

# CENTER FOR MODERN TORAH LEADERSHIP



## JUDGES IN ORDER TO BRING ORDER

By Rabbi Aryeh Klapper

Elul is the springtime of the soul, when a Jewish educator's fancy turns to the causes and texts they most love. It is a time of sublime optimism and therefore of many new shiurim and new programs. Via G-d's continual expectation that human beings as a species will improve morally and genuinely repent, it represents the triumph of hope over experience.

My dvar Torah for Parashat Shoftim 5783 concluded:

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 *dayyanot* in financial cases?

Let's be clear up front that a credible program would require more years and higher standards than any existing program for women, parallel to the better American *yadin yadin* programs for men.

But it might radically increase the use of halakhah and beit din for financial matters, in the manner that the availability of *yoatzot halakhah* greatly increases the number of *niddah* questions asked.

Furthermore, the position of halakhic arbitrator could provide a plausible source of employment that would enable learned women to invest the years necessary to achieve their potential as halakhic scholars.

If we will it, it is no dream. Please contact me at [moderntorahleadership.org](http://moderntorahleadership.org) if you are interested in supporting such an effort.

5784 rapidly became a year for nightmares rather than dreams. But it's important in tough times to at least remember our dreams.

On the same axis but a much smaller scale, I'll begin teaching a weekly online iyyun shiur on Masekhet Sotah this Monday, September 9, from 7:30-9pm. I'm deeply grateful to 2024 SBM Fellow Roni Sosis for organizing this. Men and women are of course equally welcome. Mekorot will be distributed in advance but preparation is optional. If you're interested in attending, please email [moderntorahleadership@gmail.com](mailto:moderntorahleadership@gmail.com) with your Whatsapp # to receive the Zoom link and be added to the shiur group.

This essay is also being written while nervously awaiting the arrival of an unknown number of teenagers for an inaugural cholent mishmar. So I'll simultaneously cheat and be presumptuous by presenting and dialoguing with HaGaon Rav Asher Weiss *sblita's* Torah essays this week.

Rav Weiss suggests a *chakirah*: Is the appointment of judges an independently valuable mitzvah, or rather a means of doing *tzedek* and *mishpat*? Rambam's tenth root for determining whether to count a mitzvah-obligation among "the 613" states that one should ignore obligations that are means to a mitzvah-end, and not mitzvah-ends themselves. Yet Rambam counts the appointment of judges; it follows that he sees the appointment of judges as a mitzvah-end, and not merely as a means for the doing of *tzedek* and *mishpat*. Sefer Mitzvot Ketanot (=SeMaK) and Yereim do not count the appointment of judges among "the 613", and therefore must see their appointment as only a means.

Rav Weiss suggests that we understand the dispute along the lines of his initial *chakirah*. For SeMaK and Yereim, the appointment of judges is only a means to the doing of *tzedek* and *mishpat*; for Rambam, the appointment of judges is a mitzvah-end.

In the aggadic epilogue to his essay, Rav Weiss cites Shev Shemaiteta, Introduction (R. Aryeh Leib Heller, "the Ketzot") asking whether the mitzvah of appointing judges is fulfilled via the appointment of honest and learned but socially ineffective judges. R. Heller answers by noting that Chapter 19 of Judges draws an analogy between the city of Sodom in Genesis and the city of Giv'ah. The citizens of Sodom attempt mass rape and murder of the angels visiting Lot; the citizens of Giv'ah actually rape and murder a visiting concubine. Yet Sodom is utterly destroyed, and Giv'ah only partially! The reason is that in Sodom, the law, and therefore the judges, endorsed and perhaps even mandated these crimes, whereas in Giv'ah, the criminals knew they were breaking the law and defying their judges. This suggests that the appointment of ineffective judges is a mitzvah.

Rav Weiss argues that there is hope for a society that maintains a just legal system even while defying it, but none for a society that no longer pays any tribute to virtue. I think that he sees this as mapping onto Rambam's position that the appointment of virtuous judges is a mitzvah-end rather than a means to the mitzvot of doing *tzedek* and *mishpat*.

In the halakhic body of his essay, Rav Weiss takes a different approach. He argues there that Rambam tasks the appointed judges not merely with *tzedek* and *mishpat*, but also with *haamadat hadat al tilah* = firmly establishing religion (in society) and *lekhapot*

*et Benei Yisroel al mitzvotaim* = to compel the Jews to perform their mitzvot. This formulation is grounded in Rambam's description of the *shoterim* as enforcers of public morals (Hilkhot Sanhedrin 1:1), on the assumption that *shoterim* are merely the long arm of the *shofetim*.

Despite my enormous appreciation for Rav Weiss' general body of work and personal scholarship, I have difficulty with many elements of this analysis.

First, I think it's important to distinguish between the doing of *tzedek* and *mishpat*, which are acts, and the establishment of a society that embodies *tzedek* and *mishpat*, which is a state/condition. I also think that Rambam only excludes obligations from "the 613" if they are means to the performance of other acts, not if they are means to the achievements of states and conditions. Therefore, Rambam would count the appointment of judges among "the 613" even if he saw their appointment as a means to the establishment of a *tzedek*-and-*mishpat* society.

This position can be demonstrated by a *reductio ad absurdum*. Rambam in the Guide contends that ALL mitzvot have one of more of three fundamental ends: perfection of the body, perfection of opinions, and those two lead to perfection of the soul. To count any mitzvot at all, he therefore must be willing to count mitzvot that are means to the achievement of conditions.

If I understand Rambam correctly, the establishment of a *tzedek*-and-*mishpat* society is not an ultimate end, but rather a means to the perfection of the bodies, opinions, and eventually souls resident in that society. Ultimate ends relate only to individuals. I'm not sure how broadly this position is held in Jewish philosophy. I would guess that at least some mystical thinkers would be inclined to define at least some ultimate ends in terms of the Jewish people as a whole rather than in terms of individuals. But I don't know for certain, and in any case I am generally not inclined to that sort of mysticism.

I am also very partial to the position of Chazon Ish and others that coercion on *mitzvot bein adam lamakom* is fundamentally undesirable, albeit sometimes justified. But I concede that this is not Rambam's position.

Even for Rambam, and along the lines of Rabbi Heller, I wonder whether the appointment of honest but ineffective judges by an elite without the consent of the governed has any purpose at all. Such appointments would not reflect any innate desire for repentance, and therefore would not indicate any potential for change.

Rav Weiss's halakhic section explains that SeMaK and Yereim exclude the mitzvah of appointing judges from their lists because the judiciary serves only to implement *tzedek* and *mishpat* in the discrete cases they judge. Alternatively, one might follow Rav Heller's line of thought and suggest that SeMaK and Yereim see appointing honest judges and then flouting them as worse than hypocrisy, not as tribute paid by vice to virtue but rather as salt rubbed mockingly in virtue's wounds. This issue might better be judged case-by-case.

Rav Weiss very cautiously introduces another possible practical outcome of his initial *chakirah*: does the mitzvah of appointing judges apply nowadays, when we no longer have classical "semikhah" = ordination ad qualified for judge-ship via laying-on-of-hands by someone whose own line of semikhah traces back to Mosheh Rabbeinu? Perhaps the ritualistic mitzvah of appointing judges requires the appointees to have such semikhah. However, if judges have a societal task, then the mitzvah would only require making appointments from the best class of applicants available. Thus SeMaK and YeReim might see the mitzvah as suspended nowadays, while Rambam sees it as fully in force.

Rav Weiss hastily adds that everyone acknowledges that the separate mitzvah of acting-with-*tzedek*-and-*mishpat* applies to Jews at all times and in all places; the only question is about the narrow mitzvah of appointing judges.

One might suggest that if we extend the task of judges beyond the *tzedek*-and-*mishpat* axis, as Rambam does, then the mitzvah can only be fulfilled by the appointment of judges who seek to maximize all forms of halakhic observance. However, if we limit their task to the realm of establishing a just society, perhaps the mitzvah can be fulfilled by the appointment of honest people.

Possibly SeMaK and Yereim in fact believe that appointment of judges with compulsory jurisdiction is purely a means to the end of a *tzedek*-and-*mishpat* society, and therefore don't count it among "the 613". Possibly this means that in a society which is fiercely resistant to being forced to litigate in *beit din*, the mitzvah is best fulfilled by appointing people whom fellow Jews are most likely to voluntarily litigate before, a category that just might include women.

*Shabbat shalom!*