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חרות ואחריות

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"Taking Responsibility for Torah"

(WHEN) SHOULD HALAKHAH BE ENFORCED

Rabbi Aryeh Klapper, Dean

America has a "wall of separation" between synagogue and state, whereas in Israel the civil courts can be called upon to enforce the orders of state-recognized Rabbinical courts (*batei din mamlakhtiyim*). This difference was brought to public attention most recently when the Israeli police arrested a Masorati rabbi for failure to obey a *beit din* summons (not, as many reported, for performing an unauthorized wedding; that was the subject of the summons, not the cause for the arrest). Such cases test whether Jewish, and specifically Orthodox, support for religious freedom in the U.S. is a substantive commitment or rather a pragmatic concession to the realities of life as a small religious minority.

Here are two other ways in which the depth of that commitment can be tested.

First, Israeli courts have the authority to impose sanctions such as confiscation of passports and drivers' licenses or even imprisonment on men who refuse a *beit din's* order to divorce their wives. Do we support the utilization and even strengthening of such measures, such as the recent extension of this authority to Jewish non-citizens passing through Israel?

Second, consider the opening of this week's parshah (Devarim 16:18)

שִׁפְטִים וְשֹׁטְרִים
תִּתֶנּוּ לָךְ בְּכָל־שַׁעְרֶיךָ
אֲשֶׁר יִקְנֶה אֶל־הֵיךְ נָתַן לָךְ
לְשֹׁטְרֶיךָ
וְשִׁפְטוּ אֶת־הָעָם מִשִּׁפְט־צֶדֶק
Shoftim and shotrim
*you must place for yourself in all your gates
which Hashem your G-d is giving you
by tribe*

They will be shofet the people mishpat tzedek.

Rashi defines the nouns *shoftim* and *shotrim* as follows:

שִׁפְטִים = דִּינֵינָהּ הַפּוֹסְקִין אֶת הַדִּין.
וְשֹׁטְרִים = הַרְדִּים אַחַר מִצְוַתוֹם בְּמִקְלָה וְרָצוּעָה עַד שִׁקְבַּל עֲלָיו אֶת דִּין הַשּׁוֹפֵט
Shoftim = *judges who decide the law*

Shotrim = *those who enforce their commands with baton and strap until they accept the judge's ruling*

This verse seems to mandate the establishment of an executive – call them police, sheriff, or marshals – tasked with enforcing the rulings of the halakhic judiciary.

Rabbi Shmuel David Luzzatto (SHADAL; his commentary is now available online at alhatorah.org) sharply disagrees with Rashi.

אִין סָפֵק כִּי הַשּׁוֹטְרִים אֵינֶם שְׁלִיחֵי ב"ד הַרְדִּים בְּמִקְלָה
כִּי בְּמִצְוַת הַרְדִּים בְּמִקְלָה הֵיוּ נִקְרָאִים נוֹגְשִׁים, לֹא שׁוֹטְרִים
וְלִמְעַלָּה (א', ט"ו) אָמַר
"וְאָקַח אֶת רֹאשֵׁי שְׁבֵטֵיכֶם אֲנָשִׁים חֲכָמִים וַיְדוּעִים וְאֵתְּן אוֹתָם רֹאשֵׁי
עֲלֵיכֶם וְגו' וְשׁוֹטְרִים",
וּבְדַבְרֵי הַיָּמִים ב' י"ט: "א
"וְהָנָה אֲמַרְיָה כֹּהֵן הָרֹאשׁ וְגו' וְזַבְדִּיהוּ הַנְּגִיד וְגו' וְשׁוֹטְרִים הַלְוִיִּם
לְפָנֶיכֶם",
וּבִהְיוֹשֵׁעַ ח:ל"ג
"וְכֹל יִשְׂרָאֵל זָקְנָיו וְשׁוֹטְרִים וְשׁוֹפְטֵי",
וְהָנָה הַשּׁוֹפְטִים הֵיוּ דָנִים בְּמֵה שְׁבִין אָדָם לְחִבְרוֹ, אוּ בְּבֹא עֲדִים עַל אִישׁ
שְׁחָטָה,
וְהַשּׁוֹטְרִים הֵיוּ מְשִׁיחִים עַל שְׁלוֹם הַמְּדִינָה וְגוֹזְרִים גְּזֵרוֹת וְהַנְּהַגוֹת עַל
הָעָם

*There is no doubt that the shotrim are not the agents of *beit din* who enforce via baton*

because in Egypt the baton-enforcers were called nogsim, not shotrim and above (Devarim 1:15):

Moshe said: "I took the heads of your tribes, men wise and known, and I placed them as heads over you . . . and as shotrim", and in II Chronicles 19:11:

"Here Amaryah the Priest and Zevadyahu the nagid . . . and the Levites as shotrim before you and in Yeshoshua 8:33:

"and all Israel with its z'kenim and shotrim and shoftim." So the shoftim judged in interpersonal matters, or when witnesses came that a man had sinned, while the shotrim would oversee the peace of the state and decree decrees and practices on the people.

Shadal may have a strong **textual** case against limiting the role of the *shotrim* to the physical enforcement of court orders. But his argument that they constituted a separate

branch of government charged with issuing decrees has no textual basis at all! Rather, it seems to me, his interpretation may reflect a political conviction that the judicial and legislative powers of the state are best separated, or else he had lots of terms for leaders and needed to find something unique for each category to do.

Rashi's reading however has a strong **contextual** basis. Our verse begins by mandating the appointment of both *sboftim* and *shotrim*, and yet concludes that their single purpose is to be *shofet*. This strongly indicates that the role of the *shotrim* is subsumed with that of the *sboftim*, and that they are support personnel rather than independent actors.

However, support personnel need not be tasked with enforcement specifically. I learned from Rabbi Abraham Halbfinger of blessed memory that justice always depends on efficient administration. The best of batei din with the best of intentions, handling divorce and conversion cases with great sensitivity and deep personal attention, but with a filing system that often misplaces vital documents, will produce more and worse long-term injustices than an impersonal and callous beit din which keeps perfect records. One cannot expect *tzedek* from the best of *sboftim* unless they have the right personnel and system for keeping track of vital documents, or *shtarot*. Some of the worst problems with batei din in both America and Israel are the result of underfunding such vital background positions, and/or of underappreciating how important it is to fill those positions well.

But it is also true that justice ultimately also requires enforcement. Bad people do not do the right thing by choice when self-interest points the other way; and good people can be stubborn in their mistakes, for various reasons. A system of law that depends on entirely voluntary submission to the law and to judicial authority will end in the tyranny of bad people. This is why competent American batei din do not agree to hear financial cases unless both sides sign secularly enforceable binding arbitration agreements. Otherwise, bad people will take good people to beit din and if they win, collect, and if they lose, simply move on to secular court.

At the same time, enforcing the law when it lacks broad social support usually generates different sorts of injustices. It becomes a tool of power - whether in the hands of a minority or a majority - rather than a tool of justice.

Halakhah regarding marriage, divorce, and Jewish identity is therefore often trapped within a conflict of values. On the one hand, the fact that so many Jews reject the authority of halakhah means that efforts at

enforcement are often, and often correctly, perceived as powerplays by specific subcommunities rather than as pursuits of justice. On the other hand, leaving the area completely voluntaristic leaves one spouse at the mercy of another at the moment of greatest conflict and antagonism, and leaves converts subject to the whims of particular subcommunities, bureaucrats, and individuals.

One might argue that halakhah should meet these challenges by divesting itself of all non-personal implications. This seems to me both impossible and wrong. Jewish status is inherently a communal matter; to argue for the complete separation of religion and identity is to undo the fundamentals of Judaism. I think it is also reasonable for marital status to be an issue of communal concern and recognition. The breakdown of a common understanding of marriage may make that an untenable position in the progressive West; and yet that most American liberals still seek state recognition of a broader range of marriages, rather than advocating for the abolition of marriage as a state-cognizable category, may say something important (even for those of us who think that the time has come for the state to completely remove itself from the business of marriage, and either to treat people purely as individuals, or else to let them form economic/domestic partnerships as they wish without any notion that such partnerships entail emotional or sexual elements or commitments).

There cannot be true *mishpat tzedek* without *shotrim*. Often this means simply that our society cannot achieve true *mishpat tzedek*. Often nothing positive will be accomplished by appointing more *shotrim*, or by giving the existing *shotrim* more power. Power contributes to *tzedek* only if it is grounded in legitimate authority, and legitimate authority requires the consent of the governed.

There is no reason or basis for aspiring to have *shotrim* enforce all of halakhah on a community which rejects its authority. An immediate task for a halakhically committed community is to build moral authority for the Law in the areas where halakhah requires enforcement to produce *tzedek*. To do that, we need to demonstrate our own commitment to *tzedek* within *halakhah*. In both Israel and America, this means putting serious time, money, attention and political capital into building a beit din system that is highly professional and capable of building moral consensus across communities.