

# Issues in Community Custodianship and the Election of Communal Representatives

An analysis through the Torah sources

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The Yeshivah Mosdos are heading towards historic elections for the board members who will be entrusted with the responsibility of managing, directing and growing our organisations and the vital roles that they serve in spreading Torah, Yiddishkeit and Chassidus throughout the Melbourne community.

In this essay we present some of the Torah perspectives and Halachic rulings on issues in communal elections and community custodianship as discussed in the Rishonim and the Poskim.

A significant portion of this essay is based on two Teshuvos of the Tzitz Eliezer<sup>1</sup>, Rabbi Eliezer Waldenberg (Jerusalem 1915-2006), which were studied at the highly popular Sunday morning Shaalos and Teshuvos shiur in Kollel;

As the Tzitz Eliezer wrote in his introduction of the Teshuva, this is not addressing specific cases or communities and is certainly not mixing into Machlokes י"ח. Each community is different in its set-up and make-up. As we will see, prevailing local custom is a factor of great significance. Therefore for specific rulings, competent Halachic rulings must be sought.

Our intent is to present general Halachic principles and guidelines which can be applied and may be relevant in any particular community setting.

## The need for a board

The need for a board of community custodians is obvious. The Divrei Chaim writes that the age-old custom of custodianship in Jewish communities is necessary because otherwise the community would unravel. For successful and efficient ability to function and operate, decisions need to be made. These will impact on the welfare of the

community members and will impact community resources, funds, organisations and the future of the community.

In truth, these matters should be determined according to the will of the community members themselves. But each person thinks differently and has different interests.

There are many issues and decisions to be made and one cannot realistically or viably address each concern to every community member before deciding what to do.

Instead, Halacha recommends a system of community governance whereby a panel of custodians are installed (as outlined below) to make these decisions. They are considered to represent the will of the community and are empowered to serve as the community's agents in making and implementing decisions.

Who are these custodians? How are they appointed and by whom? What are their responsibilities and what is their authority?



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the Tzitz Eliezer*

## Custodians of the city

The Gemora<sup>2</sup> refers to the “*Shiva Tuvei Ha’ir*” (literally the seven good ones of the city). This is the body of custodians of the city, who represent and act on behalf of and for the benefit of the community.

Elsewhere, these custodians are referred to as *Parnasim*, or *Parnsei Ha’ir*<sup>3</sup>. The Rashba<sup>4</sup> refers to them as the *Brurim*, the elected or selected ones. They are also described as the *Ziknei* or *Chashuvei Ha’ir*<sup>5</sup> or the *Manhigei Ha’ir* (leaders of the city)<sup>6</sup>. We will refer to them as the custodians of the city/community.

There need not be exactly seven<sup>7</sup>. Seven is used as an example of a large number. There may be more than seven, depending on the needs and size of the community and prevailing local custom.

### What is included in the powers of the community custodians?

The Gemora<sup>8</sup> describes the authority of the *Tuvei Ha’ir* to be able to sell as Shule or other communal holy items. The Rishonim expand their scope of authority to include; overseeing charity assessment, collection and allocation, managing community assets and appointing Rabbonim, Chazzanim and Tzedaka collectors. They are also able to legislate enactments as required for the benefit of the community or city and its residents.

Their powers include the ability to buy and sell assets and other needs for the community, to raise or levy taxes and fees on the community and to forgo on payments due. In previous times where Jewish communities enjoyed greater autonomy, they were also able to fine or punish wrongdoers and even *mafkir* their wealth as required.

### How should the community custodians be installed?

In order for the community custodians to serve as agents for and make decisions on behalf of the residents, there needs to be a process of election by the residents themselves. Our sages teach<sup>9</sup> “we do not install a *Parnas* over the community without first consulting the community”.

In the words of the Tzitz Eliezer; Not having elections or allowing someone to take authority for themselves, would “breach the boundaries” of peacefulness and community brotherliness, igniting the fire of *Machlokes*. Such a situation could lead to unscrupulous or dishonest people taking leadership who would not be looking out for the needs of the vulnerable<sup>10</sup>.

“We do not install a *Parnas* (custodian) over the community without first consulting the community”

Therefore, he continues, the Chachomim of each generation acted on behalf of the community to ensure a process of election for the custodians, so that all members of the community would be represented and their interests taken care of.

### Who is eligible to vote?

The Tzitz Eliezer<sup>11</sup> outlines that eligibility to be able to vote in community elections is limited to those defined as residents of the city. Their right to vote comes by dint of their responsibility to pay dues, upkeep and taxes. Only those who have lived in the city for more than 12 months are considered as *B’nei Ha’ir*<sup>12</sup>.

The Gemora teaches that someone who buys a house in the city automatically becomes a resident and is eligible to vote. The Rishonim explain that in doing so, they have declared their intent to remain in the city. The same may apply to someone who signs a 12 month lease.

This definition of a city resident applies to the giving (and receiving) of *Maos Chittim* (Tzedaka for Pesach needs). Originally this was a communal tax. Only residents (as defined

above) were assessed and obligated to contribute. Similarly only a resident pauper was able to receive *Maos Chittim*<sup>13</sup>.

Nonetheless, as in most aspects of communal governance, if there is a pre-existing custom the Minhag is followed in defining the eligibility criteria.

Maharam bar Baruch<sup>14</sup> adds an additional limitation that only *balabatim* who pay the community taxes are able to vote. Further, every voting member must accept upon themselves a *Cherem* that they will vote *L'sheim Shamayim* and for the benefit of the whole city.

The ruling of the Maharam bar Baruch is brought by the Ram"o in Shulchan Aruch<sup>15</sup> and he adds that whomever refuses to accept the *Cherem* is disqualified and their opinion disregarded.

### **Are there special voting powers and how is the majority determined?**

In Halocha this discussion is phrased as; Do we follow *Rov Minyan* or *Rov Binyan*?

The *Rov Minyan* approach requires that we follow the absolute numerical majority with an equal voting right to each eligible person. The *Rov Binyan* approach either limits or gives greater weight to a specific segment of voters deemed to have greater stature or calibre (this would be akin to the policy of restricting the right to vote to land owners who were presumed to be more wise). This may be defined in terms of people of wealth, position of importance or Talmidei Chachamim.

#### *Rov Binyan*

Rabbi Shmuel d'Modina<sup>16</sup> (known as the Maharshdam – 1505-1588 Salonika) discusses this dilemma and favours the position of *Rov Binyan*. Toras Chaim Hasefardi<sup>17</sup> similarly writes that it does not make sense that the

ignorant poor masses should be able to claim that they are the majority and thereby force their will upon the elite. He argues that since the elected governors are required to manage assets of the community, liabilities and expenses, it makes sense that greater weight be given to the wealthy who contribute more heavily.

“Every voting member must accept upon themselves a *Cherem* that they will vote *Lsheim Shamayim*”

This is the position of the Sefer Hachinuch<sup>18</sup> who writes that the minority who are Chachomim should override the majority. The only time an absolute numerical majority is followed is in the Sanhedrin where they are all men of calibre.

The Ramban<sup>19</sup> does not definitively say that we follow *Rov Binyan*, but he writes that if one is greater than the other, their opinion cannot be immediately disregarded just because they are the minority.

#### *Rov Minyan*

The Tzitz Eliezer challenges this position. Even if *Chochma* (wisdom) may be considered as grounds for greater voting power, why should wealth give a person greater weight? If it is unfair to follow the 90% of the poor population over the 10% wealthy, then it is equally unfair the other way around. Is it just to deprive the poor of their rights just because they are impoverished? The fact that they contribute less is not of consequence. The small amount given by the poor man may in fact be even greater (proportionally) than the larger amount given by the wealthy.

The Tzitz Eliezer concludes that whilst significant weight should be given to the view of the “wiser” minority, ultimately the outcome is determined by a simple majority vote where each member has equal voting power.

There is an exception where the minority is able to overrule the majority. This is where the minority opinion follows the Halocha whereas

the minority does not. The Mishna<sup>20</sup> teaches that even if 99 paupers say that the owner of the field should collect and distribute the *Peah* produce and 1 says that it should be left for all to take, we follow him, because his opinion follows the Halocha.

### Who is eligible to stand for election?

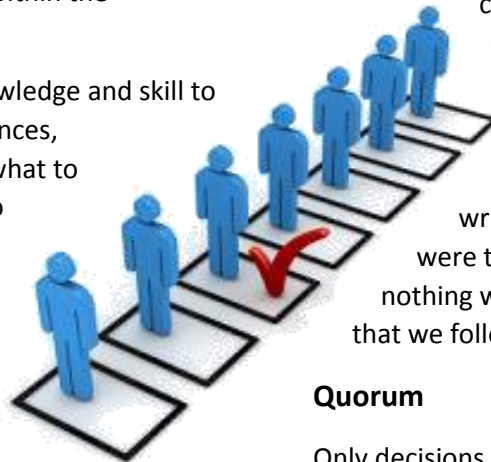
The Tzitz Eliezer writes that since the community custodians are responsible to manage finances and assets and communal funds and because they are entrusted with wide-ranging powers which would affect others, they must be אנשים שלימים חכמים ונבונים נאמנים עד למאד, knowledgeable and extremely trustworthy. They also must be known within the community.

They need to have the knowledge and skill to be able to manage the finances, knowing what to buy and what to sell, “what opportunities to draw close and what to push away”.

The Gemora<sup>21</sup> teaches that one should not ask for accountings with the appointed Tzedaka collector. This is because only very honest people may be appointed to this position and we are not suspicious of those who are righteous אין חושדין לכשרים. The Gemora<sup>22</sup> teaches that a Gabbai Tzedaka must be trustworthy like the great Rabbi Chananya ben Tradyon.

The Rambam<sup>23</sup> rules that one who lacks *Yiras Shamayim*, even if they are knowledgeable in Torah, should not be appointed to a position of leadership over the Jewish community.

“There is an exception where the minority is able to overrule the majority. This is where the minority opinion follows the Halocha whereas the minority does not”



### May a person who was elected by the majority refuse to take the position?

Whilst not obligated, one who is elected as an official by the majority should accept the position upon themselves. However they cannot be forced against their will.

### How are decisions made by the elected custodians?

When elected by the community, the elected board of governors have the empowerment of the community to make decisions.

Decisions are made following the majority rule within the body of custodians, with each member having equal voting right. Decisions do not need to be unanimous<sup>24</sup>. Pre-existing custom or by-laws can mandate unanimous votes or special majorities (e.g. 75%) for all or specific types of decisions.

The Chasam Sofer (CM 116)<sup>25</sup> writes that if a unanimous vote were to be required on every decision, nothing would get done and it is obvious that we follow the majority.

### Quorum

Only decisions made by all of the elected governors together are binding. This does not require a unanimous decision, but the deliberations and voting need to be in the presence of all of the members just like the Sanhedrin<sup>26</sup>.

If a minority of the members were not present when a decision was made and they later challenge the decision, the decision will not be binding. If the minority who are in opposition would have been present in deliberations, they may have been able to persuade the others with their arguments. Even if they choose to redeliberate and revote with all members

present, it is questionable whether this will help. This is because the majority will be uncomfortable to retract their opinion so as to protect their pride.

### **Are all decisions made by the elected governor binding on the community?**

Once elected, do the custodians have unlimited powers to make binding decisions on behalf of the community? What happens if the majority of the community disagree with a decision?

On this issue we find two divergent views amongst the Rishonim and Poskim.

The Ravia<sup>h27</sup> writes that every decision is subject to the consent of the community members. The default presumption is that the community would support the decisions of their elected officials until such time as they verbally protest. But should the majority of the community dispute the decision, the decision will not be binding. He argues; what difference does it make whether they (the community) accept the authority (of the custodians) at the outset (i.e. at the point of elections) or at the end (i.e. when the decisions are made)? He maintains that the community has the ability to retract its vote and thereby withdraw their empowerment.

Others argue that this approach effectively disempowers the elected governors and their functioning is merely like the actions of monkeys i.e. no authority<sup>28</sup>. Rather, since the custodians are elected by and invested with the *koach* of the majority, they themselves are considered as the majority and all of their decisions are binding irrespective of any protest.

The Mabi<sup>t29</sup> distinguishes between ordinary and extraordinary business. The custodians have full and sole-authority in decisions which are standard and ordinary business. This is because at the time of election, the voters understood that the governors they elect would be making these decisions. Therefore by voting, the community consents to this

empowerment. However when it comes to extraordinary business, the elected governors are not able to make binding decisions without putting it to a majority vote of the community since it could be argued that their authority was not accepted in these regards.

### **Can positions be passed on to family members?**

Concerning the Jewish king the Torah says למען יאריך ימים על ממלכתו הוא ובניו בקרב ישראל, "in order that the days of his kingship be extended, for him and his descendants amongst the Jewish people". From this verse our sages<sup>30</sup> learn that on the death of a king, his son will inherit the position if he is capable and possesses the necessary skills and character traits (see above), they inherit the throne. By the inclusionary phrase ישראל, the Sifri derives that this applies not only kingship but to all other positions of leadership. This brought as Halocha by the Rambam<sup>31</sup>.

However, all of this is where there is no protocol or custom or limited contract. If someone is elected or employed to a position of authority for a specific term, there is no Chazaka to the position and at the end of the term they are required to stand down. It need not be said that the position will not be transferable to their children or other desired person and a new election would be required.

Within their term, they may not be removed unless there is a clear and strong reason to do so e.g. gross misconduct. To do so otherwise would be forbidden as it would cause *chashad* (wrongful suspicion) and would be wrongfully depriving someone of their *parnoso*<sup>32</sup>.

### **Can the custodians co-opt other members?**

According to the Rosh the elected are empowered in all of their decisions, including the right to co-opt other custodians. Others write that they may not add more custodians since unlike the elected custodians, the co-

opted members do not have the express empowerment of the membership.

If there is established custom or by-laws which allow the co-opting of further custodians, they may do so, since this was understood by the community members when they voted for the original custodians.

An extension of this dispute is the scenario or the death or resignation of a member. The Rosh requires a new election to replace. Until the position is filled, no decisions can be made.

The Rashba<sup>33</sup> writes that the absence of 1 member should not shut down the board. Otherwise, if even one member was to go away or be absent for a few days would the entire authority be removed? He argues that such a scenario is obviously not the *daas hatzibbur*.

## Conclusion

These are just some of the halachos and Torah guidelines for some of the issues in communal structures and governance and the election of communal officials.

As expressed at the outset, they may not apply in all cases and to all communities. It is nonetheless a fascinating perspective into community dynamics and the laws and customs of communal structures as they have been applied throughout the ages.

In the merit of this Torah study, may our beloved local Melbourne Yeshivah community be blessed with growth and success with dedication to the ways of the Torah and Halocha and the teachings of our Rebbeim, to sanctify Hashem's name and be a shining light to the world.

Underpinning much of our discussion is the minimising and removal of Machlokes. May true Shalom and communal brotherhood pervade our Kehillah and the Jewish and wider world at large as we march forward together to a better and brighter future.

May we merit the ultimate peace when all of the world will serve Hashem as one, with the coming of Moshiach and the final redemption.

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<sup>1</sup> Volume 3, Siman 24 and 29

<sup>2</sup> Megillah 26a

<sup>3</sup> Tosefta Megillah Chapter 2

<sup>4</sup> Shaalos uTeshuvos 2:125

<sup>5</sup> Mordechai Bava Basra 484,

<sup>6</sup> Rosh Sanhedrin 3:2

<sup>7</sup> Teshuvos Harambam 271

<sup>8</sup> ibid

<sup>9</sup> Brachos 55a

<sup>10</sup> Tzitz Eliezer ibid

<sup>11</sup> 3:24

<sup>12</sup> Bava Basra 7b

<sup>13</sup> See Shulchan Aruch O.C. 429:1

<sup>14</sup> Quoted in Hagaos Maimonios Hilchos Tefillah ch 11

<sup>15</sup> C.M. 163:1

<sup>16</sup> Shaalos uTeshuvos O.C. 37

<sup>17</sup> 2:40

<sup>18</sup> Mitzvah 78

<sup>19</sup> Sanhedrin 80

<sup>20</sup> Peah 4:1

<sup>21</sup> Bava Basra 9a

<sup>22</sup> Bava Basra 10b

<sup>23</sup> Hilchos Melochim 1:7

<sup>24</sup> Radbaz 3:910, Rosh shu"t 6:5

<sup>25</sup> Choshen Mishpat 116

<sup>26</sup> Rahsba Teshuvos 5:126

<sup>27</sup> Quoted by the Mordechai Bava Basra 482

<sup>28</sup> Maharshdam Y.D. 227

<sup>29</sup> Teshuvos 1:84

<sup>30</sup> Sifri Parshas Shoftim

<sup>31</sup> Hilchos Melochim 5:7

<sup>32</sup> Shach YD 257:4

<sup>33</sup> Teshuvos 3:297