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MAJORITY RULE AND DISPUTED ELECTIONS: AN INTRAHALAKHIC PERSPECTIVE

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As understood by Rabbinic tradition,

- a) Devarim 17:18-23 ("*lo tasur*") creates an obligation for individuals to obey rulings of the Great Sanhedrin.
- b) Devarim 30:11-14 ("*lo bashomayim hi*") declares that such rulings must derive from accountable human reason rather than claims of Divine partisanship.
- c) Shemot 23:1-4 ("*acharei rabim l'hatot*") establishes majority rule as the decision-making mechanism when there is disagreement within the Sanhedrin.

However, careful reading of the tradition suggests that the first two rules are not absolute.

- a) The opening of Mishnah Tractate Horayot makes clear that under some circumstances some individuals must follow their own positions against the Sanhedrin's ruling – which individuals, circumstances, and rulings is of course the subject of disagreement.
- b) Eiruvim 13b reports a position that the halakhah follows Beit Hillel against Beit Shammai because a Heavenly Voice (*bat kol*) said so.

What about majority rule? In a sense the exceptions in Mishnah Horayot limits the power of majorities. But they deal with cases where an individual has legitimate certainty based on human reason that the Sanhedrin has erred. Moreover, the exceptions apply only to the individual who possesses such certainty – the majority establishes the law for everyone else. Thus in Mishnah Eduyot Chapter 5, Akavia ben Mahal'el holds fast to four idiosyncratic positions against the majority of his colleagues, even though Talmud Sanhedrin 88a informs us that those positions were formally adopted as a ruling of the Sanhedrin. (There is a dispute as to whether Akavia followed his own rulings in practice.) Nonetheless, Akavia on his deathbed admonishes his son to follow the majority, because his son has no basis for certainty. So majority rule still stands as the basis for decisions where each side acknowledges a possibility that the other is correct.

The stronger challenge to majority rule emerges from Eiruvim 13b. Why was a Heavenly Voice necessary to establish that the law followed Beit Hillel? Shouldn't the law simply have followed whichever positions held the majority on each specific issue?

This challenge is embodied in a *beraita* on Sanhedrin 88b. The *beraita* begins by declaring that "Originally, disputes did not multiply in Israel." Rather, whenever disagreement arose, the issue would be brought to the local *beit din*, and if not settled, would climb a ladder of courts until it reached the Great Sanhedrin, where it would be decided by consensus, or failing that, by majority vote. However, "When the students of Hillel and Shammai multiplied . . . disputes multiplied in Israel." Majority rule no longer worked to establish the law. Why not?

Talmud Yebamot 13b-14a provides the answer. Beit Hillel held the majority. Among both the first generation of Amoraim, in both the Palestinian and Babylonian traditions, there was a dispute as to whether Beit Shammai followed their own positions in practice.

ומ"ד עשו,

כי אזלינן בתר רובא - היכא דכי הדדי נינהו.

הכא - בית שמאי מחדדי טפי.

The position that Beit Shammai followed their own positions holds that we follow the majority only when the scholars on each side are equivalent

but here, Beit Shammai were sharper

Essentially, Beit Shammai held that Beit Hillel's majority was generated by an artificial expansion of the franchise to scholars of insufficient stature. Beit Hillel may have responded either by arguing that all scholars should vote if they met a minimum standard, or that their own scholars were actually of equivalent stature to Beit Shammai's. Beit Hillel might have further claimed that Beit Shammai's standard was gerrymandered, i.e. that they had picked a cutoff point for voting rights specifically **because** it gave them a majority.

This metadispute, in which each side claimed a majority of legal votes, could only be resolved by a Heavenly Voice. Moreover, Yebamot 14a allows for the possibility that the Heavenly Voice was also insufficient, and Beit Shammai held to their positions in practice even afterward on the basis of *lo bashomayim hi*.

Regardless, what happened before the Heavenly Voice emerged? The end of Chapter 1 of Mishnah Yebamot, as understood by the Bavli, explains that they would inform the

other side if someone was a *mamzer* by its standards but not theirs, or if food was *tamei* by its standards but theirs. They found a *modus vivendi* that enabled community during a constitutional crisis.

But enabling social community does not make the political difficulties go away. Mishnah Shabbat Chapter 1 records 18 controversial, generally isolationist decrees that were passed on a single day, in a single place, when Beit Shammai held the majority. The Talmud Yerushalmi tells how this majority was obtained: “The student of Beit Shammai stood below, and would kill (*bayu borgin*) the students of Beit Hillel.” The commentators seize on the “would” to claim that violence was threatened, but not carried out, but the point remains the same: Beit Shammai’s majority was achieved by force.

These decrees subsequently obtain a unique halakhic status such that they could not be repealed by even the greatest of successor courts “because they stood up for them with their lives.” It seems plausible to read this as a euphemistic way of saying that violence might recur if they were repealed. The political system remained fragile, as in the United States after the various compromises that maintained the union up until the Civil War.

The Heavenly Voice sought to restore the legitimacy of majority rule. But fairly soon, the Sanhedrin itself falls, perhaps because it cannot handle the political divide over whether/when and how to rebel against Rome. Halakhic Judaism develops in pluralistic modes resembling the original *modus vivendi* between Beit Shammai and Beit Hillel, in which different jurisdictions cooperate and are transparent with each other without feeling a need to settle their disagreements. Palestinians and Babylonians, Ashkenazim and Sefardim, and so on.

But there is an instinct, formal or informal, that halakhah cannot survive pure anarchy. At least within jurisdictions, there must be a decision mechanism, and maybe for some new issues, or when facing new situations, there must be a way to settle issues for the entire Jewish people. Generally the practical mode is consensus or at least supermajority rather than majority, but the rhetoric tends to cite *acharei rabim lehatot*, especially when the conversation is among scholars and the lay population has clearly not reached consensus. The question of who gets the franchise naturally recurs. Should only the greatest scholars have a voice? Or anyone with semikhah (from a recognized yeshiva, who publicly maintains an approved ideology, etc.).

The above has been an attempt at a descriptive political history. I’ve tried to show why majority rule has not been a sufficient mechanism for maintaining a unified halakhic

community, and to some extent how halakhah has nonetheless survived.

Very likely the implications are more general. For example: The legitimacy of majority rule always depends on a metaconsensus about who gets to vote. When ideological camps form, there is a temptation to challenge that metaconsensus and disenfranchise ideological opponents. This becomes easier when ideology morphs into identity (Beit Shammai, Beit Hillel), because it becomes much easier to know who belongs in which camp, and because people start voting as blocs even on issues with minimal ideological implications. Nonetheless, at least at the outset everyone continues to acknowledge that legitimacy is derived from the **principle** of majority rule, and that principle becomes too obviously absurd if people are disenfranchised explicitly because of their opinions. One needs to find a standard for exclusion that practically ensures one’s majority but is formally unrelated to any of the substantive issues. That standard can be race, gender, religion, ethnicity, or academic acuity, etc.

The Heavenly Voice did not resolve these issues within halakhah. It cannot tell us whose semikhah counts nowadays, or what degree of scholarship gives one a full halakhic vote, even if we discount the issue of gender. Achronim dispute whether the Voice even established a principled bias in favor of a broader franchise – maybe it simply told Beit Shammai that they were wrong in believing themselves sharper than Beit Hillel. Maybe the problem was that Beit Shammai couldn’t appreciate other *darkei halimmud* (learning methodologies) and mistakenly assumed that anyone who learned differently learned worse.

Political community is always fragile, and sustaining it requires willingness on the one hand to submit to a fair decision-mechanism, and on the other to recognize the importance of compromise on issues where one or both sides cannot submit with integrity. When compromising is too deep a violation of integrity, community becomes impossible if one forces a decision – but maybe no decision is necessary.

My hope is that articulating these principles helps us act more thoughtfully, carefully, and courageously, in all our communities.