this commandment is like that which we said at the beginning - that one of the judged not go after his colleagues, but rather he should understand the things on his own. The reason is because it is possible that from this the case will sometimes be totally [decided] by the opinion of [only] one of them. Understand the matter, as it is such. And God, may He be blessed, did not want to give over a capital case to one opinion. ... And the rest of the things that we learned from it - such as the one who advocated innocence may not advocate guilt; that we do not open with guilt; and that we do not begin from the great one - all of it is out of the pity of God, may He be blessed, upon His creatures. [It is] metaphorically like a man who has pity on his children, as it is written (Deuteronomy 14:10), "Children are you to the Lord, your God." And work upon yourself [to understand it] by way of a parable: If a man fathered a hundred and he built a city for them and placed them there, but saw that they would not survive in the community unless he decreed upon them that anyone who hits his neighbor would be punished with his money; and if he kills him, he shall be killed. And one of them got up and transgressed his decree [and killed another] - if he forgave him, behold, the community would be lost; as fear would not stay upon the [others. So] what is there for him to do and not see the death of his second son? He would nonetheless seek any way he can to exempt him according to the law. If he can, that is best, but if it is impossible in any way, he would command to kill him, so as to preserve the community [for] the others. And so is this matter - understand it.

From the laws of the commandment is that which they, may their memory be blessed, said (Sanhedrin 17a) that if they all [advocated] for guilt, that he is exempt

MISHNEH TORAH, SANHEDRIN, CHAPTER 9

"If Sanhedrin opens capital case with a unanimous guilty verdict, he is exempt, until some merit is found to acquit him; then those who convict will be in the majority and then he will be put to death."

SANHEDRIN 17A

אמר רב כהנא סנהדרין שראו כולן לחובה פוטרין אותו מ"ט כיון דגמירי הלנת דין למעבד ליה זכותא והני תו לא חזו ליה

Rav Kahana says: In a Sanhedrin where all the judges saw fit to convict the defendant in a case of capital law, they acquit him. The Gemara asks: What is the reasoning for this halakha? It is since it is learned as a tradition that suspension of the trial overnight is necessary in order to create a possibility of acquittal. The halakha is that they may not issue the guilty verdict on the same day the evidence was heard, as perhaps over the course of the night one of the judges will think of a reason to acquit the defendant. And as those judges all saw fit to convict him they will not see any further possibility to acquit him, because there will not be anyone arguing for such a verdict. Consequently, he cannot be convicted.

RASHI: כיון דגמירי - דבעי הלנת דין בפרק היו בודקין (שם) שאם לא מצאו לו זכות יום ראשון מלינין אותו למחרת שמא ימצאו להם טעמי זכות: