**YESHIVAT HAR ETZION**

**ISRAEL KOSCHITZKY VIRTUAL BEIT MIDRASH (VBM)**

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**PARASHAT HASHAVUA**

**Rav Yishai Jeselsohn**

**Parashat Devarim**

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**לע"נ**

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**יהודה פנחס ע"ה בן הרב שרגא פייוועל נ"י**

**כ"ב אב תשכ"ח – י' אב תשע"ב**

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**"Hearing [the Disputes] Between Your Brothers"**

**I. The Study of *Choshen Mishpa*t**

For several generations, it has been customary in *yeshivot* to concentrate on studying tractates in the orders of *Nashim* and *Nezikin*, which are concerned primarily with matters connected to *Choshen Mishpat*, monetary law. It should be emphasized that monetary law constitutes a considerable part of the Written and Oral Law, the laws of evidence and claims are among the most complicated and complex in the Talmud, and many Torah scholars toil over them day and night.

In the commentary we will be focusing on this week, the *Or Ha-Chaim* throws a wrench into the world of *Choshen Mishpat*, with a perspective that calls into question the need for so much study of these issues. We will examine his commentary and try to identify its sources, and will then try to explain why there is still great justification for the extensive focus on these fields.

**II. What should be heard?**

At the beginning of *Parashat* *Devarim*, Moshe Rabbeinu describes the difficulties of bearing responsibility for the people on his own, as a result of which he appointed judges. As part of his account of the appointment of judges, Moshe also describes the role of the judge:

And I charged your judges at that time, saying: Hear [the disputes] between your brothers, and judge righteously between a man and his brother, and the stranger that is with him. You shall not respect persons in judgment; you shall hear the small and the great alike; you shall not be afraid before any man; for judgment is God's; and the cause that is too hard for you, you shall bring to me, and I will hear it. (*Devarim* 1:16-17)

The meaning of the second verse is quite clear: a judge must not practice deception in judgment; he must issue true and just rulings, without bias toward any party. But what is the meaning of the first verse? Why do they need to be told, "Hear [the disputes] between your brothers"? Obviously, this is how a court functions. Would the judges otherwise have thought they should issue judgments *without* hearing both litigants?

The *Or Ha-Chaim* asks precisely this question, and adds another difficulty:

It is difficult: What is the need to command this; if they do not listen, about what would they judge?! Furthermore, why did the Torah write this way [using the word *shamo'a* in the infinitive] and not simply write [an imperative such as] *shim'u*? (*Or Ha-Chaim*, *Devarim* 1:16)

The shift to *shamo'a*, rather than the expected *shim'u*, seems to imply that the commandment here is not merely to hear what the litigants say, but includes some additional dimension.

The *Or Ha-Chaim* suggests that two laws can be learned from this unusual verb form – and we will see that it is very possible that there is a connection between the two.

The first law is:

The intention was that listening [to the litigants' arguments] would be ongoing [rather than a one-time process] and they should not [give in to the feeling that they have already listened to the litigant enough times, so that they are] sick and tired of it. (*Or Ha-Chaim*, ibid.)

The judges are obligated to hear *all* the arguments, even when they are drawn-out, troublesome, and seemingly irrelevant:

There are two aspects to the matter: 1) Regarding the litigants, that if they say “we have further arguments” or “we have further proofs,” the judges should not be tired of their words, even if they bring proof after proof that are not beneficial, and the judge should not say “there is no further proof or argument” but should continue to listen; 2) If the litigants become a burden to them, the judges should not say “We have put in a lot of effort today and will not hear anything more until later,” but should listen without pause... (*Or Ha-Chaim*, ibid.)

The judges may not take a break whenever they feel like it; rather, they must hear all of the litigants’ claims, even when they seem to be irrelevant.

There are several ways to understand the reason for this law. First, it may stem from a desire not to offend any of the litigants. Second, it is possible that among the many arguments, one will turn out to be valid, and therefore they are obligated to hear all of them. It is also possible that someone who is being rushed by the court will feel that the court is against him, and this will harm the litigant and his ability to plead his case well.

However, the second law brought by the *Or Ha-Chaim* allows us to introduce another dimension into the discussion:

He also wanted to warn the judges to be astute enough to discern the truth of the matter from between the lines of what the litigants had to say. Although the verdict must be based on the litigants’ arguments, if it becomes clear from the way they arrange their words and the twisting of their language that the truth is the reverse of what their words indicate – then the judges are to be guided only by what their eyes see.

That is why it says to "hear," i.e., understand, "between your brothers," meaning, to listen to what passes between them in their words and arguments. "And [based on that, to] judge righteously [*tzedek*]," meaning, judge in accordance with what is clear to you [the judges] as correct [*tzedek*], even if it is the opposite of organized law [i.e., the apparent implications of the case]. For the laws come only for a judge who does not know the solution of the matter; a judge is to be guided only by what his eyes see. (*Or Ha-Chaim*, ibid.)

Here the *Or Ha-Chaim* relates to another dimension of hearing. We are not dealing with hearing the arguments themselves, but rather the spirit of the matter and what stands behind the words. When a party asserts his claims, the usual concern is the claim itself: does it impose liability or exempt one from liability? Here, however, the *Or Ha-Chaim* argues that a judge must issue his rulings based not only on the content of the claims brought before him, but also on his discernment between the lines of which of the parties is telling the truth.

This is a very novel position. According to the plain sense of all the passages in the Talmud that deal with conflicting claims of opposing litigants, a great deal of emphasis is placed on the claims themselves, and not necessarily on how they are presented. It is true that in many cases, arguments are granted credibility for reasons beyond the claim itself (such as: the principle of *migo*, the principle of "the mouth that forbade, etc.," the principle of the admission of the defendant, and others). But there is no reference to things stated between the lines, or to the manner in which a claim is presented, or to whether or not the speaker sounds convincing. The simple reason for this is the unreliability and subjectivity of such elements; it is possible that a certain claim will be viewed as credible by one judge, while the opposite will be viewed as credible by another judge.

Thus, we must examine the words of the *Or Ha-Chaim* more carefully, and understand their source and foundation.

**III. A Judge Must be Guided Only by What His Eyes See**

The idea that "a judge must be guided only by what his eyes see," upon which the *Or Ha-Chaim* bases his novel approach, is found in three Talmudic passages. The Gemara in *Sanhedrin* (6a) cautions judges to maintain awareness of God’s presence in the court and of their responsibility before Him. In this context, one might well wonder why anyone would want to sit as a judge; after all, he may err in his judgment and expose himself to punishment! To this the Gemara answers: "A judge must be guided only by what his eyes see." Rashi explains:

"Only by what his eyes see" – to judge, and he should try to issue a just and true judgment, and then he will not be punished. (Rashi, *Sanhedrin* 6a, s.v. *ela lefi mah she-einav ro’ot*)

The Rambam also codifies this principle (*Hilkhot Sanhedrin* 23:9).

What we learn from this Gemara, then, is that a judge who rules in accordance with what he perceives to be the truth will not be subject to punishment, even if he ruled incorrectly.

The Gemara in *Nidda* (20b) relates that Rabbi Yehuda Ha-Nasi once examined some blood at night and declared it impure, but when he examined it again in the daytime, he thought it should be declared pure. The Gemara then explains, in the wake of the rule that a judge must be guided only by what his eyes see, that this was not an absolute mistake on the part of Rabbi Yehuda Ha-Nasi, as it is possible that the appearance of the blood had in fact changed.

Here we learn a second law that emerges from this principle – that a judge must rule in accordance with the facts before him at that moment, and not in accordance with what could happen in the future.

However, these two passages are not related to the *Or Ha-Chaim's* interpretation of the concept of "what his eyes see," for the *Or Ha-Chaim* speaks of rulings in the wake of feelings rather than claims and proofs. It seems to me that the third Talmudic passage that mentions this concept comes closest to the *Or Ha-Chaim's* understanding.

The Gemara in *Bava Batra* relates Rava’s instructions to his students, Rav Papa and Rav Huna the son of Rav Yehoshua:

When a legal decision of mine comes before you [in a written form], and you see any objection to it, do not tear it up before you have come before me. If I have a [valid] reason [for my decision], I will tell [it to] you; and if not, I will withdraw. After my death, you shall neither tear it up nor infer [any law] from it. You shall neither tear it up – since, had I been there, it is possible that I might have told you the reason – nor infer [any law] from it – because a judge must be guided only by what his eyes see. (*Bava Batra* 130b)

Rava here presents a novel teaching – that his students may rule against one of his rulings because of the principle that "a judge must be guided only by what his eyes see." The Rashbam explains this as follows:

A judge must be guided only by what his eyes see. And the same applies to a matter that depends on reasoning, that he must be guided only by what his heart sees [as correct]. (Rashbam, ad loc.)

Here there is already a leap forward. The Gemara in *Nidda* talked about real data, that a judge must rule based on the solid facts in front of him, without regard for theoretical data. This is clear and understandable. But the Rashbam here goes a step further and expands the rule not only to facts but also to logical arguments: if a certain reasoning does not seem right to the judge, he is not allowed to issue a ruling based on it, but must rule based on his own reasoning.

Even in this passage, however, we have not yet found an explicit source that says a judge can ignore the content of the claims and relate only to what he sees between the lines of what the litigants say. It seems that the *Or Ha-Chaim* expands the concept even more than the Rashbam does; he maintains that the principle that "a judge must be guided only by what his eyes see" applies not only to laws, but also to how one interprets the content of the facts and proofs brought before the judge.

**IV. Rules Based on Assessment and Intuition**

If that is indeed the case, we have not found an explicit source for the *Or Ha-Chaim's* position in the Talmudic passages dealing with the principle that "a judge must be guided only by what his eyes see." It seems, however, that we do find in the words of *Chazal* the possibility of a judge ruling in a manner that does not follow the usual legal paths.

The Gemara in *Ketubot* tells an amazing story about two rulings of Rava:

A woman was once ordered to take an oath at the court of Rava, but when Rav Chisda's daughter said to Rava [her husband]: I know that she is suspected of [making false] oaths – Rava transferred the oath to her opponent [to be the one to make an oath].

On another occasion, Rav Papa and Rav Ada bar Matana were sitting before [Rava] when a bond was brought to him. Rav Papa said to him: I know that this bond is paid up. Rava said to him: Is there any other man with the Master [to confirm his statement, as a second witness]? He said to him: No. The other said to him: Although the Master is present [to give evidence], there is no validity [in the testimony of] one witness. Rav Ada bar Matana said to him: Should not Rav Papa be [deemed as reliable] as the daughter of Rav Chisda? He replied: As to the daughter of Rav Chisda, I am certain of her; I do not have such certainty established, however, about the Master. (*Ketubot* 85a)

In the first ruling, Rava accepts his wife's words even though she is disqualified from testifying (as a woman, and also there is only one witness). In the second ruling, Rava refuses to accept the words of his student, Rav Papa, without another witness joining him. Rava explains his actions: "As to the daughter of Rav Chisda, I am certain of her"; that is to say, I know that my wife never lies, and therefore I can rely on her and accept her testimony, even though that does not accord with the law.

Similarly, the Gemara in *Bava Metzia* relates that Mari bar Isak was a violent man, and that because of that violence, Rav Papa issued a ruling against him in a matter of inheritance that was not in accordance with the law:

There came [a man claiming to be] a brother from Bei Chozai to Mari bar Isak, saying to him: Divide [our father's estates, which you inherited] with me. He said to him: I do not know you.

They went before Rav Chisda, who said to him: He [Mari] spoke well to you, as it is written: "And Yosef knew his brothers, but they knew him not," which teaches that he had gone forth without the stamp of a beard and came [before them] with one [and thus it is possible that Mari truly does not recognize you, even if you are his brother].

He [further] said to him: Go and bring witnesses that you are his brother. He replied: I have witnesses, but they are afraid of him, because he is a powerful man.

Thereupon he said to the other [Mari]: You go and bring witnesses that he is *not* your brother. He said to him: Is that the law? The burden of proof lies on the claimant! He answered: This is how I judge for you and for all who are powerful men like you. (*Bava Metzia* 39b)

Here too we see that the context and the general information before a judge can be considered in the course of a legal proceeding, even though this is not the letter of the law.

These rulings were codified by the Rambam as a broad principle:

A judge may adjudicate cases involving monetary law based on factors that he is inclined to regard as true and concerning which he feels strongly in his heart are correct even though he does not have proof of the matters. Needless to say, that if he personally knows that a matter is true, he may judge the case according to his knowledge.[[1]](#footnote-1) (*Hilkhot Sanhedrin* 24:1)

But we find exceptions to this rule. First, the Rambam does not apply it to capital cases (ibid. 20:1). Second, in *Hilkhot Nizkei Mamon*, he rules in almost the opposite manner:

Damages should not be collected, nor is an atonement fine imposed, nor is an animal executed, unless definite proof is brought [as substantiated] by acceptable witnesses. (*Hilkhot Nizkei Mamon* 8:13)

The *Netivot* (15, 2) distinguishes between different areas, within the ruling of the Rambam, and argues that indeed a judge cannot remove money from one person and give it to another based on his assessment of the truth, but he does have the authority to make changes in the burden of proof, as we saw in the passages cited above.

The *Shulchan Arukh* (*Choshen Mishpat* 15:5) also brings the possibility of a judge ruling in accordance with his assessment of the truth, but he qualifies it nowadays due to the diminished level of the judges. Therefore, he suggests that the judge try to examine and inquire into the case until the truth of the matter is established.[[2]](#footnote-2)

Besides the Rambam, we find many other *Rishonim* who state as the normative *halakha* that a judge has authority to rule based on his assessment of the truth. The Rashba, for instance, writes in his *Responsa* (I, 1144) that this is how the Ramban acted in practice. The Rosh expands upon the importance of this law and even brings proof for it from the famous ruling of King Shlomo, which was issued based exclusively on his assessment of the truth:

And we were commanded to judge in an absolutely truthful manner, and even though we are not prophets to judge what is in people's hearts, a sage is greater than a prophet [*Bava Batra* 12a], and we will follow in the footsteps of the ancients and learn from their actions… This matter has a source in tradition, from the father of wise men [=Shlomo], who commanded which woman should be given the living child. Therefore, in each and every generation, we are commanded to break the jaws of injustice and to guide those who have turned aside to their crooked ways to return to the path of righteousness. (*Responsa ha-Rosh* 68, 23)

The Maharik takes things a step further and rules, as does the *Or Ha-Chaim*, that a judge should rule in accordance with his assessment of the truth, even against explicit arguments:

In my humble opinion, it seems to be an exceedingly simple matter that a judge must rule in accordance with the truth as it is verified to him, and not in accordance with the arguments if they contradict the truth, for why should the truth be dismissed because of deceitful claims, God forbid? (*Responsa Maharik*,118)

The assumption that underlies both the words of the Maharik and the understanding of the *Or Ha-Chaim* is connected to the purpose and essence of the law. The essence of the law is to strive for the truth, to issue an absolutely true ruling. Therefore, when it seems to the judge that the truth is different from what follows from the usual assessment of the various arguments, he should follow his heart.

It seems that we are dealing here with a far-reaching conception, according to which all the monetary laws in the Talmud apply only when the judge does not *know* what the truth is, while when the truth is clear and apparent to the judge, there is no need for all these laws. This notion is quite novel and there will be many who will disagree with it.[[3]](#footnote-3) Indeed, it seems that we see here a fundamental dispute about whether "judgment belongs to God," and a judge must rule in accordance with the laws of the Torah as they were taught by *Chazal*, or whether judgment might involve an obligation to clarify the human truth, in which case a judge must assign greater weight to his tools – his reasoning and his understanding – even when they contradict the written law.

This latter viewpoint also raises questions about the many Talmudic passages that are the focus for many *yeshiva* students. Is all this study in the world of *be-di’avad*, in some way suboptimal?

It seems that this is not the case. First, those passages must be studied in order to know what to do when the judge does *not* know what the truth is. Second, a judge's ability to discern the truth is greatly sharpened by a deep and thorough study of the laws of evidence and claims that appear in the Talmud.

After delving more deeply into the words of the *Or Ha-Chaim*, we can go back and draw a connection between his two interpretations: In order for a judge to discern which of the litigants is telling the truth, it is of great importance that he hear *all* of the litigants' words – even when they do not involve an explicitly relevant claim.

(Translated by David Strauss)

1. At the end of this *halakha*, the Rambam relates to the testimony of witnesses as a tool that is not always reliable, but must be accepted as a Divine decree: "Why then did the Torah require two witnesses? Because when two witnesses appear before a judge, he must judge according to their testimony whether or not he knows it to be true." [↑](#footnote-ref-1)
2. The *Rif* in *Ketubot* cites the *Geonim* who say that today (already in their times) we are not sufficiently God-fearing to allow judges to rule in accordance with their assessment of the truth. [↑](#footnote-ref-2)
3. As we saw in the Rambam above. [↑](#footnote-ref-3)