

## The Idea(s) Behind Peshara (Sanhedrin 6a-7a)

What is the concept of peshara all about? In this shiur, we will examine three approaches to peshara, all of which can enrich our idea of the dimensions of what a religious legal system should take into account.

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### Is peshara just another form of din?

#### 1. סנהדרין לב:

כְּדִישׁ לְקִישׁ, דְּרִישׁ לְקִישׁ רְמִי: כְּתִיב "בְּצֶדֶק תִּשְׁפֹּט עַמִּיתְךָ", וְכִתִּיב "צֶדֶק צֶדֶק תִּרְדֹּף". הָא כִּיצַד? כָּאן – בְּדִין מְרוּמָה, כָּאן – בְּדִין שְׁאִין מְרוּמָה.

This distinction is in accordance with the statement of Reish Lakish, as Reish Lakish raises a contradiction between two verses: It is written in one verse: "In justice shall you judge your neighbor" (Leviticus 19:15), and it is written in another verse: "Justice, justice, shall you follow" (Deuteronomy 16:21), with the repetition indicating that it is not enough to merely judge with justice. He continues: How can these texts be reconciled? Here, this latter verse is stated with regard to a possibly fraudulent trial, where the court must take extra care to judge with justice; and there, that former verse is stated with regard to a trial that does not appear fraudulent.

רַב אֲשִׁי אָמַר: מִתְנִיתִין כְּדִשְׁנִין, קָרְאִי אֶחָד לְדִין וְאֶחָד לְפֶשְׁרָה.

Rav Ashi says: The ruling of the mishna here, that cases of monetary law require inquiry and interrogation, is as we answered, i.e., in accordance with any one of the answers offered by the other *amora'im*. And those verses were not stated with regard to fraudulent trials; rather, one is stated with regard to judgment, in which the court must pursue justice extensively, and one is stated with regard to compromise.

כְּדִתְנִיא: "צֶדֶק צֶדֶק תִּרְדֹּף" – אֶחָד לְדִין וְאֶחָד לְפֶשְׁרָה. כִּיצַד? שְׁתֵּי סְפִינוֹת עוֹבְרוֹת בְּנֶהָר וּפָגְעוּ זֶה בְּזֶה, אִם עוֹבְרוֹת שְׁתֵּיהֶן – שְׁתֵּיהֶן טוֹבְעוֹת, בְּזֶה אַחֵר זֶה – שְׁתֵּיהֶן עוֹבְרוֹת. וְכֵן שְׁנֵי גַמְלִים שָׁהִיוּ עוֹלִים בְּמַעְלוֹת בֵּית חוֹרוֹן וּפָגְעוּ זֶה בְּזֶה, אִם עָלוּ שְׁנֵיהֶן – שְׁנֵיהֶן נוֹפְלִין, בְּזֶה אַחֵר זֶה – שְׁנֵיהֶן עוֹלִין.

As it is taught in a *baraita*: When the verse states: "Justice, justice, shall you follow," one mention of "justice" is stated with regard to judgment and one is stated with regard to compromise. How so? Where there are two boats traveling on the river and they encounter each other, if both of them attempt to pass, both of them sink, as the river is not wide enough for both to pass. If they pass one after the other, both of them pass. And similarly, where there are two camels who were ascending the ascent of Beit Hōron, where there is a narrow steep path, and they encounter each other, if both of them attempt to ascend, both of them fall. If they ascend one after the other, both of them ascend.

הָא כִּיצַד? טַעוּנָה וְשְׂאִינָה טַעוּנָה – תִּידְחָה שְׂאִינָה טַעוּנָה מִפְּנֵי טַעוּנָה. קְרוּבָה וְשְׂאִינָה קְרוּבָה – תִּידְחָה קְרוּבָה מִפְּנֵי שְׂאִינָה קְרוּבָה. הֵיוּ שְׁתֵּיהֶן קְרוּבוֹת, שְׁתֵּיהֶן רְחוּקוֹת – הֵטַל פֶּשְׁרָה בֵּינֵיהֶן, וּמַעְלוֹת שָׁכַר זֶה לְזֶה.

How does one decide which of them should go first? If there is one boat that is laden and one boat that is not laden, the needs of the one that is not laden should be overridden due to the needs of the one that is laden. If there is one boat that is close to its destination and one boat that is not close to its destination, the needs of the one that is close should be overridden due to the needs of the one that is not close. If both of them were close to their destinations, or both of them were far from their destinations, impose a compromise between them to decide which goes first, and the owners of the boats pay a fee to one other, i.e., the owners of the first boat compensate the owner of the boat that waits, for any loss incurred.

### Motives behind peshara:

#### Equity:

#### 2. דברים ו'יח

וְעָשִׂיתָ הַיָּשָׁר וְהַטּוֹב בְּעֵינֵי ה' לְמַעַן יֵיטֵב לָךְ וּבָאתָ וַיִּרְשֶׁתָּ אֶת-הָאָרֶץ הַטֹּבָה אֲשֶׁר-נִשְׁבַּע ה' לְאַבְרָהָם:

Do what is right and good in the sight of God, that it may go well with you and that you may be able to possess the good land that your God promised on oath to your fathers,

#### 3. רש"י שם

הישר והטוב. זו פְּשָׁרָה לַפְּנִים מִשְׁוֹרֵת הַדִּין:

The right and the good: this is *peshara*, within the line of the law.

#### Mediation:

#### 4. שו"ת מהר"ש מוהילבר חושן משפט סימן ט (על חושן משפט סימן יב, סעיף ב

R. Shmuel Mohilever, 19th century religious Zionist pioneer!

וכן המנהג פשוט בכל בית דין שבישראל שאם רואים לאחר הפסק שיכולו לבוא מזה לידי קטטה ומריבה ואפשר גם לסירוב וביטול הפסק דין בכללו, כי יד ישראל אינה תקיפה כעת להעמיד הד"ת על תלו בכל תוקף, מפייסים את הבעל דין שיוותר מה לבעל דינו וכל איש על מקומו יבוא בשלום.

#### Concern for mistakes:

#### שולחן ערוך חושן משפט יב:כ

צריכים הדיינים להתרחק בכל היכולת שלא יקבלו עליהם לדון דין תורה:

The Judges are obliged to keep away [from adjudicating cases] in doing all that is in their power in order not to accept upon themselves to try suits in accordance with strict law.

#### ירושלמי סנהדרין א:א, דף יח עמוד א (דפוס ונציה)

רבי יוסי בר הלפתא אתון תרין בר נש מידון קומוי. אמרי ליה. על מנת שתדיינו דין תורה. אמר לון. אני איני יודע דין תורה אלא הידע מחשבות יפרע מאותן האנשים. מקבלין עליכון מה דנא אמר לכון.

Rabbi Yose bar Halaphta, when two people came before him for judgment and told him, "on condition that you judge us by the law of the Torah," told them, "the law of the Torah I do not know \*He knew the theoretical law of the Torah but not necessarily the application to the case before him, since that would have presumed perfect and complete information. But the judge, by

*biblical decree, is dependent on what is told him in court. The information given to him by necessity is incomplete., but He Who knows thoughts should collect from those people \*Who either lie in court or withhold information.. You have to accept what I shall tell you."*

רבי עקיבה כד הוה בר נש אזל בעי מידון קומיה הוה אמר ליה. הווי יודעין לפני מי אתם עומדין. לפני מי שאמר והיה העולם. שנאמר ועמדו שני האנשים אשר להם הריב לפני ה'. ולא לפני עקיבה בן יוסף.

When a person came to Rabbi Aqiba to have a suit decided before him, he told him: "You should know before Whom you are standing, before Him Who commanded and the world came into existence, as it is said: *The two people who are quarrelling shall stand before the Eternal, \*Deut. 19:17. The verse continues: "before the priests and the judges."* not before Aqiba ben Joseph."

תני. קודם לארבעים שנה עד שלא חרב הבית ניטלו דיני נפשות ובימי שמעון בן שטח ניטלו דיני ממנות. אמר רבי שמעון בן יוחי. בריר רחמנא דלי נא חכים מידון.

It was stated: Forty years before the Temple was destroyed, criminal jurisdiction was removed from Israel (*when Judea came under direct Roman rule*), and in the days of Simeon ben Shetach (*read this with a similar citation in 7:2: Simeon ben Yohai, as confirmed by the next sentence. The removal of civil cases to Roman courts cannot be dated to the reign of Alexander Yannai, Simeon ben Shetah's brother-in-law, but to Hadrian, in the aftermath of the war of bar Kokhba*) civil jurisdiction was removed. Rabbi Simeon ben Yochai said, praised be the Merciful, for I am not intelligent enough to judge (*From his time on, rabbinic jurisdiction in Palestine was limited to courts of arbitration which are not representatives of God and therefore under less pressure to render absolutely correct judgment.*)

### **Rav Yosef Dov Soloveitchik, "Reflections of the Rav" (pp.53-54)**

Din pits one party against the other. The Dayan analyzes the relevant facts of the case and applies the appropriate legal sanctions as described by the Choshen Mishpat. The law is administrated with cold impartiality and its decisions are dictated by objective data. One party emerges the victor, his case vindicated. The plea of the other is denied. Discord and resentment persist even as the court docket is cleared and the case is closed. The legal issue has been resolved, but human bitterness continues to fester.

In Peshara, however, social harmony is the primary concern of the Dayan. The fine points of the law and the determination of precise facts are of secondary importance. The goal is not to be judicially astute but to be socially healing. The psychology of the contenders, their social-economic status and value, as well as the general temper of society are the primary ingredients employed in the Peshara process. These considerations are evaluated within the broad Halachic parameters of the Choshen Mishpat, and the final resolution of the conflict is a delicate and sensitive blending of both objective legal norms and subjective humanistic goals. For this reason,

Peshara is the preferred alternative... Peshara is a juridical procedure presided over by the Dayan; it does not contradict the law but is its preferred and finest fulfillment.