

DIMENSIONS IN CHUMASH

Parshas Ki Teitzei

Forty that are Thirty-Nine - The Parsha of Malkos

אַרְבָּעִים יִכְנוּ

*Forty shall he strike him*¹

BACKGROUND

The opening verses of chapter 25 discuss one who is liable to receive *malkos* (lashes) for having transgressed a prohibition of the Torah.² As we know, the halachah is that the person receives not forty lashes, but thirty-nine. The basis for this, as outlined in the Mishnah at the end of Maseches Makkos,³ is the final phrase in the preceding verse, which states that he shall be struck “כְּדֵי רִשְׁעוֹ בְּמִסְפָּר – according to his wickedness, by a count.” The Mishnah sees the words “בְּמִסְפָּר” and “אַרְבָּעִים” as one phrase: “בְּמִסְפָּר אַרְבָּעִים – the number of forty,” which it expounds to mean “the number which leads to forty,” i.e. thirty nine.

It is fair to say that this is one of the more challenging *derashos* (halachic expositions) in the Talmud. The simple meaning of the words “בְּמִסְפָּר אַרְבָּעִים” would seem to be, “the number forty.” How does it come to mean “the number before forty”? Moreover, given that these two words are actually in two separate verses, how are they being read together in the first place?

By way of elaboration, the Gemara⁴ explains that had the order of the words been “אַרְבָּעִים בְּמִסְפָּר”, that would have meant forty. However, since it orders them as “בְּמִסְפָּר אַרְבָּעִים,” it is understood as meaning “the number leading to forty.”

Yet, while these words do give us some direction, the matter remains somewhat elusive, and its nuances are discussed at length by the commentators.⁵

1 Devarim 25:3.

2 *Malkos* is the standard punishment for one who commits a transgression involving a deed (as opposed to speech or thought), unless the Torah specifies a more stringent penalty. This matter is discussed at length in the third chapter of Maseches Makkos.

3 22a.

4 Ibid. 22b

5 See Commentaries of Rivan and Ritva to Makkos ibid. and Rashi to verse 2 s.v. *bemispar*.

THE RAMBAM'S REVOLUTION

Against this background, let us consult the Rambam's discussion of this matter. As we will see, a close look at his words will give us an entirely new understanding, not only of the Chazal's exposition, but of the verses themselves. In Hilchos Sanhedrin,⁶ the Rambam writes:

How do they administer lashes to one who has incurred them? In accordance with the amount he can bear, as it says "כְּדֵי רִשְׁעוֹ בְּמִסְפָּר" – according to this wickedness, by a count." And that which it says [in the next verse] "אַרְבָּעִים – forty," means that we do not add on beyond forty, even if were to be as strong as Samson. However, we do detract for one who is weaker... Therefore, the Sages said that even one who is fully healthy, we only give him thirty-nine, so that even if we [mistakenly] give him an extra lash it will turn out that he will [still] only have received the forty that are due to him.

These words are simply remarkable. The Rambam seems to be saying that the number of *malkos* one should receive on a Torah level is actually *forty* – as the verse states – with the number thirty-nine being the product of a rabbinic enactment to protect against giving more than forty! How is all of this to be reconciled with the Gemara which derives the number thirty-nine from the exposition of "בְּמִסְפָּר אַרְבָּעִים"? The commentators explain⁷ that the Rambam sees the Gemara's exposition as what is known as an *asmachta*, which is when a law that is rabbinic in nature is "attached" to a verse in the form of a derashah.

Support for the Rambam's approach can be seen from a statement of Rava in the Gemara⁸ who says that one who stands up for a Sefer Torah but not for a Torah scholar is a fool, for we see that the Torah stated that one receives forty lashes and then the Sages came and deducted one. According to the Rambam, the "deduction" of the fortieth lash by the Sages is not the product of their exposition of the Torah's words, but a protective rabbinic enactment on their part!

THE SIGNIFICANCE OF WRITING "THE NUMBER" BEFORE "FORTY"

Let us now uncover a deeper level in the Rambam's words. According to the Rambam, the Torah has actually provided two answers to the question as to how many lashes the person should receive:

1. בְּמִסְפָּר – The amount he can take.
2. אַרְבָּעִים – forty.

Let us ask a simple question. The correct formulation of the halachah would seem to be: "A person should receive forty lashes, unless he cannot take that amount, in which case he receives the amount he can take." This being the case, why does the verse first give us the "*bedieved*" contingency answer for a person who cannot take the full amount, and only then tell us what that amount should actually be! Surely, it should have first presented the primary answer (forty) and then discussed the case of one who cannot take that amount!

This is the crucial question that the Rambam is addressing, and what's more, the answer to this question will directly affect our understanding of what the word "forty" means. By placing word "בְּמִסְפָּר" first, the Torah is thereby indicating that *this* is the primary answer – whatever amount he can take! However, if that is so, then by stating "אַרְבָּעִים" second, the number forty can no longer represent the amount he is *meant* to receive – as that has been stated as "the amount he can take" – rather, it represents the amount *beyond which he may not* receive!

6 17:1. See also in his Commentary to Mishnah Makkos ibid.

7 See Kessef Mishneh, Hilchos Sanhedrin loc. cit.

8 Makkos 22b.

In other words:

- ▷ Had “אַרְבָּעִים” been written before “בְּמִסְפָּר”, it would have meant “forty”.
- ▷ Having been written after “בְּמִסְפָּר”, it now means “no more than forty”.

This is why the Rambam too, when he raises the question of how many lashes we give, likewise first answers “however much he can take,” and then states “not more than forty.”⁹ In essence, he is following the order of the verses themselves. Moreover, we will appreciate that, according to the Rambam’s approach, there is no problem whatsoever with the fact the two key words are in two separate verses; for according to him, they are indeed two separate answers, upon which the halachah is based! Finally, it now emerges that the Torah has cautioned against giving more than forty lashes *twice*: firstly by saying “no more than forty” and secondly with the words “לא יִסִּיף – he shall not add on.” As such, we can certainly understand why the Sages saw fit to enact a protective measure against going beyond forty, and hence, set the maximum at thirty-nine.



THE MAHARAL: FORTY THAT BECOME THIRTY-NINE

The approach taken by most Rishonim in this matter is that the amount of thirty-nine lashes derives from the phrase “בְּמִסְפָּר אַרְבָּעִים” through an actual *derashah* – “the number that leads to forty.” However, this being the case, let us ask a simple question. Why does the Torah write the amount in a way which certainly *appears* to say forty, then leaving it up to a halachic *drash* exposition to fathom that the amount is *in reality* thirty-nine?

The Maharal¹⁰ explains that from a certain point of view, the person really does deserve forty lashes. As Rashi comments elsewhere,¹¹ the number forty corresponds to the forty (formative) days during which a child is formed in the womb. As such, it represents the totality of the person. Since the entire person was involved in the sin, it is therefore only fair that he should receive forty lashes. However, in reality, it is the physical part of the person – formed over the first thirty-nine days – that is drawn to sin, while his spiritual and lofty soul – which enters on the fortieth day, is pure. Therefore, although all forty “parts” of the person *participated* in the sin, only thirty-nine of them are actually *culpable*, while the fortieth part simply fell into bad company. The result is that if the physical body will be chastised and corrected, the soul will naturally be fine, and no further punishment is necessary. Hence, what appears to be the product of forty parts only requires thirty-nine responses!

In addition to being a most fascinating explanation, this idea is also a source of encouragement for the perpetrator. For at the same time as he receives punishment for his actions, he also receives affirmation in terms of his essence. The message is: “There are parts of you that need to be addressed and improved, but there is also a part of you that is capable of improving them.”

9 The Minchas Chinuch (mitzvah 594) raises a question on the Rambam from the principle of the Turei Zahav (Orach Chaim 588:5) that the Sages will never make an enactment that will entirely and categorically obviate a Torah mitzvah; rather, only one that will suspend it in a particular situation (e.g., not blowing shofar on Rosh Hashanah when it falls on Shabbos). If so, then if the Torah actually states that he should receive forty lashes, to then set the maximum at thirty-nine would be a complete uprooting of that mitzvah! Based on our discussion, we can answer this question. If “אַרְבָּעִים” meant “forty” – then mandating thirty-nine would indeed present a contradiction to that idea. However, if it means “no more than forty,” thirty-nine is also no more than forty and is thus no contradiction.

10 Gur Aryeh loc. cit. See also *Be'er Hagolah, be'er* 1.

11 Bereishis 7:4.

DARSHENING VERSES AND DARSHENING THE JEWISH PEOPLE

Indeed, it appears that there a profound idea here of a more general scope. We have noted that there are two aspects to the verse:

1. That which appears on the surface (*pshat*) to be the amount.
2. That which, upon further inspection (*drash*), gives us that actual amount.

These two planes correspond to the two ways of assessing the person himself:

1. On the surface, he appears to be completely culpable.
2. Upon deeper inspection, there is a core part of him that remains pure.

These “two sets of two” correspond to each other. The outer *pshat* level of the verse reflects the surface assessment of the person, while the inner *drash* level reflects the more inner way of looking at the person. This may give us a deeper insight into the idea that expounding the verses of the Torah arouses Divine mercy toward the Jewish people. The form that mercy takes is looking beyond the surface, which appears entirely culpable, and assessing the Jewish people in terms of their pure essence. The destinies of the Torah and the Jewish people are intertwined, so that when we *darshen* the Torah, looking beneath its surface, Hashem *darshens us* and judges us with mercy in accordance with our true inner worth!