**YESHIVAT HAR ETZION**

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

**\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\***

**TALMUDIC METHODOLOGY**

**By Rav Moshe Taragin**

**For easy printing, go to**

[www.vbm-torah.org/archive/metho74/14metho.htm](http://www.vbm-torah.org/archive/metho74/14metho.htm)

**Shiur #14: A Two to One Majority Verdict**

The verse in *Shemot* 23:2 allows a verdict to be based on a 2-1 majority. Tosafot in two locations raise an interesting contradiction regarding the employment of “*rov*” or a majority. The manner in which they respond to this question highlights several fundamental theories about the manner in which the halakhic system resolves monetary disputes in the absence of *eidim*.

The question is based on a well-known doctrine that a *rov* (statistical majority) cannot be employed to extract monies from a defendant. Even though a *rov* CAN be employed in many halakhic areas, it cannot be utilized to take monies away from a *muchzak*. This doctrine is based on Shmuel’s response to a scenario raised by the *gemara* in *Bava Batra* (92a) about someone who sold an ox incapable of working. The buyer wants his money returned since MOST people purchase oxen for work; hence, this was a faulty sale, a *mekach ta’ut*. The seller responds that some people, albeit the minority, purchase oxen for consumption, and this lame ox can service that need. Rav allows the *rov* to be employed in this case, rendering the sale faulty and extracting money from the seller to be returned to the purchaser. Shmuel, however, objects and rules “*ein holchin be-mammon achar* *ha-rov*” – we do not follow a *rov* to extract money. Since a minority of people actually purchase oxen for meat and not for work, the seller can defend his money and refuse to repay by claiming that this particular sale was based upon the minority.

Based on this precedent, Tosafot question the ability to extract monies based upon a 2-1 majority in a 3 person *beit din*. After all, the same principle of *rov* is being employed, and Shmuel already asserted that *rov* isn’t strong enough to extract monies! Tosafot raise this question in two places, providing a different answer in each.

In *Sanhedrin* (3b), Tosafot respond that the *rov* in the scenario of selling an ox is less “compelling” (“*chashuv*”) than the *rov* of a 3 person panel of *beit din* which has reached a 2-1 majority verdict. Tosafot does not clarify what renders the *rov* in the *beit din* more compelling.

A preliminary idea would be to distinguish between two types of *rov* – a “*ruba de-ita kaman*” and a “*ruba de-leta kaman*.” The former refers to an actual set with a majority of that set expressing certain features. In our case, the set includes three *dayanim*; two have exhibited the feature of issuing the same verdict, while the minority member of the set exhibits the opposite feature, issuing a different verdict. This ACTUAL *rov* (in which the set is “in front of us,” “*ita kaman*”) is a very compelling statistic and can be employed to extract monies. In contrast, the *rov* in the scenario of a faulty sale is a *ruba de-leta kaman* – a statistic based on human nature and not on an actual set of items. MOST PEOPLE purchase oxen for labor, and this buyer wants to associate the sale with that statistic. Perhaps a *ruba de-leta kaman*, which is not based on an ACTUAL SET “in front of us,” is less compelling. In fact, in the case of the faulty sale, the *ruba de-leta kaman* is not even based on human NATURE, but rather on human CONDUCT. The Ramban (in his comments known as *Milchamot* *Hashem* to *Kiddushin* 50b) distinguishes between a *ruba de-leta kaman* based on innate human nature and one based on human tendencies, and he claims that the latter form of *ruba de-leta kaman* is relatively weaker.

Essentially, then, Tosafot is differentiating between the *rov* in question within a 2-1 *beit din* as opposed to the *rov* in operation in the sale of a lame ox. Since the former is a STRONG *ruba de-ita Kaman*, it can be employed to extract monies; since the latter is a weak *ruba de-leta Kaman*,it cannot be used to extract monies. This approach to solving the contradiction is outlined by the *Shev Shmaitza* (4:6).

Tosafot in *Bava Kama* (27b) address the same question but appear to offer a completely different answer. They claim that the minority opinion in a *beit din* is ELIMINATED, and therefore money can be extracted. A typical *rov* merely addresses the *safek* (doubt) and offers a statistical likeliness to help address the *safek* and render a verdict. Since the *safek* still exists, money cannot be extracted based on the principle of “*ha-motzi mei-chaveiro* *alav ha-raya*,” “one who wishes to extract money from another must bring proof.”Money can never be extracted if a residual *safek* exists. In the context of a 2-1 majority verdict, however, the minority opinion is cancelled, and it is therefore considered as if all three judges issued the same verdict. Since no residual *safek* exists, monies can be extracted.

In a well-known essay, R. Chaim Brisker explains that Tosafot maintain that the *rov* which determines that we follow a 2-1 majority of judges is a *rov* of “conversion,” not one of “sufficient majority.” There are instances in which a *rov* is sufficient – for example, drinking most of the cup of wine or cutting most of the *siman* of animal while performing *shechita*. In these instances, performing an action on MOST of an item is sufficient to render the ACTIVITY as having been fulfilled. A different type of *rov* actually TRANSFORMS or CONVERTS the minority and imposes upon it the status enjoyed by the majority. For example, if two pieces of kosher meat are mixed with one piece of non-kosher meat, the minority meat is “converted” into kosher meat and the entire indiscriminate mixture may be eaten (at least on the Biblical level). Tosafot maintain that by allowing a 2-1 majority within *beit din,* the Torah is not merely validating a verdict of the majority. Rather, the majority opinion is imposed upon the minority and the entire *beit din* renders one unequivocal verdict. (This approach was outlined in two previous *shiurim*: <http://vbm-torah.org/archive/metho-by-topic/sanhedrin.html>, *shiur* #11 and *shiur* #12.)

A final clause in Tosafot’s comments in *Bava Kama* suggest a third solution to this contradiction. Tosafot write, “You cannot apply the barrier or *ha-motzi mei-chaveiro alav ha-raya* because *beit din* is ultimately extracting the money.” Tosafot may be distinguishing between money extraction by a litigant in a situation of *safek* and money extraction by *beit din*. Does the principle of *ha-motzi mei-chaveiro* EVEN apply to *beit din*? This partially depends on the definition of *ha-motzi mei-chaveiro*. Is possession considered an inherent PROOF of ownership, obligating an actual counterproof to sanction monetary extraction? If so, the principle may be similarly applicable to *beit din* in its efforts to extract money form the guilty party. Since only a majority of judges believe money should be awarded, sufficient proof has not been manufactured to warrant monetary extraction from the current possessor, who enjoys latent proof of ownership. However, the principle of *ha-motzi mei-chaveiro* may not entail PROOF of ownership as much as a willingness to retain a status quo of possession unless a litigant provides sufficient counterproof to justify legal action. Until compelling evidence has been offered, *beit din* will not initiate a change, choosing instead to let matters remain as they were. In the context of a majority of judges, however, legal action has already been initiated and the judges have not reached a unanimous decision. The “lockdown effect” which generally underwrites *ha-motzi mei-chaveiro* should not apply.

To summarize, Tosafot seems to provide three very different approaches to solving the contradiction between Shmuel’s non-application of *rov* in the faulty sale instance and the application of *rov* in a situation of a 2-1 *beit din* verdict. One approach suggests that the “brand” of *rov* is different; the *rov* governing a 2-1 *beit din* is qualitatively superior and allows monetary extraction. The second solution suggests that any trace of *safek* has been eliminated in a 2-1 scenario. *Rov* has completely eradicated any minority opinion and any *safek*. The third option suggests that *beit din* is not limited by the *ha-motzi mei-chaveiro* principle, which severely regulates the extraction of monies in other instances.