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DOES THE TRUTH HAVE HALAKHIC AUTHORITY? PART 1

By Rabbi Aryeh Klapper

Mishnah Eduyot 1:5-6 records two rationales for the inclusion of minority opinions in halakhic texts even though the law follows the majority. The first is to allow subsequent courts to rely on such opinions. The second is to prevent subsequent courts from relying on such opinions.

The second opinion is attributed to a minority. However, Tosefta Eduyot reverses the attributions.

Bottom line, the inclusion of an opinion attributed to a minority generally provides no evidence one way or the other as to whether it can be relied on by subsequent poskim.

However, the first rationale is dominant with regard to positions mentioned in the Shulchan Arukh/Mapah. These presumptively carry enough authority to be relied on in some situations.

Conversely, the deliberate exclusion of a position from the Shulchan Arukh/Mapah is generally understood as an effort to deny it all halakhic authority. "Exclusion" means that Rav Yosef Caro and Rav Moshe Isserles were aware of the position and omitted it.

Is contemporary halakhah bound by such exclusions?

A halakhic position may "lose" because of pragmatic bet-hedging rather than outright rejection. Choosing one position over another may not prevent us from treating the issue as subject to equipoise or near-equipose doubt. Such doubts are often used as a basis-among-others for leniency. Is it legitimate to construct such "double-doubt" arguments on the basis of a position that the Shulchan Arukh omits?

Rav Ovadiah Yosef (Yabia Omer 7:44) raises this question with regard to chametz-containing mixtures on Pesach.

Shulchan Arukh OC 447 states that chametz cannot be nullified in a mixture on Pesach, no matter how small the initial amount or ending percentage of chametz.

חמץ בפסח אוסר תערובתו
בין במינו בין שלא במינו,
במשהו,
אפילו בהנאה.

Chametz on Pesach forbids any mixture,
whether mixed with its own kind (= *b'mino*) or a different kind
(= *b'sheayno mino*),
even in a nominal amount (= *b'mashehu*),
even for the purpose of benefit other than eating.

This ruling is stated without qualification or dissent even though Tur OC 447 attributed a contrary position to Sheiltot d'Rav Achai Gaon.

חמץ בפסח –

הסכימו רוב המפרשים שאוסר תערובתו
בין במינו בין שלא במינו,
במשהו,

חוץ מבשאלות, שפוסק בנותן טעם.
ואין נוהגין כן.

Chametz on Pesach –

most commentators agreed that it forbids any mixture,
whether mixed *b'mino* or *b'sheayno mino*,
even *b'mashehu*,

except for Sheiltot, who rules *b'nosein taam* (=only if the chametz
flavors the mixture).

But we do not practice in accord with that opinion.

Rav Caro comments in Beit Yosef:

ומה שכתב רבינו: "חוץ מהשאלות, שפוסק בנותן טעם" –
הר"ן כתב שגם הרבינו תם והר"ז סבורין כן.
ומכל מקום לא קיימא לן כוותיהו לגבי כל אינך רבוותא;
ועוד, שכתבו התוספות שלא עשה רבינו תם מעשה להתירו בנותן טעם;
וגם הרשב"א כתב בתשובה (ח"א ל) שכן הלכה רווחת ותורה יוצאה לכל ישראל
שהוא בכל שהוא:

That which our master wrote: "Except for Sheiltot, who rules
b'nosein taam" –

RaN wrote that Rabbeinu Tam and Rabbeinu Zerachyah HaLevi
also hold this way.

Nevertheless, we do not hold like them against all the other rabbis.

Furthermore, Tosafot write that Rabbeinu Tam would not rule in
practice (to permit a mixture that contained chametz but not) *b'nosein taam*.

Also, Rashba wrote in a responsum (1:30) that the widespread
halakhah and Torah throughout Israel is that chametz forbids
(mixtures) even *b'mashehu*.

R. Isserles glosses in Darkhei Moshe:

וכתב המרדכי פרק כל שעה (דף רכ"ה ע"ד) (סי' תקסח)
דבכל מקום שיש בלא זו צד להתיר,
אף על פי שאנו מחמירין לאסרו במשהו –

מכל מקום, בכהאי גוונא סומכין אדברי השאלות, דפוסק שהוא בששים.

And Mordekhai to Pesachim Chapter 2 (#568) wrote
that in any circumstance where a basis for leniency exists without
this,

even though we are stringent to forbid chametz even *b'mashehu* –
nonetheless, in such circumstances we rely on the position of
Sheiltot, who rules that (chametz is forbidden only) if the ratio is one
sixtieth (= *b'nosein taam*).

So there is no doubt that R. Caro and R. Isserles were aware of Sheiltot's position and omitted it deliberately. Rav Isserles deliberately excluded even using Sheiltot as a secondary rationale for leniency.

However, Rav Ovadiah records a general dispute among later authorities as to whether exclusion by Shulchan Arukh is sufficient to prevent use as a secondary rationale. R. Isserles in a responsum (Shu"t RAMO #28) relies on the position of Mordekhai cited in Darkhei Mosheh, even though that position is omitted from Mapah. That seems clear evidence that Rav Isserles did not intend to utterly exclude Sheiltot's position from halakhic authority. However, Rav Ovadiah does not make this argument even though he cited Shu"t RAMO. He further claims that there is a consensus in favor of relying on this specific position of Sheiltot together with multiple other rationales for leniency, although there is debate whether it can be used together with one other rationale.

Rav Ovadiah then argues that an independent analysis of the evidence reveals that a significant minority of rishonim held that chametz on Pesach is nullified in a mixture that it does not flavor. For example, Beit Yosef cites RaN as attributing this position to Rabbeinu Tam and Baal HaMaor, although conceding that Rabbeinu Tam did not rely on this position in practice. These attributions are supported by many other rishonim. Some of these rishonim say that they find Rabbeinu Tam's intellectual arguments convincing, but that like him, they are unwilling to rule in practice against established custom. Rav Ovadiah concludes:

הואיל ורבים מהראשונים הסכימו מעיקר ההלכה לסברת ר"ת שחמץ בפסח
במשהו,
וכדעת השאלות –
מסתברא ודאי שראויה סברא זו לצרפה לספק נוסף לקולא,
ולתיר מטעם ספק ספיקא

Since many of the rishonim agree as a matter of fundamental halakhah to the reasoning of Rabbeinu Tam that chametz on Pesach (is permitted) *b'mashehu*, as is the opinion of Sheiltot – it is certainly reasonable that this reasoning can be combined with another doubt for leniency, and to permit on the ground of a “double-doubt”.

Rav Ovadiah creates the impression that the halakhic decisionmaking process is mechanical and metarule-bound. The questions to be answered are: What authority can be given to positions excluded from Shulchan Arukh? Is Sheiltot's position held by an isolated individual or a significant minority? Substantive questions come up only as necessary to resolve process questions.

However, Rav Ovadiah describes the position of Sheiltot as opinion/*daat*, in contrast to the reasoning/*sevarah* of Rabbeinu Tam. This terminology acknowledges that Rabbeinu Tam's position was probably not a practical halakhic decision. The same is true of many other rishonim who cite Rabbeinu Tam's position with intellectual approval.

It's not obvious to me why positions never held lemaaseh can be used lemaaseh, especially when the Shulchan Arukh deliberately excluded them. Perhaps Rav Ovadiah holds that while the historical/textual truth of a position is not always sufficient reason to make it the baseline halakhah, positions that have a strong possibility of being historical/textual truth should whenever possible not be utterly excluded from halakhic authority.

Let me be clear that they can and may be utterly excluded when such exclusion is necessary. Beit Shammai's positions are stripped of all halakhic authority when against Beit Hillel's – *ayno mishnah* – even though Beit Shammai were intellectually keener than Beit Hillel. I suspect that minority positions with strong truth-claims pose greater threats to normative halakhic authority than positions with weak truth-claims and therefore are **more** likely to be **utterly** excluded. Similarly, Rabbi Eliezer's positions are retroactively delegitimated in the Oven of Akhnai story **because** a Heavenly Voice supported them, not despite that support.

However, utter exclusion is an extreme measure. Under ordinary circumstances, it seems reasonable to say that the stronger a position's claim to truth, the harder it becomes to utterly exclude that position on the basis of metarules.

Another way to distinguish our case from those of Beit Hillel/Beit Shammai and Rabbi Eliezer/The Sages is by distinguishing two concepts of truth. Those narratives involve arguments about religious truth derived by religious intuition or rational argument from first principles. In contrast, Rav Ovadiah's “truth” refers to the outcome of correctly interpreting the Talmud and then properly following the applicable metarules for deriving halakhah from the correct interpretation of the Talmud.

Rav Ovadiah also never directly addresses whether Sheiltot (or Rabbeinu Tam) actually held the position attributed to him, or whether Sheiltot's position correctly interprets the Talmud. This to some extent reflects a stance of humility. But I wonder whether lurking behind the methodological screen isn't a suspicion that Sheiltot's position is what a first-generation interpreter would have reached by correctly interpreting the Talmud and accurately applying metarules of authority.

I tend to see psak-by-metarule as a *bedieved* stance, meaning that it's what a posek does when lacking the time or evidence or ability to decide the underlying substantive questions. I am therefore uncomfortable relying on Sheiltot (or Rabbeinu Tam) without knowing whether this was actually his position; if yes, why it was his position; and if yes, whether it is a compelling interpretation of the Talmud. I will iyH address those questions in Part 2 of this essay, coming *beli neder* soon.

Chag kasher vesameiach!