



Appointing Judges
By David Silverberg

Parashat Devarim records Moshe's review of selected events that had occurred during the forty-year history of *Benei Yisrael's* travels through the wilderness. Among the first events documented here is Moshe's establishment of a judicial network. Finding himself unable to personally settle all the nation's internal disputes, Moshe decided to delegate judicial responsibilities to a large staff of judges. Moshe here recalls the series of instructions he conveyed to the new appointees, including the admonition, "*Lo takiru panim ba-mishpat*" (1:17). Literally, this phrase would be translated as, "Do not recognize faces in judgment." Seemingly, Moshe here warns the judges to try cases fairly and objectively, without affording preference to one litigant over another due to personal concerns or social stature.

The *Sifrei*, however, interprets this verse differently, whereby Moshe speaks here not to the judges themselves, but rather to government officials empowered to make judicial appointments. According to the *Sifrei's* reading, Moshe urges impartiality not during the process of litigation and judicial decision-making, but rather in assigning people to judicial posts. Appointments must be made based on a purely objective assessment of a given candidate's credentials, without any consideration given to personal relationships or socioeconomic status.

Based on the *Sifrei's* surprising reading of this verse, Maimonides cites *Lo takiru panim ba-mishpat* as the Biblical source for the prohibition against appointing unqualified judges. In *Sefer Hamitzvot*, Maimonides lists this prohibition as the 284th "negative command." He addresses this prohibition in greater detail in *Mishneh Torah*, in the third chapter of Hilkhos Sanhedrin (*halakha* 8), where he writes:

Any *Sanhedrin* [supreme rabbinical court], king or exilarch who appoints for Israel a judge who is not qualified and is not proficient in Torah scholarship or worthy of being a judge, even though he is altogether pleasant and has other fine qualities – the one who appointed him has violated a negative command, as it says, "*Lo takiru panim ba-mishpat*"... The Sages said: Perhaps you should say, "So-and-so is handsome, so I will appoint him judge"; "So-and-so is strong, so I will appoint him judge"; "So-and-so is my relative, so I will appoint him judge"; "So-and-so knows every language, so I will appoint him judge" – he will ultimately render the guilty innocent and the innocent guilty, not because he is evil, but because he does not know [the laws].

A number of later writers have addressed the question of what compelled the *Sifrei* to introduce such a novel interpretation of this verse. As we mentioned, this warning of *Lo takiru panim* appears amidst Moshe's instructions to the newly appointed magistrates:

I instructed your judges at that time as follows: Hear out your fellow men and adjudicate justly between [each] man and his fellow or stranger. Do not be partial in judgment [*Lo takiru panim ba-mishpat*]; hear out young and old alike. Do not fear any man, for judgment belongs to God. And the matter that is too difficult for you, bring to me and I will hear it out.

(1:16-17)

In these verses Moshe clearly addresses the judges themselves, and not the officials who make judicial appointments. The *Sifrei* takes the liberty of isolating the *Lo takiru panim* clause from its context, or at least imposing upon it an additional level of interpretation. Why did the Sages choose not to accept the straightforward reading of this verse, as forbidding partiality in the context of judicial proceedings?

Malbim, in his commentary, answers that the *Sifrei* advanced this interpretation in order to justify the Torah's repetition of the *Lo takiru panim* clause. This phrase appears again later in Sefer Devarim (16:19), and we may reasonably assume that the two admonitions are not identical. To explain this otherwise peculiar redundancy, Malbim suggests, the *Sifrei* arrived at a novel explanation of the first instance of this phrase, whereby it demands impartiality not in the judicial process itself, but rather in the appointment of judges.

The Maharal of Prague, in his *Gur Aryeh* (a work on Rashi's commentary to the Torah), suggests a deeper reason why the *Sifrei* adopted this novel reading of the verse. According to the Maharal, Moshe implicitly warned against subjectivity and partiality in judgment by establishing a judicial network in the first place. The entire purpose of a judicial system is to resolve disputes in a fair and equitable manner, to allow all citizens a degree of protection from abusers by providing a framework for lawsuits. A court that adjudicates on the basis of anything other than the raw data and objective legal standards has negated the entire judicial concept. The Maharal thus argues that Moshe had no need to issue a specific warning against partiality in the courtroom. The *Sifrei* therefore arrived at a different interpretation of the verse, whereby it refers to the appointment of judges. Favoritism in judicial appointments, dangerous and reprehensible as it may be, does not necessarily undermine the entire judicial concept as biased judgment does. Moshe thus found it necessary to issue a particular warning urging officials to appoint judges based on objective criteria, rather than due to personal considerations and the like.

Monuments and *Asheira* Trees

Later in the aforementioned passage, Maimonides cites the following remark from *Chazal*: “Whoever appoints for Israel an unqualified judge is considered as having erected a monument [for purposes of religious worship]... and in a place where there are Torah scholars, [he is considered] as having planted an *asheira* tree.”

This comment stems from a pair of adjacent verses later in the Book of Devarim (16:21-22), amidst a series of laws pertaining to the Torah's judicial process: “You shall not go and plant an *asheira* or other [similar] tree next to the altar of the Lord your God, which you will make. And do not erect for yourself a monument which the Lord your God despises.” The Torah here forbids the two kinds of public, decorative displays that were commonly found among the pagans – an idolatrous tree called the *asheira*, and elaborate monuments used for sacrificing. In an attempt to explain the relevance of this prohibition to the judicial context in which it appears, the Sages assert that the Torah seeks to draw an equation of sorts between these displays and imprudent judicial appointments.

As noted by many writers – the first being Rabbi Yosef Kolon (Italy, 15th century), in *She'eilot U-teshuvot Maharik*, 117 – the passage cited by Maimonides does not actually appear in Talmudic literature. In Masekhet Sanhedrin (6), the Talmud indeed remarks that one who appoints an unqualified judge is akin to having planted an *asheira*, but nowhere does it draw an equation to erecting a sacrificial monument. Presumably, as Rabbi Yosef Karo speculates in his *Kesef Mishneh*, Maimonides had a variant text of the Talmud or had access to some other source which has since been lost.

In any event, this passage cited by Maimonides requires some explanation. We can readily understand why appointing an ill-equipped judge assumes greater severity when proficient scholars are available. Less obvious, however, is how this additional degree of severity is reflected by the difference between erecting a monument and planting an *asheira* tree. How does the gravity of planting an *asheira* – which evidently exceeds that of erecting a monument – express the severity of showing preference to an incompetent judge over a qualified Torah scholar?

Rabbi Naftali Zvi Yehuda Berlin (the “Netziv”; 19th century, Lithuania-Poland), in his *Herchev Davar* (the elaboration to his Torah commentary, *Ha’amek Davar*), suggests that Maimonides perhaps alludes here to a practical, halakhic difference between the two situations. In the presence of a Torah scholar, appointing an incompetent judge is forbidden even if no other options are available. Such an appointment infringes upon the honor of the resident scholar, and, by extension, of the Torah itself. But when no Torah scholar lives in the region, Netziv asserts, incompetent judges may be appointed in the absence of better alternatives. This distinction is represented by the analogies of the *asheira* tree and the sacrificial monument. *Asheira* trees, which are essentially articles of idolatrous worship, are banned by the Torah under all and any circumstances; accordingly, the passage cited by Maimonides likens the appointment of an ignoramus in the presence of a scholar to planting an *asheira*. Monuments, however, as Midrashic sources indicate, were once permitted as articles of religious worship; indeed, we read in the Book of Bereishit of a number of instances where the patriarchs erected monuments in the Almighty’s honor. It was only once the pagans institutionalized the use of monuments as religious symbols that it was banned by the Torah. Accordingly, this prohibition provides the model for appointing unqualified judges where no scholars are present, which could, under certain circumstances, be tolerated.

The Seven Qualities

Earlier in Hilkhot Sanhedrin (2:7), Maimonides delineates seven qualities required to qualify for the judiciary. He deduces these qualities from two verses: the narrative in Parashat Devarim (1:13) where Moshe describes his initial establishment of a judicial system, and the parallel account in the Book of Shemot (18:21), where Moshe’s father-in-law, Yitro, specifies the qualities Moshe should look for in appointing judges. Before presenting Maimonides’ list of the seven requisite attributes, let us first cite the relevant verses:

- 1) “And you shall seek out from among the entire nation men of virtue, who are God-fearing, men of truth, who spurn wealth, and appoint them as chiefs of thousands, hundreds, fifties and tens.” (Shemot 18:21)
- 2) “Choose for yourselves men who wise and discerning and familiar to your tribes, and I will appoint them as your heads.” (Devarim 1:13)

Based on these verses, Maimonides enumerates the following qualities:

- 1) Wisdom (*chokhma*);
- 2) Humility (*anava*);
- 3) Fear of God (*yir’a*);
- 4) Disregard for wealth (*sin’at mamon*);
- 5) Love of truth (*ahavat ha-emet*);
- 6) Love of people (*ahavat ha-beriyot*);
- 7) Well reputed (*shem tov*).

Four out of these seven characteristics flow very clearly from the aforementioned verses. The virtues of wisdom, fear of God, disregard for wealth, and love of truth are mentioned explicitly, whereas the basis of the other three qualities – humility, love of people and reputation – are less obvious. Maimonides explains that he extracted the need for “love of people” from the phrase “*yedu’im le-shivteikhem*” – “familiar to your tribes.” In his view, this description refers not to mere familiarity, but rather to widespread endearment. Some later writers have speculated that Maimonides here builds upon the occasional usage of the root *y.d.a.* – which generally denotes knowledge or familiarity – in reference to love or affection. The most famous example is the Torah’s description of Adam “knowing” his wife Chava (“*Ve-ha-adam yada et Chava ishto*” – Bereishit 4:1), which is generally understood to mean

intercourse. In any event, Maimonides understood the term “*yedu'im le-shivteikhem*” as referring to a person who has earned the affection of many people due to his friendly, amiable demeanor.

The need for a positive reputation, according to Maimonides, stems from the term “*anshei chayil*,” which we translated as “men of virtue.” Maimonides explains this expression as referring to those “who are persistent with regard to *mitzvot* and conduct themselves with utmost care, who control their inclinations to the point where they are not subject to any denigration or ill repute; and they have a pleasant countenance.” In other words, *anshei chayil* describes people who exercise such self-control and meticulous observance of *mitzvot* that they are beyond reproach, and thus enjoy an untarnished reputation.

As for the attribute of humility, there is some confusion regarding the basis of this requirement. Although Maimonides very clearly points to the aforementioned verses as the source for all seven requisite properties, when it comes to humility, he seems to invoke an entirely different basis: “And just as our teacher Moshe was humble, so must every judge be humble.” The basis for humility as a prerequisite for judicial service lies not in the verses that spell out the other required qualities, but rather in the example set by Moshe himself. As later writers have noted, humility is clearly but one of Moshe’s many unique qualities. Maimonides’ reasoning, that Moshe’s character forms the paradigm required of every subsequent Jewish judge, should perhaps dictate that judges must also be endowed with prophecy and Moshe’s other attributes. Presumably, Maimonides arrived at the importance of humility in the judicial process through sheer intuition. A judge who thinks too highly of himself is less likely to decide cases patiently and scrupulously, or pay heed to his colleagues’ arguments. It is thus likely that Maimonides’ insistence on a judge’s humility was intuited, and not derived strictly from Moshe’s example.

Chakhamim and Nevonim

Many later writers, including the *Lechem Mishneh* commentary, which appears in classic editions of *Mishneh Torah*, observed that Maimonides’ list of the seven required attributes runs in contrast with that of the *Sifrei*. The *Sifrei* explicitly differentiates between the adjectives *chakhamim* and *nevonim* – “wise” and “discerning” – which Maimonides combined into a single attribute. The *Sifrei* demonstrates the difference between these two terms through an analogy to two types of merchants: those who trade only when they are approached with merchandise, and those who actively pursue commercial opportunities. As Rashi explains (commentary to 1:13), *navon* denotes a person who draws upon his existing knowledge to arrive at new theories and conclusions (“*meivin davar mi-tokh davar*”). As opposed to the *chakham*, who, like the first type of merchant, only responds with answers when he is approached, the *navon* works to creatively expand his knowledge by rigorously assessing the implications of the data he has already absorbed. Maimonides, without specifying the difference between *chakham* and *navon*, incorporates both terms under a single category of “wisdom.” The *Lechem Mishneh* directs us to other Talmudic sources from where Maimonides extracted his view, that *chakhamim* and *nevonim* essentially describe the same quality.

Of course, Maimonides cannot deny the significance of the Torah’s usage of two different terms in describing the required attribute of “wisdom.” Although he combines them into a single category, the fact remains that this quality consists of two aspects, described by the Torah with the adjectives *chakhamim* and *nevonim*. The question then becomes why he nevertheless combined them. If they connote different qualities, which presumably they must, how can we explain their inclusion within the same attribute in Maimonides’ list of requisite character traits?

Maimonides perhaps felt that one cannot separate the accumulation of knowledge from the insight needed to apply the information. He may have been unprepared to grant the title “*chakham*” to an individual who has amassed volumes of knowledge but lacks the intuition and common sense to process this knowledge and reach the appropriate conclusions. In Maimonides’ view, perhaps, the “wise” man must possess both the book knowledge and the analytical skills to apply it, and he therefore combined *chakhamim* and *nevonim* into a single attribute.