



Does the Majority Rule?

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Our *parashah*, as per its name “Mishpatim,” meaning “laws,” is full of statutes, many of which have served as the basis of the Jewish civil law and procedure. Indeed, many laws can trace their origin to our *parashah*: What happens in a case of murder or in a case of robbery, labor laws, what happens when one person’s property damages someone else, what if the damaged party is a human being, and so on. Not only do we find the laws themselves, but also how to adjudicate them: the role of the court, the role of oaths, the prohibition on accepting bribes, and the demand for truthfulness on all sides.

Our parashah presents a fascinating example of this phenomenon in its serving as the anchor for the well-known principle of “majority rule.”

As can be expected, when the Talmud develops these laws, the direct line between the verses in our Parashah and the principles and individual laws derived from them can be hard to follow. Sometimes the derivations are somewhat roundabout, or—more specifically—derived through the

techniques of *midrash*. Often, the broader context of the verses, teaches something fundamental or essential about the law at hand. Thus, an initial read will suggest a simple lesson, and a second read will produce a broader and more complex picture of the law. Our *parashah* presents a fascinating example of this phenomenon in its serving as the anchor for

the well-known principle of “majority rule.”

This principle is expressed throughout the corpus of Rabbinic legal texts, but is especially present in Massekhet Sanhedrin which deals with jurisprudential procedure. For example, the way that legal decisions are rendered in monetary cases:

משנה סנהדרין ג', ו'

שנים אומרים זכאי ואחד אומר חייב – זכאי. שנים אומרים חייב ואחד אומר זכאי –
חייב

Mishnah Sanhedrin 3:6

Two [judges] say that he is innocent and one judge says that he is liable—he is innocent. Two say that he is liable and one says that he is innocent—he is liable.

This is also the procedure for capital cases:

משנה סנהדרין ה', ה'

אם מצאו לו זכות פטרוהו ואם לאו עומדים למניין

Mishnah Sanhedrin 5:5

If they find reason to declare him innocent, they dismiss him and if not, they stand for a count.

This “count” is essentially a process of counting votes, to determine what the majority of the judges think about the case so that we can rule accordingly. And again, in the description of how the court adjudicates questions of ritual law:

בבלי סנהדרין פה עב

נשאלה שאלה בפניהם, אם שמעו - אמרו להם

Talmud Bavli Sanhedrin 88b

The question is asked before them, if they have heard [the proper ruling] they say [it] to them

meaning that if there is a tradition determining the *halakhab*, they quote the tradition and rule accordingly. However, in the absence of tradition they go according to the majority in this case as well:

ואם לאו - עומדין למנין. רבו המטמאים - טמאו, רבו המטהרין - טהרו

And if not, they take a count. If those who consider it impure are more numerous—they [the court] have determined it impure, if those who consider it pure are more numerous—they [the court] have determined it pure.

The scriptural anchor for this principle is: “You shall neither side with the majority to do wrong—you shall not give perverse testimony in a dispute, incline after the many (*rabbim*)” (Exodus 23:2).

This verse and the principle of following the majority has a most dramatic expression in the Talmudic story known as “Akhnai’s Oven” (Bava Metziah 59b). The heart of that story is a description of a bitter dispute between all of the scholars in the *Beit Midrash* (study house) and R. Eliezer alone. At the climax of their disagreement a heavenly voice is heard: “A heavenly echo emerged and said. What do you have against R. Eliezer? The law is according him in every case!” The heavenly echo decides that the law is rightly in accordance with R. Eliezer’s opinion. This should be the end of the discussion, the end of the story. However the reaction of the protagonists is not to accept the heavenly decree, rather to oppose it: “R. Yehoshua stood up on his feet and said: It is not in heaven!” and

thereby asserts his opposition to the heaven's decision.

The Talmudic narrator isn't satisfied with R. Yehoshua's reaction and seeks an explanation of his words. What does it mean to say that "It is not in heaven?" R. Yirmiyah's words are brought in response: "R. Yirmiyah said: For the Torah was already given on Mt. Sinai and we don't heed heavenly echoes, as it is already written in the Torah, 'incline after the many.'"

R. Yirmiyah's response contains a number of stages. First, he distinguishes between two distinct periods of time: before and after the giving of the Torah at Mt. Sinai. We can see our *parashah* and its laws serving as a watershed moment between these two separate time periods. What distinguishes between these two time periods? The next stage explains, "We don't heed heavenly echoes", emphasizing the word "we." R. Yirmiyah is explaining that 'we', the ones who inhabit the *Beit Midrash*, 'we' who control the judicial process, 'we' who live after the giving of the Torah, 'we' don't listen to heavenly echoes. Maybe others, living in a different period of time under different conditions would, but definitely not we who are here in this Beit Midrash at this historical moment. Definitely not us.

This brings us to the next stage, which essentially answers the question of what to do and how to decide if we aren't heeding heavenly echoes. How can we finalize decisions? This third component of R. Yirmiyah's statement is an expansion on a quotation from the verse from our *parashah* that we quoted above: "as it is already written in the Torah, 'incline after many'". Meaning, now decisions are made through majority rule—we follow the majority. Decisions aren't finalized by fiat of a Divine voice, rather by numbers, by counting the individual human voices and seeing where their greater numbers are.

The transition from following a heavenly echo or Divine declaration to following the majority of the opinions represented in the court is a significant shift of the location of decision making from heaven to earth. But this is not the only significant shift that R.

Yirmiyah's statement describes. It is also a shift from momentary or incidental ruling—each question has a unique Divine answer—to a jurisprudential process. Another fundamental difference between the “before” and “after” is who is making the decision, as this is seemingly a shift from the Divine to humanity.

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However, when R. Yirmiyah substantiates the shift from human beings by quoting a verse, he essentially anchors his position that one need not listen to heavenly voices by quoting a heavenly voice! According to R. Yirmiyah, the principle of following the human majority rule is Divine, it is

Sinaitic, the independence from God in the future was granted by God at Sinai. Thus, in place of the heavenly voice or echo comes the human process, the process of those who are but an image of God. Yes, it is not in heaven, but only in the narrowest sense.

What is so surprising and challenging in this, is what arises from going back into the biblical text, and reading this verse in its context. For in fact, when you read it in its context it seems to be saying the exact opposite of how R. Yirmiyah reads it! While R. Yirmiyah uses this verse to support the notion of majority rule, actually this verse is brought to condemn the following of a majority! “You shall **neither** side with the many/majority (*rabbim*) to do wrong—you shall **not** give perverse testimony in a dispute [so as] to pervert it in favor of the many/majority.”

The words of negation from the verse are not present when R. Yirmiyah is described quoting this verse in the Talmudic discussion, they are left out, thus leaving the reader with a selective quotation of the verse that ends up meaning the opposite of what it means in the

biblical narrative. In order to understand how it can be that our rabbis ground a core jurisprudential principle in a verse that seems, ostensibly, to reject it, we need to look more closely at the verse. “You shall neither side with the many/majority to do wrong—you shall not give perverse testimony in a dispute so as to pervert it in favor of the many/majority.”

This verse has a number of clauses. Only the last one, “to pervert it in favor of the many/majority” is quoted by R. Yirmiyah. This clause in the verse is preceded by a prohibition and says “you shall not give perverse testimony... to pervert it in favor of the many/majority.” This clause regards a situation of *riv*, dispute, and says: “you shall not give perverse testimony in a dispute.”

It opens with the prohibition “you shall not give perverse testimony (*lo ta’aneh*),” or “you shall not give perverse testimony... to pervert it in favor of the many/majority.”

Commentators have interpreted this clause in light of the prohibition in the ten commandments of, “You shall not bear false witness (*ta’aneh*) against your neighbor” (Shemot 20:13).

Meaning that this is a prohibition on false testimony. According to this, the prohibition of *lo ta’aneh* within the context of the verse in Mishpatim is forbidding one to allow the many to seduce him into giving false testimony. Similarly, the opening clause of the verse states that one should not be pressured by the majority or follow the masses toward what is bad and wrong. The verse provides a few scenarios in which that is a likely risk, and tells you that you should not join up with the many who are behaving contrary to morality and the law, *riv* seems to be one of these contexts.

There is something striking about this reading of the verse, as doing wrong and following the bad is always prohibited, and perjury is wrong whether you are doing it alone or doing it with others or just with their encouragement! The verse’s adding the context of a group of

people who are inciting evil, testifies that there is a need for a specific warning and prohibition when talking about a group that is tending towards the negative. It seems that the verse is not only instructing us that we should not bear false witness for evil or to bear false witness at all but specifically to not follow the group in these circumstances.

The verse assumes that there is the need for a specific prohibition of following the majority, a need to strengthen our resistance to doing the wrong thing when following the crowd is involved. The verse subtly intimates that there is a unique level of danger and liability when there is a group working towards a bad ends, there is a chance that we might be lenient and more inclined to just follow what it seems the many, “everyone” is doing.

The Midrash Halakhah explains that it can be difficult to hold a position that is contrary to the one held by those who are around you:

מכילתא דרבי שמעון בר יוחאי פרק כג
ולא תענה על ריב לנטות' - שלא תאמר בשעת מנין דיי שאהיה כרבי פלוני אלא
אמור מה שלפניך

Mekhilta deRabbi Shimon ben Yohai 23

“You shall not give perverse testimony... to pervert”—So you do not say at the time of counting [the legal positions] it’s enough for me to be like this rabbi. Rather say [what accords with] what is in front of you.”

How much more difficult is it to maintain your opinion, maintain your integrity, when it is in opposition to not just one opinion, but many, and in particular when one is a lone voice against evil. A close reading of the verse forces us to recognize how difficult it is, in fact, to not join up with the majority to do what is wrong. The positive Talmudic reading of “incline after the majority” and “do not follow the majority to do evil” create a composite statement.

Through it, the emphasis at the center of the story on this principle shifts from being a simple positive statement of following the majority to one that carries with it echoes of the warning that sometimes one can not and may not do or say what the majority determines. Even though it can be especially hard to stand up for your own opinion, stand up in the breach for what is right.

Let us merit to identify the good, and to be brave enough to follow it, to be for it even if that is not the direction that the majority is heading in.

Shabbat shalom.