



HaRav Shaul Israeli zt"l
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HEMDAT YAMIM

PARASHAT HASHAVUAH

Mishpatim 24 Shevat 5771

The Right View of a Jewish Legal System

(Harav Shaul Yisraeli - from Siach Shaul, pg. 258)

Our Rabbis learned important lessons from the opening to our *parasha*, "And these are the statutes ..." (Shemot 21:1). Rashi learns from "and" that just as the previous principles were received at Sinai, so were these laws of monetary conduct. The Tanchuma (Mishpatim 3) relates to this the *pasuk* in Tehillim (147:19-20): "He told His words to Yaakov ... He did not do so for every nation and statutes He did not inform them."

As a rule, the Satan and the nations chide Bnei Yisrael about the *chukim* (laws without a clear reason). They leave us alone about the *mishpatim* (monetary laws), which seem understandable because they are similar to their laws. Yet, we can appreciate our system of justice when we see the form of justice that the nations employ (against us) in the UN. Our justice is intrinsically true, not like the humanly mandated justice to which some pay lip service.

Hashem "spoke" the Ten Commandments in such a manner that "*shamor*" and "*zachor*" and, actually, all of the commandments were said at the same moment. Why was there a need for such a miracle? The reason is to show that each commandment includes everything, and interconnected laws are intrinsically different from independently standing ones.

The *pasuk* says that "the land He gave to mankind" (Tehillim 115:16). However, if this "possession" emanates from "to Hashem is the land and all that is in it" (ibid. 24:1), then we will know that the world is only ours after we bless Hashem for that which we get from it (Berachot 35a). If we understand that we need permission from Hashem for our things, then we understand that if we steal food and then make a *beracha* on it, we are blaspheming Him (Bava Kama 94a). In effect, if we are not sure if something is stolen, then we do not know if it is "kosher" for us. Such is our view of monetary law.

Our monetary law system is different in another way. Moshe was told to place the laws before "them," that is, every individual Jew. Who has to be aware of the law of Jewish servants? Every individual, not just *beit din*. Each person has to be careful not to mistreat another. A *dayan* can rule only based on what he knows, and sometimes someone who is not correct can win with a lie or based on the rule that only with full proof can one extract money. Indeed, every individual has to be his own judge – to realize his obligations.

One should be afraid of receiving money he might not deserve. One can and should be concerned about his own needs. However, it is more important to strive that all the money he obtains is legitimately his and serves his internal, spiritual needs.

This is why we teach Jewish children monetary law (see Bava Kama 30a and the *mishna*, Bava Batra 10:8). The greatest wisdom is not being overly cunning regarding monetary concerns and not hiring sharp lawyers to gain undeserved advantage. If we do not see things this way, then we have adopted "*mishpatim*" in the manner of the nations. If this is the case, we are perverting justice, which should be a measuring stick of morality, and turning into a tool for accumulating wealth at all costs. The Torah expects more of us.

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Question: Our daughter was engaged, and her *chatan* broke off the engagement with complaints we know are untrue. We paid for many wedding expenses, and his side has not agreed to pay their share. The *chatan* had given our daughter an engagement ring and other jewelry, and we have received word that his family wants them back. Are we required to return them, or may we hold on to the jewelry until we have been compensated?

Answer: This question has two elements, one specific to Even Haezer (laws related to marriage) and another that is classic Choshen Mishpat (monetary law).

The *mishna* (Bava Batra 146a) says that certain *sivlonot* (presents that a *chatan* gives to a *kalla* before their marriage) return to the *chatan* if they do not get married. The basic distinction is as follows. Those presents (including food stuffs) that were meant to be used up during the pre-wedding celebration were appropriately given even if the end goal of marriage was not met and need not be returned. However, presents that were to last into the future are deemed to be done on the condition of marriage and must be returned if they do not get married (see also, Shulchan Aruch, Even Haezer 50:3). Although usually we say that conditions that undo a transaction must be verbalized, when it is clear that a present is based on future expectation, it is deemed conditional. This is true even if the *kalla* is not at fault at all, including if one of the parties dies (*ibid.*). In fact, if the *kalla* backs out, then her side has to pay for the money the *chatan* wasted on the celebrations. (Similarly, a *chatan* is required to return the presents that he received from the *kalla*'s side- *ibid.* 4). Thus, on the basic level, you are required to return the jewelry.

However, on the second level, your claims are likely to have merit. You spent a lot of non-refundable money on wedding preparations, which now, by his backing out, is a loss to you. It is likely somewhat complicated to figure out how much of the above the other side owes you, and it may depend on specific elements of agreements and the chain of event that we are unaware of. We will not express an opinion without hearing both sides, and it might require a formal *beit din* setting to determine an exact solution. However, since the other side has resisted dealing with the matter, the question is about taking the law into your own hands by withholding the jewelry.

Taking things of value in lieu of payment one believes he deserves is known as *tefisa*, and its laws are very complicated. The biggest limitations are against unilaterally taking something as collateral for a loan, which the Torah forbids (Devarim 24:11), causing damage during the *tefisa*, and when one takes something he cannot prove he deserves (Rama, Choshen Mishpat 4:1). However, the main problem is in the act of taking. If the other party had voluntarily given the object (as in this case), he can hold on to it as a guarantee until his rights have been properly addressed (whether by agreement, mediation, or arbitration) (see Yam Shel Shlomo, Bava Kama 3:5). While it is problematic to obtain the object through deception (K'tzot Hachoshen 4:1), that is certainly not the case here.

Legal *tefisa* can also be an advantage where it is unclear to a *beit din* which side is correct, as the one holding the object in hope of payment is no longer the only one trying to extract payment from the person in possession. (The details are too complex to discuss seriously in this context, but one can see Klalei Tefisa (CM 25), par. 7, 17).

All of this being said, it is extremely important from a personal, spiritual, and practical perspective to allow the painful matter of a broken engagement to heal with as good terms as possible. Extended recriminations and posturing can cause all sorts of problems for the *chatan*'s and the *kalla*'s futures. Therefore, one should make certain sacrifices to do what is smart, not just what is right.

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The Reason to Follow the Majority

(condensed from Ein Ayah, Berachot 6:16)

Gemara: [There was a disagreement among the rabbis regarding the blessing after eating dates. Rabban Gamliel, a strong leader who, in this case, held the minority opinion, was eating with a group of rabbis. He asked Rabbi Akiva to make the blessing on behalf of all, assuming he would follow Rabban Gamliel's ruling, but Rabbi Akiva took the other approach.] Rabban Gamliel said to him: "How long will you place your head in the midst of the disagreement?" [Rabbi Akiva] responded: "Although you say that way and your friends say that way, you have taught us that when there is a disagreement between the majority and the minority, we are to follow the majority."

Ein Ayah: The fundamental idea behind the way to decide among differing opinions is based on the pursuit of truth and of peace. Sometimes, the power of truth prevails, and sometimes the power of peace prevails. Let us now explain.

Certainly, in all cases of disagreement and/or doubt, we should inquire what the truth is, which can be ascertained by means of logic and corroborating sources. However, when we cannot conclude what the truth is, we still need to determine which ruling to follow, and the rule is: "Lean in the direction of the many" (Shemot 23:2). The reason to make such a decision is for peace, so that there not be a multitude of disagreement in Israel.

Rabban Gamliel complained to Rabbi Akiva for the latter's "placing his head in the midst of the disagreement," in other words, for thinking that he was able to decide (with his head) whose opinion was more correct. Rabbi Akiva answered that he had not acted based on a decision of who he thought was correct. Rather, the need for peace, which is a foundation of the world, demands that he act as he did. In other words, he was not putting his head, or intellect, in the midst of the disagreement and thereby seemingly discounting the words of his teacher [Rabban Gamliel]. Rather, even if it turned out that the truth is with Rabban Gamliel, it is better not to rule like him because of peace. It is apparently for this reason that Rabbi Akiva did not cite the *pasuk* of "lean in the direction of the many." The commentators point out that the rule found in the *pasuk* works only when all of the participants in the disagreement are present at the same place, as we shall explain. One can inquire if the logic behind the *pasuk* is that the majority probably represents the truth, or that the need for peace dictates to follow the majority. Regarding truth, when all are together and hear the others' arguments, we assume that the majority considered everything and are more likely to have come to the correct decision. When they are not together, we have to consider that had they heard the other side, they might have conceded. However, regarding peace, even if they are not in the same place, the majority has an advantage.

One can also say that these two ways of looking at the matter are behind the disagreements between Beit Shamai and Beit Hillel. We are told that the members of Beit Shamai were, on average, sharper than those of Beit Hillel, but Beit Hillel constituted a majority. Beit Shamai reasoned that numbers should not make a difference when one side has a clear intellectual advantage at arriving at the truth. Beit Hillel felt that the basis for following the majority has to do with keeping the peace, in which case the level of the scholar is not the determining factor. Since we accept the idea of following the majority even regarding cases where the groups are not present together, we see that the matter has to do with peace. In any case, following the majority is not a matter of taking sides to denigrate the opinion of the opposing minority scholars.

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Following the Majority When the Minority Is More Knowledgeable

(based on Shurat Hadin, vol. VI, pp. 40-42)

[In connection to this week's Ein Ayah piece on the philosophy behind following the majority, we thought it would be interesting to explore a related halachic discussion. As background to the topic, one should be aware that in many shtetls, there was no "professional" *beit din*, nor even three talmidei chachamim. When a *beit din* was needed, the rabbi would include two others, even those with limited Torah education, and certainly nowhere near the rabbi's caliber.]

The Chida (Shem Hagedolim 10) cites a *machloket* among *Rishonim* about what to do when a much more knowledgeable *dayan* finds himself in the minority against two low-level *dayanim*. The Ra'avad says we follow the majority. He bases himself on the *gemara* (Yevamot 14a) that says that Beit Shamai were sharper than Beit Hillel and yet we accept the opinions of Beit Hillel, who constituted the majority. The Hagahot Oshri concurs.

The Sha'ar Ephrayim (10) cites Rav Hai Gaon who argues and says as follows: "If they are equal in wisdom, we leave the words of the individual and follow the words of the majority, and if the one is greater than the two, we follow the one who gives good reasoning for his words." The Ramban (Sanhedrin 32a) argues with Rav Hai Gaon. It seems that the disagreement is whether that which we follow the majority is a set concept of following a majority or whether we are to follow a "majority of wisdom," just that we assume until we know otherwise that the majority of people contains the majority of wisdom.

The Sefer Hachinuch (#78) says that the matter depends on the context of the *machloket*. In general, that which we follow the majority even when their ruling is considered of lesser quality is true only in a formal setting, such as Sanhedrin [or *beit din*]. What is special there is that there is a need for a set number of people and that the Torah explicitly commands us to follow the majority no matter what. The Minchat Chinuch (ad loc.) says that this is explicit in the fact that Beit Shamai did not have to rescind their rulings despite being the minority, as their acumen was important because their *machlokot* with Beit Hillel were outside the formal setting of Sanhedrin. The Hagahot Oshri says that even in regard to a *machloket* outside of *beit din*, we follow the greater in number, and even Beit Shamai stopped relying on their opinions after the Heavenly voice sided with Beit Hillel. The S'ma (25:18) understands the Rama as following the less compelling majority even for *machlokot* outside *beit din*.

The Shvut Yaakov (I, 137), related to being outnumbered by two ignorant "*dayanim*" and said that the majority wins, as long as there is one learned *dayan*, even if he is the minority *dayan*, to validate the *beit din*. The Sha'ar Mishpat (18:1) disagrees since, if the *beit din* is valid only due to the minority *dayan*'s expertise, how can they rule against him? He says that even the Ramban accepted the majority only when they were valid *dayanim*, just that the minority was exceptionally qualified.

In any case, most *Rishonim* and *Acharonim* indicate that, within *beit din*, we follow the majority even if they do not compare in wisdom to the minority opinion.

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