

THE TORAH WAY OF JUSTICE

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(What follows is a journalistic reconstruction from notes taken during a lecture by Rabbi Joseph B. Soloveitchik at the RCA Midwinter Conference in 1973. Weaknesses or defects are to be ascribed solely to our faulty transmission.)

1. INTERPRETING THE WORD מַמְחֵרֶת

A. The Day After Yom Kippur - The text deals with Moses judging the Israelites from morning to evening. וַיְהִי מִמָּחֳרָת וַיֵּשֶׁב מֹשֶׁה לִשְׁפֹט אֶת הָעָם. וַיַּעֲמֵד הָעָם עַל מֹשֶׁה מִן הַבֹּקֶר

. עַד הָעֶרֶב. (Exodus 18:13). This follows the episode of Yisro's arrival in the desert

and one would ordinarily interpret וַיְהִי מִמָּחֳרָת as the day after Yisro's coming. (The Ibn Ezra so understands it.) Rashi, the Ramban and the Mechilta, however, inform us that

מַמְחֵרֶת refers to מוֹצָאֵי יוֹם הַכַּפּוּרִים, namely, the day after Moses' descent from Mt. Sinai where he had acquired G-d's forgiveness for the "golden calf" sin. As Rashi tells us: וְאֵין פֶּרֶשָׁה זֹאת כְּתוּבָה כְּסֹדֶר. Our question is, why was this מַמְחֵרֶת

connected to the first Yom Kippur in Jewish history?

B. Analyzing the Word Etymologically - The word מַמְחֵרֶת always suggests a value judgment, indicating a contrast with the day preceding. It can have one of two meanings:

1. This day is worthy because it is related to and is an extension of the day before; the source of dignity is the yesterday but the today, too, has an enhanced status because it is appended in time to the Kedusha of the preceding day.
2. An alternative meaning of מַמְחֵרֶת is that this day is a drastic break from the yesterday which was shameful; the day before was negative and destructive, this day is positive and reaffirming. Thus, מַמְחֵרֶת can mean either a) Yesterday was the real day; this day but extends its glory b) This day is the real day; yesterday was a day of shame and negation.

C. Illustrating Both Meanings

1. (Exodus 32:30) וַיְהִי מִמָּחֳרָת... וַיִּשְׁמַע הָעָם אֶת הַדְּבָר הַרֹעַ וַיִּתְּאֲבָלוּ...

The yesterday involved merry making, orgies and wild dances before the golden calf

(וַיִּקְמוּ לַצְחָק); the מַמְחֵרֶת however, was for sobering up, regaining perspective

and for teshuva. Hence, this day's worthiness is noted in contrast with the yesterday.

2. (Lev. 23:15) וספרתם לכם ממחרת השבת

Here we deal with the lingering of Kedusha; the passage of time does not extinguish the Yom Tov experience; today is not bleak and dreary but rather a continuation of the day preceding.

3. מוסיפין מחול אל הקודש (יומא פ"א). Here we clearly deal with the mitzvah of extending a day of worthiness; not to let a great experience diminish through the passage of time. Chassidim, particularly, extended their Shabbosim in expression of the ממחרת spirit.

D. Relating It To Yom Kippur - Since ממחרת can have two meanings, as explained above, מוצאי יום הכפורים. Rashi felt impelled to indicate that in our text it signifies. The day of Yom Kippur is a peak experience of reconciliation, an enriching and cathartic influence upon one's personality, which must not terminate at the conclusion of the day. A day of משפט, whenever it occurs, should reflect the awe and kedusha of Yom Kippur.

II. THE CONCEPT OF פשרה

A. The פשרה Concept - In Sanhedrin 6b, we find רכי יהושע בן קרחה א' מצוה לכצוע. When litigants appear before a Dayan, he offers them two choices: a Din Torah where only the halacha p'sukah operates (the חושן משפט) or a פשרה where the הובע and the נחבע agree to have the Dayan resolve the litigation according to his own judgment, though it contradicts the strict halacha. Here the Dayan employs both the חושן משפט and other humanistic considerations in arriving at a compromise decision. Indeed, the Dayan refers פשרה to דין and the Rav had heard from his father that Reb Chaim almost always rendered פשרה decisions.

Here Halacha differs from Roman or modern civil law. The latter regards arbitration or compromise as contradictory or extraneous to the administration of justice. The judge can recommend out-of-court reconciliation but he must eliminate himself from this procedure because the role of the judge is the strict adjudication according to law. In Halacha, the פשרה decision is a juridical action, a legal procedure; it is not a deviation or

contradiction of the halacha, but it's preferred and finest fulfillment; פשרה is the function of a Dayan just as דין is his function; he acts as a Dayan, not as an arbitrator. The same halachic requirements are found in both; פשרה צריכה קנין (the קנין sets up the דין; it doesn't connote the prior relinquishing of rights); אין דנין בלילה; כ"ד של הדיוטות, etc.

The concept of פשרה is based on ethical and metaphysical considerations. In Sanhedrin 66, the idea of פשרה is derived from two Scriptural verses and both verses are needed because each contributes another aspect to justify the institution of פשרה. One aspect responds to a social-ethical need, namely to attain שלום in society; the second aspect is metaphysical, namely, that absolute right or wrong eludes finite man.

B. Verse One: The Ethical Consideration

זכריה ח' - "אמת ומשפט שלום שפטו כשעריכם" והלא במקום שיש משפט אין שלום ובמקום שיש שלום אין משפט אלא איזהו משפט שיש בו שלום.

In a strict דין situation, there is משפט but no שלום because one of the parties is vanquished, humiliated and resentful. The issue is resolved but the people involved remain in conflict; hatred and antagonism intensify; society is in disarray. The secular judge is indifferent to this failure; שלום is outside his jurisdiction; his decision, governed only by law, inevitably involves victory for one and defeat for the other. The Torah, however, wants the דין to be not only a magistrate but a teacher; to ask both parties to retreat from points of advantage; both, he tells them, are wrong; he enlightens them that no conflict justifies emotional rancor; this is teaching, not just judicial action; this is the real meaning of the word שופט as we will shortly explain.

In illustration of above, note מכילהא on Shemos 18:16

"ושפטתי בין איש ובין רעהו" - בין איש זה הדין שאין בו פשרה. ובין רעהו - זה הדין שיש בו פשרה ששניהם נפטרים זה מזה כרעים.

Also on Pirke Avot 1:8

אל תעש עצמך כעורכי דינים - וכשיהיו בעלי הדין עומדים לפניך יהיו בעיניך כרשעים וכשנפטרים מלפניך יהיו בעיניך כזכאין כשקבלו עליהם את הדין.

This means: Do not assume the omniscient role of all-knowing judges who can determine matters with absolute certainty; only G-d is an **קל עורך דין** (the word **עורך** means that all details are clearly set before us as on a **שלחן עורך**); tell them, as they stand before you that both have elements of wrongness in their case; as a consequence, when they leave, they will both feel exonerated and friendly; in a **פשרה**, both reduce their claims and give something up, then both will feel **כזכאין**.

C. Verse Two: The Metaphysical Consideration

(שמואל ב - ח') "ויהי דוד עושה משפט וצדקה" - והלא כ"מ שיש משפט אין צדקה, וצדקה אין משפט, אלא איזהו משפט שיש בו צדקה.

Once again, only in **פשרה** do we also attain charitable justice.

In secular law, the Aristotelian principle of contradiction operates, that if A and B are mutually exclusive and contradictory, then if A is right, B must be wrong; if B is right A must be wrong; both A and B can't be right. In accordance with this principle, the strict law decides for only one of the litigants. The Halacha, however, deals with mutually exclusive concepts and uses them both, on the premise that right and wrong in the finite realm is never absolute. There is no infinity for man even in the moral realm. So man is metaphysically both right and wrong; in a **פשרה** both win and both lose; both relinquish something, not as a compromise of their rights but as the juridical essence of **צדקה**; neither triumphs or is vanquished. There is no malicious joy or resentful humiliation. Thus, **פשרה** is morally just and is not merely a social expedient.

The halachic compatibility with contradictions is illustrated with

שני כתובים המכחשים זה את זה, עד שיבא הכתוב השלישי ויכריע ביניהם.

This does not suggest that any one verse is wrong but, rather that both are valid. The third verse, indicating the halachic course, can not nullify the validity of the other two verses.

III. THE ROLE OF A **שופט**

What is a **שופט**? - He is not the same as a **דיין** or a magistrate, rather a **שופט** deals with the totality of human relations, the whole gamut of human needs, both material

and psychological. In the קבלת שבת psalms, we note the elation and rejoicing in nature as G-d will come to judge the world.

ישמחו השמים ותגל הארץ... יעלו שדי... כי בא לשפט הארץ וכו'...

Also שמעה ותשמח ציון ותגלנה כנות יהודה, למען משפטיך ה'.

What is the cause of this ecstatic rejoicing? Surely G-d's judgment should fill us with trepidation as in the ונתנה חוקך. The answer is that G-d as שופט is coming to commune with the world, to be close to His creation, to give friendship to man, not necessarily to judge, examine and to condemn man. Only now can we appreciate the rapture of G-d's coming.

The ספר שופטים is translated in both Greek and the Latin as "Book of Judges". Actually, Devorah was שפטה את ישראל בעת ההיא which means that she guided and taught; nowhere do we read of actual judging; does a judge act like a queen, appoint army heads, lead in war on Sisra, pursue an enemy or sing the hymn of Devorah? When the verse says ויעלו אליה כני ישראל למשפט, it means for comfort, encouragement, and understanding. This is inherent in the word שופט. Similarly, so with all the other Judges.

A further proof of the broader meaning of שופט is indicated in the fact that Moses was busy with people מן הכקר עד הערב (Ex. 18:13). What kind of litigations could exist in a desert economy where one's clothing did not wear out, food descended as Mannah with regularity, hoarding was impossible because all excess deteriorated. Apparently, the total spectrum of the שופט involved Moses, extending love, friendship, psychological succor for the scars and nightmares of the previous servitude, the myriad of human problems of former slaves. Yisro, accustomed to the concept of a דיין who is concerned only with legal adjudication couldn't understand why Moses sat with regal airs of an oriental monarch יושב כמלך וכולם עומדים. והוקש הדבר ליחרו שהיה מזלזל ככבודן של ישראל להוכיחו על כך (רש"י).

Actually, their standing was a spontaneous gesture of friendship, to be close to Moses as to a friend, not a king. The word used by Yisro is נצב which means standing at attention, a sign of subordination, a state of readiness to serve; the word used by the Torah, however

is ייעמד which simply refers to a physical posture in contrast to Moses' sitting and therefore connotes no demeaning servility.

The reply of Moses to Yisro was three fold, as explained by Ramban and Rashi, namely that we are dealing here with the broader concept of a שופט and not solely with a דיין. His three responsibilities were a) Pray for Them (כי יבא אלי העם) (לדרש אלקים) The Ramban explains that it refers to תפלה; the people wanted Moses to intercede for them, to share their agony and troubles as a friend. Also, b) To Be a Judge (כי יהיה להם דבר בא אלי, ושפטתי וכו') not as a דיין like Yisro was in Midyan, but with פשרה, to ensure that they will remain בין איש ובין רעהו with שלום and צדקה being combined with משפט. Finally, c) To Be A Teacher - (והודעתי את חקי האלקים ואת תרתיו).

IV. SUMMATION

Now we understand that when ממחרת it was always a וישב משה לשפט את העם of מוצאי יום הכפורים, for Yom Kippur is a day of judgment and reconciliation. On the one hand we say מי יזכה לפניך בדין but then we proclaim אחה נותן יד לפושעים. Thus, both the חושן משפט and the ממחרת combine to form the שלום and צדקה of משפט. The subjective humanistic judgment of the דיין may legitimately be combined with the strict halacha in determining the final P'sak, in the form of פשרה.

PREVIOUS EFFORTS

This journalistic reconstruction of an address by Rabbi Soloveitchik is our fifth effort. Previous productions may be acquired as follows:

- No. 1 "Lecture On Ten Commandments" (Previously appeared in RCA Mah Nishma); copies available from R.C.A. Office.
- No. 2 "Four Tisha B'Av Themes" (Previously appeared in RCA Mah Nishma); copies available from R.C.A. Office.
- No. 3 "Adam and Eve" - nature of man, woman, marriage and an explanation of Genesis Chapters 1 and 2; available from Alumni Affairs Office of Yeshiva University 186 Street and Amsterdam Avenue, New York, New York 10033
- No. 4 "A Pesach Lecture" (Copies available from the R.C.A. Office).