

## The Life and Death of Majority Rule

This week's Torah portion is Mishpatim, which is Hebrew for 'laws' or 'ordinances'. The title is very appropriate because it contains no less than 53 commandments, 23 positive and 30 negative, which are collectively known as the Covenant Code. It is a primary source in Jewish Law.

I would like to focus on one of these laws. In Exodus 23:2, it says:

לֹא-תִהְיֶה אַחֲרֵי-רַבִּים, לָרֹעַ תֵּ  
Lo tihyeh acharei rabbim lera'ot  
You shall not follow the majority for evil

The meaning is clear: Don't follow the mob when you know what they are doing is wrong. Don't be swayed if a majority is against you and you know you are right. The rabbis of the Talmud deduced that if you must not follow the majority for evil, then surely you must follow the majority for good [Sanhedrin 2a]. They extracted from this verse the notion that decisions must be made by majority vote in the appropriate forum.

This is not full democracy, in that not everyone gets a vote: Only designated judges appointed to decide specific matters posed before them get to vote.

First, how many judges?

-Well, it cannot be one. It says in Pirkei Avot, "Do not judge alone, for no one may judge alone, except the One [meaning God]". [Pirkei Avot 4:8]

-It cannot be two or any even number, because our verse commands to "rule in accordance with the majority," [Ex. 23:2] and an even number may result in a tie, i.e. no majority.

-The minimum it can be is three, and that is the number of judges in a standard Jewish court, a bet din, which handles ordinary cases.

-For capital offenses and other life-and-death matters, there must be, not 3, but 23 judges, constituting a 'Small Sanhedrin'. Why 23? The answer is in the Talmud:

How do we derive that the Small Sanhedrin has only 23 members? It is said [in the Torah], "and the congregation shall judge... And the congregation shall deliver." [Num. 35:24-25] One congregation may judge [i.e. condemns] and the other may deliver [i.e. acquit], hence we have twenty [because a congregation is not less than 10]. But how do we know that a congregation is not less than 10? It is written [in the Torah], "[God said, referring to the 12 spies:] How long shall I bear with this evil congregation?" [Num. 14:27] Excluding Joshua and Caleb, we have 10. And how do we derive the additional 3?... [We need a majority of one to acquit and a majority of two to convict, so we must have at least 22. Since we can't have an even number, we add one and reach 23.] [Sanhedrin 2a]

Now, here comes the shocker. Having 23 judges *allows* for at least ten to argue for conviction and ten to argue for acquittal. But it does not *guarantee* it. What if the crime is so heinous and the evidence so overwhelming that no judge will argue for acquittal? Then, believe it or not, the defendant goes scot free. The logic here is that there is a spark of goodness in every person, because every person was created "b'tsellem Elohim", in God's image [Gen. 1:27], and if a tribunal cannot find it, bring it to the table and tie it to the case, it is not fit to judge. Note that, back then, there were no defense lawyers and no juries. The judges heard the case and the witnesses, then deliberated and rendered a majority verdict. This provision ensured that some judges would take on the role of defense lawyers, to avoid criminals going free. This point of Jewish law may be the source of the Western practice of giving a defense attorney to every defendant.

-Finally, a Great Sanhedrin of 71 judges was established, which served as the Supreme Court of Israel. Why 71? Because God told Moses in the Torah to assemble 70 elders to help him judge and govern Israel [Numbers 11:16.]. Adding Moses, this makes 71.

Our subject verse, "Follow the majority for good" was also used in a famous and critical story in the Talmud, which many call "the keynote of the Talmud". Let me read it to you:

[The rabbis were discussing whether a certain oven was ritually clean.]  
 -R. Eliezer brought forward every imaginable argument [to prove that it was clean], but [his colleagues] did not accept them.  
 -[R. Eliezer] told them: 'If the halachah agrees with me, let this carob-tree prove it!' At that point the carob-tree was uprooted 100 cubits out of its place (others say 400 cubits).  
 -[The rabbis] retorted: No proof can be brought from a carob-tree.'  
 -Again he said to them: 'If the halachah agrees with me, let [this] stream of water prove it [by flowing backwards]!' At that point the stream of water flowed backwards.  
 -[The rabbis] rejoined: 'No proof can be brought from a stream of water.'  
 -Again he urged: 'If the halachah agrees with me, let the walls of the schoolhouse prove it.' At that point the walls inclined to fall.  
 -But R. Yehoshua rebuked them, saying: 'When scholars are engaged in a halachic dispute, what business do you have interfering?' Hence they did not fall, in honor of R. Yehoshua, nor did they resume the upright position, in honor of R. Eliezer; and they are still standing [today] thus inclined.  
 -Again he said to them: 'If the halachah agrees with me, let it be proved from Heaven!'  
 - At that point a Heavenly Voice cried out: 'Why do you argue with R. Eliezer? The halachah agrees with him in all matters!'  
 -But R. Yehoshua arose and exclaimed, [quoting the Torah]: 'Lo bashamayim hi -- It is not in heaven.' [Deut. 30:12]  
 -What did he mean by this? Said R. Jeremiah: [He meant] that the Torah had already been given at Mount Sinai; [therefore] we pay no attention to a Heavenly Voice, because You, [God] have long since written in the Torah at Mount Sinai, 'Follow the opinion of the majority.' [Ex. 23:2 – our verse].

R. Nathan met Elianu HaNavi [Elijah the Prophet] and asked him: What did the Holy One, Blessed be He, do in that hour?  
 -[Elijah] replied, 'He laughed [with joy], saying, 'My sons have defeated Me, My sons have defeated Me.'  
 [Talmud , Bava Metzia 59b]

This extraordinary passage is no less than a declaration of independence by the rabbis. In it, the rabbis tell God that the Torah is out of His hands, and that human beings will make Torah decisions by majority vote, without interference from God. God evidently approved, and liked to see His children take charge so decisively. Rabbenu Chananel, an 11th century Tunisian sage, even said that the voice from heaven was a test of whether the rabbis would hold their ground, and that they passed the test.

In the end, Rabbi Eliezer refused to accept the majority decision and, as a result, was expelled from the Sanhedrin. But note that later Sages said that God and Rabbi Eliezer had gotten it right. The majority rendered the wrong decision. But no matter. The 12th century sage Nachmanides (the Ramban) said that people, even Sages, will make mistakes occasionally, but it is better to let them make mistakes a few times and render decisions applicable to all, rather than have different Jewish communities follow different rules.

So minority opinions are not always “wrong”, in the sense that the logic that led from the Torah to them is not faulty. The Talmud says of them, ‘Ellu v’ellu divrei Elohim Hayyim – These and these are the words of the Living God’ [Eruvin 13b]. Both interpretations are “right”, even though they may be contradictory. The Talmud also says:

If the Torah had been given in a fixed form, the situation would have been intolerable. What is the meaning of the often-recurring phrase "The Lord spoke to Moses"? Moses said before God, "Lord Of the Universe, make me know what the final decision is in each manner of the law. " God replied: "The majority must be followed. When the majority declares a thing permitted, it is permitted, and when the majority declares a thing forbidden, it is forbidden... The Torah is capable of interpretation, with 49 points [arguing one way] and 49 points [arguing the other way]."  
[Jerusalem Talmud, Sanhedrin 22a]

Well, majority rule is a thing of the past. The last Great Sanhedrin folded in the year 358 CE, yielding to Roman persecution. After that, no more central decisions in Judaism. From that point on, new halachic decisions were made by individual Sages, who made them stick only by virtue of the respect they inspired. And their decisions were sometimes controversial even centuries after their death.

It's a wonder we Jews lasted so long in recognizable form in spite of that.

- The Samaritans refused to accept the books of the Bible that came after the Torah and split off.

- The Karaites refused to accept the Talmud and split off in the 9th century.

- Both groups flourished for a while, numbering in the millions. The Karaites were reported to make up 40% of Jews at one time. But today their combined numbers are down to a few thousand.

-Hasidism came more than two centuries ago and promptly broke into dozens of independent sects.

-The last 150 years or so have seen a flowering of non-traditional Jewish movements in the West, each writing its own rules. The thinking was, and still is: You disagree with this or that traditional practice? Form your own movement! Associate only with those who agree with you, and vituperate against the others!

Freedom of religious thinking is a wonderful thing, but unity of tradition is also a wonderful thing. Who is to say who is right? Nobody. But the debate does not end here. There are still a few inconvenient facts to be considered. One of them is that the retention rates are much lower for offshoots. There is a deep abyss between the retention rates of secular, humanist, Reform, Reconstructionist, Renewal, or Conservative Jews on the one hand, and the much higher retention rates of traditional Jews on the other. I don't think anybody disputes the fact that the shortest book in the world is the Book of Fourth-Generation Reform Jews.

And the fragmentation is not confined to the left. Among religious Jews, in the last few decades alone, movements have sprung up that vociferously oppose the legitimacy of the State of Israel, that refuse to take up arms to defend the State, that even refuse to work for a living, as long as the State, or *somebody*, continues to support them as full-time students (which flies in the face of established halacha), that refuse to accept modern conveniences such as Shabbat elevators, and that generally work hard to impose more and more religious restrictions, over and above those of established halacha, by reinterpreting traditional teaching to suit their purposes. It is not just the do-less we have to contend with, but the do-more as well.

I miss the synagogue in Cairo, Egypt, where I grew up. It was, of course, nominally traditional, but in the Sephardic world everybody went to the same synagogue, whether they were on the far right or the far left or anywhere in between. Their personal observance was just that, a personal matter. They did not feel the need to create new movements that reflected their philosophy, complete with their own platforms and their own rabbis and their own seminaries and their own schools and their own butcher shops and their own synagogues.

If the past is any indication, all these movements will eventually wither away and die, causing huge drops in Jewish numbers. All, that is, except one. That one will carry Judaism into the far future. I don't know which one that is. But I do know this:

*Hinne! Lo yanum, velo yishan shomer Yisrael.*

Behold! The Guardian of Israel neither slumbers nor sleeps. [Ps. 121:4]

Shabbat shalom.