

HEMDAT YAMIM

PARASHAT KI TAVO

20 ELUL 5768

This week.....

- **Listen Up (liftingly)- A Glimpse from the Parasha**
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- **Incompatibility Between a Lawyer and a *Dayan*- (Harav Akiva Kahana)- from the world of Jewish Jurisprudence**

Listen Up (liftingly)

In between the pronouncements of general warnings to Bnei Yisrael to keep certain *mitzvot* and the threat of specific curses if they do not keep the *mitzvot*, our *parasha* promises Bnei Yisrael success if they follow Hashem's expectations. "If you will indeed listen to the voice (*kol*) of Hashem to observe to perform all of the commandments that I am commanding today, Hashem your G-d will place you supreme above all of the nations of the land. All of these blessings will come upon you and reach you if you listen to the *kol* of Hashem your G-d" (Devarim 28:1-2). What is meant by Hashem's *kol*, and why is listening to it mentioned twice, once before the promise of blessing and once after?

One can suggest that the voice just refers to the content of Hashem's commandments. However, the *midrash* (Devarim Rabba 7:1) hints at a different idea: "Whoever listens to the *kol* of Torah in this world will merit to hear that *kol* of rejoicing and happiness, of groom and bride (Yirmiyah 33)." Our *pasuk* is brought as confirmation of this idea. The happy *kol* we are promised is not referring to following the content of the happiness but of experiencing the sound and the mood that accompany good times. It is also noteworthy that the *midrash* does not talk about the *kol* of Hashem but the *kol* of Torah. Granted, the Torah is Divine in origin and thus the content of the Torah is the content of Hashem's Will. However, when focusing on the experience, not the content, the *kol* of the Torah has a somewhat different application. Notice also that Moshe stresses that which the people are being commanded "today," forty years after many of them had actually heard the voice of Hashem when He addressed them at Sinai.

These observations add weight to the Me'am Lo'ez's (Ki Tavo 18) thesis that the *midrash's* understanding of the *p'sukim* refers to one who listens to Torah without comprehending what he hears. The experience of just listening to the sound of Torah study creates an atmosphere that influences a person and inspires him to strive for improved observance. This idea also connects the passage in the *midrash* to the previous one: "Whoever enters synagogues and study halls in this world will merit to enter synagogues and study halls in the world to come." The term of entering these places seems strange, as the point should be to engage in meaningful prayer and study. This source too stresses putting oneself in the uplifting atmosphere and meriting that blessed experience in the future.

An uplifting mood and atmosphere is of limited value if it does not lead to a fulfillment of "to observe to perform all of the commandments." However, for many people the key ingredient in reaching that level of observance is not the absorption of intellectual material but connecting oneself to settings where he can feel the sanctity of the Torah that Hashem kindly gave us.

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Question: I work a night shift and, therefore, sleep in the day rather than at night. What do I do about saying *Kri'at Shema Al Hamita* (bedtime *Shema*) and *Modeh Ani*?

Answer: The *gemara* (Berachot 4b) instructs one who said *Kri'at Shema* at *Ma'ariv* to say it again before going to sleep. The *gemara* (ibid. 60b) mentions a *beracha* that is said at that time (*Hamapil*) and then lists *berachot* that are recited when one awakens, starting with *Elokai Neshama* and continuing with *Birkot Hashachar* to be recited as he goes through the activities of getting up and starting his day. Yet another *gemara* (Shvu'ot 15b) reports that R. Yehoshua ben Levi would say before bed certain psalms that are effective in warding off evil spirits.

Modeh Ani is not found in the *gemara* or in the Shulchan Aruch, Rama and the earliest commentators. It made its way into *siddurim* through a book called Seder Hayom, and the Mishna Berura (1:8) says: "It is good to say as soon as one gets up, *Modeh Ani* ..." As it is a relatively recent *minhag*, not a binding halacha, it is not surprising that we find little halachic literature on *Modeh Ani* for those who sleep at unconventional times. However, the concept of (ending and) starting one's day with holy thoughts is ancient and is at the heart of the aforementioned sources and others. In fact, we find the following thesis (presented in Piskei Teshuvot (1:(22)) to be very logical. The recitation of the non-*beracha* thanks to Hashem of *Modeh Ani* developed because in our times we do not allow people who have woken to say *Elokai Neshama* and *Birkot Hashachar* before washing hands, as they once did (Shulchan Aruch, Orach Chayim 46:2). It enables one to immediately convey *Elokai Neshama's* basic idea of thanks for regaining full consciousness.

After that background, we can address your specific questions. Most *poskim* say that one may not recite the *beracha* of *Hamapil* before going to sleep in the daytime (Biur Halacha to OC 339:1; see B'tzel Hachochma V, 166). One of the possible reasons is that the *beracha* was instituted for sleeping at regular times. Likewise, one is not obligated to say *Kri'at Shema* (Ishei Yisrael 35, 12), as the halacha to do so before sleeping is apparently connected to the obligation of *Kri'at Shema* at night (see Aruch Hashulchan, OC 239:3). Some recommend to recite *Viyhi Noam* and *Yoshev B'seter* before daytime sleep (Rama, OC 231:1), of note for those who normally recite these protective sections of *Kri'at Shema Al Hamita*. These *halachot* apparently apply even if one goes to sleep in the day and wakes up at night (see B'tzel Hachochma, ibid.).

We assume that the logic that applies to *Elokai Neshama* applies also to *Modeh Ani*. One who awakens from any reasonable night sleep (presumably, even if he began during the day) recites *Elokai Neshama* (Mishna Berura 46:24), although he should wait if necessary until *alot hashachar* (dawn) (Mishna Berura 47:30). There is a minority opinion that one should say *Elokai Neshama* after any sizable sleep throughout the day (see Biur Halacha to OC 52:1; Ishei Yisrael 5:(43)). Some say that if one waits until the morning, then he can certainly say *Elokai Neshama*, as by then he has both slept and experienced a new morning. However, we do not suggest making the *beracha* under these circumstances, as many say that it was instituted for the normal type of sleep and awakening before a new day (see Ishei Yisrael, ibid.; B'tzel Hachochma V, 144). The big difference between *Modeh Ani* and *Elokai Neshama* is that the latter is a formal *beracha* which one may not recite when it is not called for, whereas the former is a praise that is not in *beracha* form. Therefore, while one is not expected to say *Modeh Ani* if he slept only during the daytime, he may say it either upon awakening or when the morning breaks if he so desires.

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Ein Ayah

(from the writings of Harav Avraham Yitzchak Hakohen Kook, z.t.l.)

Excerpts from the Introduction to Ein Ayah – part I

[After jumping in and getting a taste of Ein Ayah over the last few months, we decided to return to where we arguably should have started, Rav Kook's introduction to the work. In it, he presents his logic for explaining Chazal's aggadic writings in a manner that goes beyond the simple meaning of their words.]

The two words for those who elucidate the depths of *Tanach* and the works of the Rabbis, *mefarshim* and *meva'arim*, hint at different elements of commentary, as we will explain. The words of the Rabbis, and all the more so, the words of *Tanach*, must be concise so that a little contains a lot. This requires others to come along and explain their intentions. One would expect that the job of the commentator is one of questionable success: did the commentator decipher the meaning of the original source correctly? It is depressing to consider that whoever missed the real intention was wasting his time. Yet we are told: "Expound and receive reward," which implies that the reward is unconditional. There must, then, be something positive in the process of expounding per se, a matter that, we will see, is connected to the foundation of the belief in Hashem's incredible providence over us and the dominion of true unity.

In the physical world, creatures all find the things that are beneficial to them, whether they were created that way or were produced for use. Just as Hashem's providence ensures that necessary physical things can be obtained, so too Hashem provides in different ways intellectual matters that man needs for his development. The blessing that we make on fire on *Motzaei Shabbat*, as we try to extend Shabbat's sanctity to the days of activity, teaches us that everything new in the world, even that which man develops through great G-d given ingenuity, is considered to be created by Hashem. Everything was Divinely prepared so that it would be discovered or invented at just the right time. Of all of the events that coincided to enable these developments, the most important ones are those that influenced the discoverer's intellect.

Within the intellectual world, we all know that Hashem wanted the Torah to be expounded upon and widened, which increases the spirit of sanctity and purity within Israel. Every discovery in the realm of Torah adds fuel to the spirituality of the nation as a whole. Torah is expanded by taking that which is known and clarifying and expanding its message. The world of ideas is like a great ocean whose water awaits being drawn. There are two ways to do this. One is the *peirush*, which explains correctly and fundamentally the original Torah statement. It is an expansion because the statement's content is like a wrinkled fabric; ironing it uncovers areas and the visible size increases.

However, there is another element to commentary on a Torah text or statement. The ideas of the statement itself are able to impact on other ideas that are related to the original statement by the rules of logical extension. This ability to impact on other areas and the details of the expansion are included in the original statement. This is not so innately but is an outcome of the Divine greatness, which arranged the intellectual world with all its needs and prepared ideas for eternal expansion. This is why we refer to a Torah scholar as an increasing wellspring and an unending river. This is the upper level of elucidating a Torah text, which we call *bi'ur*, which is related to the word *b'er* (a well). In this manner, new living water flows out of every uttering and idea of truthful knowledge that we inherited from previous generations of scholars and holy ancestors. The *bi'ur* is not taken only from the content of the specific statement, but from the Divine involvement within it, which paved the path in many ways for us to reach true success and happiness, to light our souls with full spiritual sustenance.

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P'ninat Mishpat

Incompatibility Between a Lawyer and a Dayan

(based on Halacha Psuka, vol. 46 - A Condensation of a Psak of Beit Din Hagadol)

Case: A defense lawyer (=pl) petitioned the court's administration to disqualify a *dayan* (=def) because of acrimony between the two, claiming that *def's* participation harms his livelihood.

Ruling: Certain relationships between litigants and witnesses or judges disqualify the latter from hearing a case. Do these *halachot* apply to lawyers as well as litigants? Lawyers do not have a recognized place in halacha and are most similar to a *mursheh*, one who represents a litigant in his absence. According to the strict law, only a plaintiff can appoint a *mursheh*. However, for hundreds of years the practice has been to allow even a defendant to appoint a *mursheh*. The Rif (Shut 157) says that a relative of a *mursheh* who is paid a flat fee for his services may serve as a witness or *dayan* in a case where he appears but not if he receives a percentage of the profits from the case's outcome. If a witness will be disqualified because of a *mursheh*, the opposing litigant can disqualify the *mursheh*. Presumably, the same is true if a *mursheh's* involvement disqualifies a set *dayan*. The Rashba (Shut III, 391) says that a *mursheh* may be incompatible with a witness or a *dayan* even if he receives no percentage of the case's proceeds. In any case, both confirm the concept of incompatibility of this type.

In this case, the discord arose when *pl* began publicly asserting and registered a complaint with the police (who did not uncover evidence) that *def* accepted bribes. One can only assume that, based on the concept of reciprocal relations (see Mishlei 27:19), animosity exists in both directions.

In a case of incompatibility, who should be removed? There is a general imperative that a *dayan* who was chosen for a case take part even if the matter is unpleasant for him (see Shulchan Aruch, CM 12:1). In contrast, the right of legal representation is uncertain, especially for a defendant. While the *minhag* and the rules of Israeli *batei din* allow it, the right to a lawyer must give way when it conflicts with a *dayan's* ability to judge properly. This is also the view of Israeli law regarding such cases. The rules of the religious courts also enable a lawyer to be removed if his presence hinders the ability to come to a just ruling or if he acts disrespectfully. It might be appropriate to appoint a different *dayan* if the lawyer had been representing the litigant for a long time to enable him to continue his job. However, *pl* was hired just for this case, after the panel of *dayanim* was set, and he should have informed the litigant that he could not accept the case. The delay in raising the issue until days before the hearing also suggests that the matter is a ploy to delay the hearing, which is in *pl's* client's best interest. Therefore, the petition is rejected.

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