

Klalei Hora'ah – Relying on the Minority

(מו.) תניא מעשה שעשה רבי כר' אלעזר, לאחר שנזכר אמרנאדי הוא ר' אלעזר לסמוך עליו בשעת הדחק (מו.)

The **Gemara (46a)** relates that Rebbi once ruled in accordance with R' Elazar's lenient opinion regarding a certain *shaylah* pertaining to *tumah l'mafreia*. After Rebbi "remembered," he said that R' Elazar's opinion is sufficient to be relied upon in a *shaas hadechak*. [Rashi explains that it was a year of famine, and it would be significantly difficult for the family were all the food that was touched to be rendered *tamei*.] The Gemara asks, what does the term "after he remembered" mean? If it means after he remembered that the *halachah* is like the Chachamim (who argue on R' Elazar and are *machmir*), how can Rebbi rely on R' Elazar? Rather, concludes the Gemara, it means that after Rebbi remembered that the Chachamim argue on R' Elazar – yet it had never been stated explicitly that the *halachah* is like them – Rebbi said that even though we generally follow the majority, we can rely on R' Elazar *b'shaas hadechak*.

This Gemara is very revealing regarding *klalei hapsak*. However, the *poskim* argue as to what exactly can be derived from here. The **Rashbash (Shu"t §513)**, citing his father the **Tashbetz**, says that all we see from our Gemara is that regarding a *d'rabbanan* matter (like the case of *tumah* in our Gemara), we can rely on a minority opinion in the event of a *shaas hadechak* (provided that the Gemara never ruled explicitly like the majority). This is also the *psak* of the **Rema (Darkei Moshe EH 127:3)**. The **Rashbash** also writes that this view is echoed by the **Teshuvos HaRan**.

However, he points out that from the **Rashba (Shu"t 1:253)** it appears that we may rely on a *shitas yachid* even by a *d'Oraysa*, since the **Rashba** brings this *klal* without stipulating that it may only be relied upon for *d'rabbanan*s. This also seems to be the opinion of the **Ohr Zarua (Sukkah §306)**, as well as the **Mizrachi (Teshuvos Mayim Amukim 2:5)**.

How does this *halachah* play out in later *poskim*? The **Taz (YD 293:4)** writes about an interesting phenomenon — the fact that many people in *Chutz La'aretz* were not being *makpid* to only eat *yoshon* products. He wanted to understand what exactly it was that they were relying on. Technically, the **Taz** points out, there is a *machlokes* between the **Tanna Kama** and **R' Eliezer** in the **Mishnah in Kiddushin (37a)** whether the *issur* of *chadash* even applies in *Chutz La'aretz* altogether. Now, it is true that the **Rif** and the **Rosh pasken** like R' Eliezer, who maintains that it does apply (presumably because of a *stam Mishnah* in **Orlah** that reflects R' Eliezer's view). However, says the **Taz**, it emerges from our Gemara that in places in *Chutz La'aretz* where it is considered a *shaas hadechak*, one may rely on the **Tanna Kama's** lenient opinion. The **Shach (Klalei Hora'ah, YD 242 s.v. od nireh)** points out that the **Bach** also maintains that one may rely on a minority opinion

b'shaas hadechak, even by *d'Oraysas*.

However, the **Shach (Klalei Hora'ah ibid.)** argues on the **Taz's** explanation. He writes that we only rely on a *shitas yachid b'shaas hadechak* regarding matters that are *d'rabbanan*; not by *d'Oraysas* (such as *chadash*). He reasons that the precedent of following the majority opinion is *mid'Oraysa* by nature, based on the *pasuk* (**Shemos 23:2**) "אחרי רבים להטות" [the **Radvaz (4:1187)** writes this as well]. In effect, then, the Torah itself is instructing us to always follow the majority, even in cases of a *shaas hadechak* regarding a *d'Oraysa*. By *d'rabbanan*s, though, we may rely on a *shitas yachid*, such as in the case in our Gemara. [Rav Elyashiv (**Kovetz Teshuvos 1:189**) points out that even the **Shach** would agree that we may rely on a *shita* that wasn't *paskened l'halachah* by *d'Oraysas*, as long as it isn't a *miut* against a *rov*.]

Nonetheless, as we pointed out, the **Bach** and **Taz** weren't the first ones to say that we can rely on a *shitas yachid* even by *d'Oraysas* — **Rishonim** already held like this. How would these **Rishonim** respond to the **Shach's** argument?

The truth is, the **Shach** assumed that the idea that we *pasken* like the majority is *mid'Oraysa*. However, the **Maharam Chaviv** (end of *sefer Get Pashut, klal 1 s.v. umihu*), based on a **Rashba (Shu"t 2:104)** and **Maharalnach (Kuntres Hasemichah p. 278 amud 3)**, writes that the *pasuk* is only referring to a situation in which the *dayanim* are gathered together and are arguing with each other face-to-face. There, we must follow the majority of *dayanim*. However, if there is a *machlokes* which spans several generations, between *poskim* who never argued with each other face-to-face, perhaps the minority would have convinced the majority of the validity of their opinion. In such a case, says the **Maharam Chaviv**, there is no *chiyuv* to go like the majority. See also **Chazon Ish (Orlah 11:7)** who writes this as well. [A similar idea is mentioned by the **Ran (Shabbos 141b)** who writes that we only follow the opinion of a *rebbe* over a *talmid* when they argued face-to-face — see **Birkei Yosef (OC 328:8)**.] According to this reasoning, the **Shach's** point is obsolete, for אחרי רבים להטות is irrelevant when discussing a situation in which the parties involved weren't arguing face-to-face. Thus, one would theoretically be allowed to rely on a "minority" opinion even by *d'Oraysas*. See also **Chasam Sofer (Niddah 9b)** and **Shulchan Aruch HaRav (additions to YD, Piskei Admor Hazaken to siman 242)** who give additional reasons why אחרי רבים להטות does not apply to a *machlokes haposkim* such as the above.

The next part of this *klal* (relying on a minority opinion) that we need to clarify is when is it considered that a *shita* is rejected

entirely. The Gemara says that if we would have *paskened* that the *halachah* is like the Chachamim and not R' Elazar, then there would be no room to rely on R' Elazar even *b'shaas hadechak*. It is only because it was never explicitly stated that the *halachah* is like the Chachamim – even though it was implied (being that they are the majority) – that we can rely on R' Elazar. The question is, what about an opinion codified as *halachah* by the *Shulchan Aruch*? Does such a ruling bear the weight of having *rejected* the dissenting opinion, and we can no longer rely on the dissenting opinion even *b'shaas hadechak*?

The **Chacham Tzvi (1:100)** writes that a *psak* in *Shulchan Aruch* in favor of one opinion does not automatically disqualify the other opinion; the dissenting view can be relied upon in case of need. [The *Chacham Tzvi* was asked whether a man who was accustomed to reviewing Mishnayos by heart daily – and whose wife was *nifterah* over Pesach, rendering him an *avel* – may continue reviewing his Mishnayos during Yom Tov despite his *aveilus* status. He responded that reviewing the Mishnayos is permitted, since the likelihood that the *avel* will forget his learning causes this to be considered a *davar ha'aveid*. As the *Rambam (Avel 10:3)* maintains that there is no *aveilus* at all during Yom Tov, the *avel* may rely on the *Rambam*, even though the *Shulchan Aruch (YD 399:2)* rules otherwise.] The *Chacham Tzvi* explains that the reason a *psak* of the *Shulchan Aruch* doesn't totally disqualify the alternate opinion is because we sometimes find that later *poskim* argued on *psak* of the *Shulchan Aruch*. This indicates that even after the *Shulchan Aruch* issues a *psak*, it doesn't mean that all other opinions are rejected.

Rav Yitzchok Eizik Chaver (Binyan Olam OC 14) brings a similar idea in the name of **Rav Yitzchok Moshe Heller**. He says that this *klal* – that an alternate *shitah* is deemed “rejected” – only applies when the Gemara itself *paskens* the *halachah* according to one opinion. The rationale behind this, he says, is that since we generally follow the majority opinion anyways, then if the Gemara felt it necessary to explicitly state that the *halachah* follows the majority, it must have been in order to completely reject the other *shitah*. When the *Shulchan Aruch paskens* like a majority, though, it isn't necessarily with the intention to disqualify the other *shitah*. Rather, it is in order to present all the *halachos* that we have from *Shas* and *Rishonim*. He writes that he related this *sevara* to **Rav Shlomo Kluger** who concurred and praised its truth.

Rav Moshe Feinstein (Igras Moshe OC 1:51:1) writes that the *poskim* don't have the authority to reject the *shitah* of a *Tanna* or *Amora*. As such, even if the *poskim* issue a *psak*, we may still rely on the “rejected” opinion *b'shaas hadechak*. This is also clear from a *psak* of the **Shach (CM 87:38)**. **Rav Ovadia Yosef (Yabia Omer YD 10:43)** points out that this is clear from the **Chida (Machzik Brachah YD 52:5; Birkei Yosef OC 7:3)** who writes that we can still use a *shitah* “rejected” by the *Shulchan Aruch* to formulate a *sfek sfeika*, and that we will apply the rule of *safek brachos l'hakel* even if the *Shulchan Aruch* ruled like those who hold to make a *brachah*. This was also the opinion of the **Chikrei Lev (YD 1:127)**

and **Rav Abdallah Somech (Zivchei Tzedek 92:12)** – that we can rely on a *shitah* rejected by the *Shulchan Aruch b'shaas hadechak*. See also **Chazon Ovadia (Yom Tov p. 19)** where Rav Ovadia Yosef writes that at times, one can even rely on the rejected *shitos* of the *Shulchan Aruch b'shaas hadechak*.

However, in a different *teshuvah (YD 50)*, **Rav Yitzchok Eizik Chaver** writes otherwise. There, he says that once the *Shulchan Aruch* or *Rema* issues a *psak*, we cannot rely on the rejected *shitah*. The **Ben Ish Chai (Rav Pe'alim YD 2:7)** writes this as well. He adds that we can only rely on the dissenting opinions – *b'shaas hadechak* – if they are mentioned by the *Shulchan Aruch*. See also **Chazon Ish (YD 150:4)** who argues on the aforementioned *Chacham Tzvi*, and writes that once the *Shulchan Aruch* renders the *halachah* in accordance with one opinion, the other opinion is completely rejected.

[It should be noted that the *Chazon Ish (ibid., :3)* has a rather novel approach to this topic. He writes that any time there is a *klal* in *Shas* dictating whom to *pasken* like (such as the *klalim* we learned this past week on 46b, or the *klal* of “*yachid v'rabbim halachah k'rabbim*”), the other *shitah* is deemed to be completely rejected and cannot be relied upon even *b'shaas hadechak*, unless there is a specific *mesorah* stating that the *shitah* wasn't rejected. [He therefore writes (**Shevi'is 23:4**) that there is no room to be lenient regarding *Shemittah* nowadays and rely on the minority opinion that holds that *Shemittah* does not apply nowadays.] However, from the words of most of the *poskim* above, including the **Igras Moshe (ibid.)**, it is clear that they did not agree to this novel approach.]

We'll conclude with one last point. **Rav Yitzchok Eizik Chaver (YD ibid.)** points out that we do not apply this *klal* – of relying on a *daas yachid* – to every case of *shaas hadechak* and *hefseid merubah*. It is merely a *heter* to rely on a *shitas yachid* in such a case, but not one which should be used at will. He explains that using this *klal* depends on the gravity of the situation at hand, the greatness of the *yachid*, and other important factors that a *moreh hora'ah* needs to take into consideration. This point is also made by the **Chelkas Mechokek (EH 17:31)** and **Yad Yehudah (Teshuvah 15)**.

In summary: 1) Nearly everyone (aside from the *Chazon Ish*) agrees that by a *d'rabbanan* matter, we may rely on a *shitas yachid b'shaas hadechak*. 2) We may only rely on a *shitas yachid* if the Gemara did not rule explicitly like the *rabbim*. 3) Some say that even if the Gemara didn't issue an explicit ruling, but the *Shulchan Aruch* did, then we may no longer rely on the rejected *shitah*. Others argue – they hold that in such a case, the other *shitah* is not considered rejected entirely. 4) Some say that the above *klal* even applies to questions of *d'Oraysas*. 5) The above *klal* is not to be used at all times. Rather, it is a *heter* that can be used when a *moreh hora'ah* sees fit.