

## PARASHAT KI TETZE

### Literal and Exegetical Understandings of the Law of Lashes

By Rav Amnon Bazak

#### A. INTRODUCTION

Parshat Ki-Tetze is characterized first and foremost by the great many mitzvot that it contains: a total of seventy-four positive and negative commandments. Many of these mitzvot reveal a general phenomenon concerning the relationship between the Written Law and the Oral Law, whereby the literal text seems to suggest one understanding, which changes once we consult the Oral Law. This subject has been addressed by our Sages throughout the generations. In this shiur, we shall focus on one brief unit in which this phenomenon is illustrated in three different details: the law of lashes. We shall attempt here to understand the literal text, the midrash halakha (halakhic exegesis), and the reason for the discrepancy between them.

The law of lashes is a short unit, comprising only three verses (25:1-3):

(1) "If there will be strife between people and they come to judgment, that they may be judged, then they [i.e. the judges] shall justify the righteous and condemn the wicked. (2) And it shall be, if the wicked party is worthy of receiving lashes, then the judge shall cause him to lie and he shall be beaten in his presence, in accordance with his misdeed by number. (3) Forty lashes shall he administer – he shall not continue, lest he continue to beat him in addition to these with a great beating, and your brother shall be despised in your eyes."

Each of these three verses contains a law which, according to the literal meaning, appears different from the way it is actually practiced according to the Oral Law. Let us examine the three laws, from the last to the first.

#### B. "FORTY LASHES SHALL HE ADMINISTER – HE SHALL NOT CONTINUE"

The best-known law of this unit, which has also become a symbol of the authority of the Sages, is the warning of the Torah in the third verse: "Forty lashes shall he administer – he shall not continue." The simple reading of the text suggests that the

maximum number of lashes cannot EXCEED forty. However, the well-known directive of Chazal instructs (Mishna Makkot 3:10):

"How many lashes are administered? FORTY MINUS ONE, as it is written, 'by number forty' – a number that is close to forty.

Rabbi Yehuda says: He receives a full forty lashes." [1]

The first opinion quoted in the Mishna – which is, in fact, accepted as law – is based upon the combination of words, "by number forty." As the Gemara explains there (Makkot 22b):

"For what reason [do we administer only 39]? Had it written, 'forty by number,' I would have said it means precisely forty; now that it says, 'by number forty,' it must refer to a number that completes forty."

Obviously, the exegesis of this verse is far from the literal meaning of the text, for the word "in number" concludes verse 2, while the word "forty" opens verse 3. [2] The Gemara relates to this statement by Chazal, regarding it as a symbol of their halakhic power:

"Rabba said: How foolish are those people who rise up in honor of a Sefer Torah, but do not rise up before a great scholar! For the Sefer Torah teaches, 'forty,' but the Sages diminish by one."

This example is noted by the Vilna Gaon in an important teaching in his Aderet Eliyahu, at the beginning of Parashat Mishpatim:

"But the halakha prevails over the literal text, as in the majority of this parasha, as well as IN SEVERAL PARASHIOT IN THE TORAH. This is the greatness of the Oral Law, which is law handed to Moshe at Sinai, and it is [a mirror image to the Written Law,] like the impression left by a stamp ... As it is written, 'How foolish are those people who rise up in honor of a Sefer Torah, etc.' Such is the case also in the law of pigul [3] AND IN MOST OF THE TORAH. Hence it is necessary to know the literal text, in order to know the 'stamp.'"

However, the Vilna Gaon fails to explain what leads Chazal to explain the verses in this fashion. It would seem that Chazal's teaching arises from their desire to limit the Torah's license to administer forty lashes, stipulating instead that the number be forty less one. But what lies behind this tendency? The Rambam (Hilkhot Sanhedrin 17:1) answers as follows:

"How are lashes administered to one who is deserving of them?... Where it says 'forty,' [it means] that not a single stroke is to be added over and above those forty, even if he is as strong and healthy as Shimshon; but for one who is weaker, fewer lashes are administered... Therefore OUR SAGES TAUGHT that [even] the most strapping subject is given thirty-nine, for if one more is added it turns out that he was administered the forty of which he was deserving."

The Rambam, of course, is introducing something new. We may understand, from what he is saying, that according to the Torah he is indeed to be given forty lashes, and that the law of "forty less one" is of rabbinical origin. Indeed, the Kessef Mishneh explains that the rabbinic exegesis of this verse is a mere textual reference (*asmakhta*), not an actual derivation. But clearly this explanation is somewhat forced, for there is no reason to regard such a typical instance of rabbinic exegesis as mere reference! For this reason, Abarbanel writes (and the Ridbaz writes something similar):

"Since the Divine will specifies that the number should not exceed forty... therefore the ruling of the Sages is that there should be thirty-nine lashes, such that in any event they will number less than forty. The reason for this is that he should not mistakenly exceed the number forty."

In light of this, we may say that two levels of this law exist. According to the literal text, the person who is sentenced to lashes is indeed deserving of forty. However, since the entire section comes to uphold the dignity of this person, the Sages derive exegetically that only thirty-nine lashes should be administered, in order to avoid any possibility of the corporal punishment inadvertently leading to unwarranted degradation of the subject. Hence the Sages are not trying to interpret the text differently from its literal meaning; instead, they are following its intention and extending the prohibition, while giving BIBLICAL AUTHORITY to their additional limitation. [4] The Sages interpret the verses thus by virtue of their authority, [5] and this indeed seems to be the meaning of the expression, "they lessened it by one." [6]

### C. "IN ACCORDANCE WITH HIS MISDEED, BY NUMBER"

Let us now return to verse 2. A simple reading of the verse – "He shall be beaten in his presence, in accordance with his misdeed, by number" – gives the impression that the number of lashes varies according to the severity of the transgression. As Ibn Ezra writes:

"It would seem that there are sins for which he receives ten lashes, [others for which he receives] twenty, or less, or more, as it is written – 'in accordance with his misdeed' – only the number cannot exceed forty."

Ibn Ezra concludes: "[This would be the case] were it not for the accepted tradition, which alone is the truth." [7] He means that according to Chazal there is no difference between the various cases in which he receives lashes; in every case he receives forty less one.

Ibn Ezra brings an additional explanation. Though it accords with Chazal's conclusion that there is no difference in the number of lashes administered for the different transgressions that carry corporal punishment, it still recognizes the distinction between different misdeeds that arises from the literal reading of the text:

"Some say that the expression 'in accordance with his misdeed' refers to heavier or lighter lashes, but in all cases they number forty."

The Chizkuni interprets in the same way, but it is doubtful whether this interpretation actually arises from the literal text.

Two of the "literal" commentators – Abarbanel and Shadal – conclude that, according to the literal text, the number of lashes does indeed vary in accordance with the severity of transgression. Abarbanel writes:

"The instruction, 'forty lashes shall he administer, he shall not continue' – does not mean that there must always be forty lashes, for sometimes it will be less, in accordance with his misdeed. The intention rather is to warn that there should be no more than forty, like the foolish custom of whipping people with cruelty, however many lashes the judge sees fit to sentence, to the extent that on many occasions people would die from these lashes."

Thus, we return to our question: why do Chazal conclude that there is a uniformity of punishment for the various types of transgressions for which corporal punishment is administered, contrary to the literal reading of the text?

A similar phenomenon exists with regard to another parasha (Shemot 21:22):

"If men strive and a pregnant woman is hurt, and the fetus departs from her, but there is no [further] loss of life, then [the man who struck her] shall surely be punished, as the woman's husband may stipulate, and he shall pay as the judges rule."

Here too, it would appear, the amount of damages to be paid is determined by the woman's husband, although we note that he is limited in the demands that he can make: "he shall pay as the judges rule." Ibn Ezra and Chizkuni explain:

"The expression, 'as the woman's husband may stipulate,' refers to a case where he accepts to pay what the husband stipulates... and if he does not agree to pay what the husband stipulates, then he goes to the court and pays in accordance with their ruling."

There are further examples illustrating the principle that arises from these instances, i.e., a trend towards uniformity, limiting the need for the judges to exercise their judgement in differentiating between sentences. This idea is quite understandable in our parasha: the Torah is exhorting us to take great care with regard to the dignity of the subject receiving lashes (and we have already discussed Chazal's ruling concerning the maximum possible number of lashes). Likewise concerning the subject of the severity of the transgressions: according to the literal text, a very heavy responsibility rests upon the judges, who must determine how many lashes each convict is to receive. Any error on their part will immediately involve a situation where "your brother will be despised in your eyes." In order to avoid this problem, the Oral Law sets a uniform number of lashes for all relevant transgressions, thereby eliminating the possibility of the court unintentionally causing unwarranted humiliation to the subject.

This way of thinking also influenced the understanding of the number "forty." According to the literal text, this number represents the maximum number of lashes to be administered even in the most severe cases, based upon the assumption that exceeding this number would involve "your brother being despised in your eyes," or out of concern that more than forty lashes could lead to the death of the subject. Abarbanel writes in this vein: "Therefore the Divine wisdom decreed the proper number, such that the command is fulfilled, without endangering human life." However, Chazal having established that this number would be administered uniformly for all relevant transgressions, there was a need to explain why specifically the number forty was chosen for the uniform punishment. One such explanation is to be found in the Midrash Tanchuma (Bamidbar 23; quoted by Ramban):

"Why forty? Because this person was formed [in the womb] during forty days, and he transgressed the Torah which was given to Moshe during forty days, therefore he is given forty lashes and then he has fulfilled his punishment."

#### D. "IF THERE IS STRIFE BETWEEN PEOPLE"

According to the literal text, our parasha discusses strife and conflict between two people, where the "wicked" one – i.e., the person who loses the case – is punished with lashes. Abarbanel explains:

"According to the literal text, the lashes are administered because of the fight. They are given either to the accusing party, for having demanded more than what was right or true, or to the defendant, for denying the truth, or for swearing [falsely]...

As is the custom in Moslem countries today ... [according to the literal text] he receives lashes in monetary matters, too, in accordance with the judge's ruling, in keeping with the matter of his misdeed, and he is whipped before the judge." [8]

But as we know, the Halakha stipulates that in monetary matters lashes are not administered. The Gemara teaches: "Anyone who is liable to pay, is not liable for lashes" (Makkot 4b and elsewhere), and also applies the principle, "Administer only the more severe punishment [when one act would engender two punishments]." But we may ask: how are we then to explain the verses, from which it appears that in monetary disputes, too, there is a punishment of lashes?

Chazal explain that our parasha deals with conspiring witnesses (eidim zomemim), in the specific instance where the law that "whatever they conspired to do to their brother should be done to them" cannot be fulfilled – such as, for example, if they testified that a kohen was the son of a divorcee. Since they cannot be punished by having done to them what they intended to do to the victim, they are given lashes. Ramban feels that this explanation is forced:

"ACCORDING TO THE TRADITION OF OUR SAGES, lashes are administered for those who have transgressed negative commandments, so what does it have to do with a fight between two people? ... Therefore they DERIVE EXEGETICALLY that this applies to conspiring witnesses...."

For this reason, Ramban suggests a different direction for interpreting Chazal's ruling that lashes are administered only for transgressions of negative commandments:

"Perhaps there would be a fight between people and one of them would be sentenced to lashes, such as, for example, where one injured the other slightly, such that the damage was not worthy of monetary compensation, or that he cursed his friend in God's name... The text addresses the most common occurrences, for the accusing party takes the defendant to court, and by his hand he is given lashes."

Even the Ramban's solution does not seem to fit in with the literal text, as we have noted above, in the words of Abarbanel. [9] In light of this, we ask once again: if

indeed according to the literal text there is an obligation of lashes for monetary matters, too, then why did Chazal cancel the law of lashes in relation to legal disputes between people, where they do not involve transgression of a negative commandment, as would seem to apply according to the literal text?

It appears that here, again, what concerned Chazal was the need to observe the Torah's exhortation concerning the dignity of the subject. Monetary disputes between people are an everyday occurrence, and the trait of mercy, which is reflected in many of Chazal's rulings that depart from the literal text, [10] requires that a person not be beaten without his actions having involved an evil intention to transgress a law of the Torah. This applies especially when the person is obliged in any case to pay monetary damages.

We have discussed, very briefly, three laws in the section of lashes, in which there would seem to be a discrepancy between the intention of the Written Law and the dictates of the Oral Law – as the Rishonim point out. We have followed the footsteps of the Vilna Gaon: "Hence it is necessary to know the literal text, in order to know the 'stamp' [i.e. the Oral Law, which is a mirror image of the Written Law]." We have raised the possibility that all of these discrepancies arise from the same reason: the inclination of Chazal, by virtue of their authority, to apply most stringently the Torah's instruction to take care concerning the dignity of the subject who receives lashes. A Jew, although he has sinned, remains a Jew, and a person who receives lashes is still "your brother."

Notes:

[1] In several other places, we find that Rabbi Yehuda rules likewise in accordance with the literal text.

a. In the law concerning slander of a bride (Devarim 22:13-21), the Tannaim are divided concerning the exp, "they shall spread the cloth" (Ketubot 46a). R. Eliezer ben Yaakov understands "according to the literal meaning," while the Sages maintain that "this teaches that witnesses are brought for both sides, and they clarify the matter like a new cloth." The Gemara links this dispute to another one. In the view of R. Eliezer ben Yaakov, the literal text refers only to a situation where the man actually had relations with the woman, whereas the Sages it applies even if he did not have relations with her. The Sifri Devarim (236) quotes the opinion of R. Yehuda: "He is never obligated unless he had relations with her" – in accordance with the literal text.

b. In the section concerning a case where a woman "puts forth her hand and grasps his private parts" (Devarim 25:11-12), the Sages are divided (Sifri, 292-293). R. Yehuda understands the unit literally – that the woman is punished for an act that involves something of an abomination. Others regard this as a source for the "law of a pursuer," maintaining that there is nothing specially important about the fact that she grasps him by "his private parts;" this is simply an example of a situation of mortal danger.

c. The principle of "matters as they are written literally" appears several times in the rulings of R. Yehuda: see Pesachim 21b; ibid. 23b; Sotah 48b; Zevachim 59a-b.

[2] Others have explained the difference between the literal text and the teaching of the Sages in this regard in a different way. In addressing the contradiction between "you shall count fifty days" (Vayikra 23:16) and the actual practice of counting forty-nine days, the Rosh (Pesachim 10:40) writes:

"It is the way of the text that when the number of some counting reaches a multiple of ten less one, it is referred to as the multiple of ten, and we do not pay attention to the fact that one is missing. Similarly, it is written, 'All the souls of the household of Yaakov who came to Egypt were seventy' (Bereishit 46:27), AND ALSO 'FORTY LASHES SHALL HE ADMINISTER.'"

This explanation raises a number of questions. First, there must be some source for the conclusion that the text really means some number less one, and - at least in our case – no such source exists. Second, his solution concerning the seventy descendants of Yaakov does not solve the principal difficulty that exists in that parasha – which is the discrepancy between the number of Leah's children mentioned there – "thirty three" - and the detailed list of names, which includes only thirty-two. Here the Rosh's solution is of no benefit.

[3] In the parasha concerning "pigul" (the meat of a sacrifice that one intended to offer outside the bounds of the Temple or to eat at the wrong time), there exists a similarly striking discrepancy between the literal text and the midrash halakha. I have discussed this matter elsewhere – see Shabbat be-Shabbato #953, Parashat Tzav 5763 (on the Zomet website: <http://www.zomet.org.il>).

[4] Proof of this direction of understanding may be brought from the Rambam, Moreh Nevukhim (III:41):

"There is also wisdom in the number of lashes, for they are limited according to their purpose, and the number is not the same for everyone,



but rather each person is given in accordance with his capacity to bear. But the limit for lashes is FORTY, even if the person could bear a hundred."

It appears that, in the Rambam's view, from the literal text it seems that he does indeed receive forty lashes. In this chapter, the Rambam emphasizes the discrepancy between the literal text and midrash halakha in another context, too – in the famous section of "an eye for an eye." Concerning this latter discrepancy, he writes:

"Do not concern yourself with the fact that there is [we do not apply this text literally but rather demand] financial compensation. For the intention Here is to give an explanation for the text, not to give explanations for the oral law, though I do have a theory about this law that I will mention orally."

[5] As stated, we shall not elaborate in this framework on the source of the authority of the Sages to interpret biblical verses in accordance with their own understanding and considerations. For the purposes of our discussion, we shall suffice with the statement in the Talmud Yerushalmi (Sanhedrin 4:2):

"Rabbi Yannai said: Had the Torah been given definitively, it would not have had a leg to stand on. Why? 'God spoke to Moshe' – he said to Him: Master of the Universe, tell me what the halakha is. God said to him, 'Follow the majority' – if those who acquit him are more numerous, he is acquitted; if those who condemn him are more numerous, he is condemned. IN ORDER THAT THE TORAH MAY BE INTERPRETED WITH FORTY-NINE FACETS OF IMPURITY AND FORTY-NINE FACETS OF PURITY."

As an ideal, then, the Torah was given with the intention of being explained in different ways, and the authority as to how the verses are to be explained in each generation rests with the Sanhedrin.

[6] It is worth noting the words of Rabbi Yosef Bekhor Shor (ad loc.), who explains the Gemara quoted above as follows:

"And from this they said, 'How foolish are those people...' – in other words, they honor a Sefer Torah and love it, and say, 'That which is in the Sefer Torah is convenient to observe – more than the scholars, who are stringent and induce and enact decrees and make it difficult for us.' Hence they come to hate the scholars, and do not rise out of respect for them. For they should love them, since sometimes they rule laws

leniently for them, such as here, FOR THE SEFER TORAH LITERALLY SEEMS TO TEACH THAT FORTY LASHES SHOULD BE ADMINISTERED, but the Sages come and lessen by one, for only thirty-nine lashes are given."

[7] This represents Ibn Ezra's approach in matters of halakha. In contrast to most of the classical commentators, particularly Rashbam, Ramban and Chizkuni, Ibn Ezra emphasizes that the discrepancy between the Written and Oral Law should be minimized. Hence he almost always concludes his explanation of a verse in accordance with the midrash halakha. Thus he writes, for example, in his short commentary on Shemot 21:24: "In general, we cannot provide a complete explanation in accordance with the literal text, unless we rely upon the words of the Sages, because when we received the Torah from our forefathers, we received at the same time the Oral Law; there is no difference between them." At the same time, his very suggestion that we may have considered a different interpretation – even if ultimately it is rejected – demonstrates that to his view, the possibility of such an explanation should not be rejected out of hand.

[8] Here again, Shadal follows the Abarbanel in giving a literal interpretation.

[9] Abarbanel himself suggests a different way of interpreting the literal text so as to accord with the ruling of Chazal. According to his explanation, verse 1 stands on its own, emphasizing the need to solve conflicts between people in court. Verse 2 discusses an unrelated law of lashes, which is carried out when someone has transgressed a negative command.

[10] It should be remembered that while the death sentence is mentioned frequently in the Torah, it is actually applied very seldom, as the famous Mishna (Makkot 1:10) teaches:

"A Sanhedrin that puts to death one person every seven years is called destructive; Rabbi Eliezer ben Azaria says: Even once in seventy years. Rabbi Tarfon and Rabbi Akiva say: Had we sat in the Sanhedrin, no person would ever have been put to death."

It seems, then, that just as the general intention was to limit the death sentence, so there was a general intention to limit the punishment of lashes, for "Lashes stand in place of [the] death [penalty]" (Sanhedrin 10a).

(Translated by Kaeren Fish)

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