

CENTER FOR MODERN TORAH LEADERSHIP



IN THE ABSENCE OF SHOTRIM – SHOFTIM AND SHOFTOT

By Rabbi Aryeh Klapper

“You must place for yourself *shoftim*/judges and *shotrim*/enforcers in all your gates”. Two recent articles by wonderful Modern Orthodox thinkers challenge the Modern Orthodox community to take this opening command of Parshat Shoftim partially to heart. Mr. Michael Feldstein contends in The Jewish Link¹ that our rabbis should be receiving more questions about financial ethics, i.e. serving more often as *shoftim*, and Rabbi Itamar Rosensweig argues² on the Beit Din of America website for relating to the financial beit din as a central communal institution. Neither of them argues for the reinstitution of *shotrim*, however.

These challenges emerge naturally from our prayers three times each day for G-d to fulfill His promise to “restore our *shoftim*/judges as at first and our *yoatzim*/advisers as at the outset” (Yeshayahu 1:26). Note that the promise makes no mention of *shotrim*, nor do our prayers.

As with ultimate Redemption, it is possible to view the Divine promise as excusing us from political responsibility. Our role in bringing about its fulfillment would then be limited to self-improvement and theurgic prayer.

Radak may take this position in his commentary to Yeshayahu 1:26:

זה יהיה בימות המשיח
שיכלו הרשעים כלם,
ושארית ישראל לא יעשו עולה ולא ידברו כזב
This will be in the Messianic age,
when all the wicked will be ended,

and the remainder of Israel will do no crookedness and
speak no deception

Radak implies that the restoration of ideal *shoftim* and *yoatzim* requires a prior cessation of the wicked and of dishonesty.

This seemingly leads to paradox. A financial-issues beit din functions ideally when it can assume the honesty and good faith of all litigants. But do people of honesty and good faith require a beit din?

Yes. In an honest world, two people suing each other in beit din are in exactly the same position as one congregant asking her rabbi; everyone just wants to know what the right thing to do is, and to be sure that they are properly fulfilling all their responsibilities. The beit din in such a situation exercises authority unconnected to power. They are *shoftim* with no need for *shotrim*.

The situation is very different when one or both litigants may be acting in bad faith, and the beit din must enforce its jurisdiction and eventually its ruling if justice is to be had. Here power is necessary, and power famously tends to corrupt.

Less famously, but perhaps more truly, powerlessness tends to corrupt. Let me explain how this applies to American batei din.

Batei din have no direct enforcement power under American law. They acquire indirect power only if all relevant parties sign a binding agreement to arbitrate in beit din and accept the outcome. When a case goes to beit din without such an agreement, a losing party can then sue in secular court as if the beit din never happened. The result is that beit din becomes most useful for con artists suing halakhic suckers – they can collect if they win, because the other side will accept the verdict, and relitigate without prejudice in secular court if they lose. A beit din whose major constituency is con artists will inevitably come to resemble them. *Shoftim* without *shotrim* are a bad idea in a world of tricksters.

The proper response is for batei din to refuse cases unless both parties first sign a binding arbitration agreement. This is in fact Beit Din of America’s policy. So we can adapt Rabbi Rosensweig’s question as follows: Why don’t more Modern Orthodox Jews sign more such agreements?

A charitable answer is that these agreements work only if both parties sign, and Modern Orthodox Jews conduct most of their business outside their community. But as Rabbi Rosensweig correctly notes, there is a clear

¹ <https://jewishlink.news/should-we-be-asking-more-halachic-questions-of-our-rabbis>

² <https://bethdin.org/the-beit-din-as-a-basic-institution-of-jewish-life/>

exception to this reality, namely divorce. Happily, the vast majority of Modern Orthodox couples sign binding arbitration agreements before their Jewish marriages for all issues related to the delivery and receipt of a get and to “The Prenup”. (May we get to 100% soon, and may this expand to other communities!) They are given the opportunity to extend that agreement to cover the financial issues of marital dissolution, but almost always refuse, on the advice of lawyers, parents, friends, and sometimes even Orthodox rabbis. Why? I think there are two good reasons.

The first is that an authority structure will deliver justice only if it is regulated, meaning that it has a clear set of procedures and goals, and accountable, meaning that there are consequences for failure to adhere to those procedures and goals. The Beit Din of America, which employs Rabbi Rosensweig, has made admirable strides in that regard over the past several decades. But it may be alone in that regard within Modern Orthodoxy.

The second is that justice in matters of money and property is largely a function of expectations. When people dispute about a transaction, the justest outcome in most circumstance is generally the outcome they would reasonably anticipate. Law therefore cannot yield justice if people can’t know in advance how the law will be decided. Even the most-qualified and best-intentioned *shofetim* can decide justly only on the basis of a properly developed set of precedents.

This points to a second seeming paradox. Batei din can yield justice only after many people have used them, but justice-seekers should not use batei din until after many people have used them. So we’re back to a beit din patronized only by grifters.

One solution to this paradox is to minimize or eliminate the arbitrage between batei din and the secular courts, using principles such as *dina demalkhuta dina*. The secular courts have a record extensive enough to enable justice, and that way, parties who expect to win in secular court can agree to arbitrate in beit din without being suckers. Over time, a beit din that develops a reputation for probity and honesty will be able to carve out distinctively Jewish and yet fully modern doctrines to be applied when parties seek halakhic arbitration, and genuine cases of first impression will occasionally arise.

In this regard, I think Rabbi Rosensweig’s use of the relevance of the ketubah as an argument for beit din is misplaced. *Bimchilat kevodo*, something has almost certainly gone badly wrong if a contemporary beit din ever considers the value of a ketubah as a serious component

of its deliberations. In the absence of a clear prior valuation, the lowest amount will always be the outcome, since the husband can claim “*kim li*” (= that’s the halakhic position I follow), and one cannot obligate payment in the face of a valid such claim. Moreover, even the highest possible evaluation of the ketubah is unlikely to yield an amount approaching the outcome of equitable distribution or community property, the two most common divorce regimes in American law. To my knowledge, reputable batei din simply ask the woman at the end to explicitly acknowledge that the husband’s ketubah obligations are satisfied by the divorce settlement.

A second solution to this paradox is to provide an ideological incentive for going to beit din that is worth a certain amount of financial risk.

Here is one possible such incentive. The qualms of some rabbonim and poskim continue to constrain efforts to grant women formal halakhic authority, and that dynamic sets up a vicious cycle in which many interested and talented women are unable to access the kind of education that would enable them to contribute creatively to top-level halakhic discourse. They settle for educations that leave them far short of equally interested and talented men, and this sets up its own vicious cycle of disrespect.

However, to my knowledge there is a halakhic consensus that women can serve as halakhic judges in financial cases if both parties agree to accept their jurisdiction. Compulsory jurisdiction might raise issues – but we have no *shotrim*. What if we began a program to train women as judges in such cases? That would require more years and higher standards than any existing program, as is the case for *yadin yadin* programs for men. But would it radically increase the use of halakhah for financial matters, in the manner that the availability of *yoatzot halakhah* greatly increases the number of *niddah* questions asked? Would the position of halakhic arbitrator provide a plausible source of employment that would enable learned women to invest the years necessary to achieve their potential as halakhic scholars?

The question is hypothetical, but if we will it, it is no dream. Please contact me at moderntorahleadership.org if you are interested in supporting such an effort.

Shabbat shalom!

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