



## The ECMO Lottery: Allocation of Limited Resources in Halacha

*And your brother shall live with you. (Vayikra 25:36)*

The allocation of limited resources is a famously difficult quandary in medical ethics and Halacha. The Poskim grapple with questions of precedence for younger patients or those who arrive first at the hospital, amidst numerous other weighty issues. In the following paragraphs we will discuss the fascinating question of using a *Goral* (a lottery) to determine which patient should be treated when there are only sufficient medications or equipment for one.

We will begin with the well-known Gemara in *Bava Metzia* 62a:

*Two people were traveling on a journey and one of them had a flask of water. If they both drink, they will both die [as it does not contain enough to sustain them both until they reach the next settlement]. If one of them drinks, he will reach the settlement [but his friend will die]. Ben Petura expounded: "It is better that they both drink and die than one of them should witness the death of his fellow man. [This was the accepted position] until R' Akiva came and taught: [The Pasuk states] "v'Chey Achicha Imach - And your brother shall live with you" – your life takes precedence over that of your fellow man.*

In other words, according to *Ben Petura*, the obligation to save the life of one's fellow man is so great that it demands *Mesiras Nefesh*, and there is no justification for withholding the water from his fellow traveler. If the owner of the water would not share it, he would be considered to have contributed to the other's death. Therefore, it is better that they both drink from the flask, even though that means that both of them will die. However, *R' Akiva* held that since the water belonged to one of the parties, he must give precedence to his own life over that of his fellow traveler.

Simply understood, *R' Akiva's* position is that when there is a danger to a person's life, he has no obligation to attempt to save someone else's. The Halacha is in accordance with *R' Akiva* but does he maintain his position even when the water doesn't belong to one of the parties? For example, if a third party owns the water, would even *R' Akiva* agree that he should divide the water between them or should he choose one over the other? (A similar question would arise if the water belonged



to both of the parties – does the person who happens to be carrying the water take precedence?)

Some say that since a third party does not have the obligation to give precedence to his own life, *R' Akiva* would agree with *Ben Petura*, and he should divide the water between them. Others say that according to *R' Akiva*, *Ben Petura's* approach is inherently mistaken given that it leads to more deaths than necessary. Therefore, even in the case of a third party, the water should not be divided but awarded to one of them.

Given that neither of the parties have a stronger claim than the other<sup>1</sup>, is there any role for drawing lots to decide who should be given precedence? A *Goral* gives each of them an equal chance of survival. Is it an acceptable method of choosing between them?

A similar dilemma has recently presented itself in hospitals where patients have been vying for the use of limited medical equipment (such as ventilators or ECMO equipment). If the patients' medical conditions and chances of recovery are similar, and none of them have already been placed on the equipment in question, may lots be drawn to determine who will merit the use of the equipment?

In Halachic literature, we find *Goral* mentioned in a slightly different context. The *Rema* (*Y.D.* 157:1) rules that if a Jewish community is threatened with annihilation unless they hand over one person to be killed, it is forbidden for them to do so. Nevertheless, according to the *Tiferes l'Moshe*<sup>2</sup> (cited by the *Pischei Teshuva*, *Y.D.* 157:54), they may conduct a *Goral* to choose one person who will be handed over.

Before we discuss the *Tiferes l'Moshe's* ruling and cite those who dispute it we should take note of the circumstances in which he advocated the use of a *Goral*. The community under threat was attempting to resolve the ethical dilemma of **saving as many lives as possible without violating the fundamental principle that directly sacrificing one individual is forbidden.**

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<sup>1</sup> The Mishna in *Horayos* (13a) delineates an order of precedence for saving lives. For instance, a Kohen takes precedence over a Levi. However, many of the Poskim contend that this is not applicable nowadays. (This topic is beyond the scope of this essay; see our essay on *Parshas Emor* 5779). Moreover, in some cases, the two parties in question would have equal precedence according to the Mishna in *Horayos*.

<sup>2</sup> R' Moshe ben Avraham Tzvi *zt"l* - the Rabbi of Cracow in approximately 1640 – one of the great Rabbis of his generation and a student and grandson of R' Heschel of Cracow.



Many of the Poskim disagree with the *Tiferes l'Moshe* (see, for example, the *Darchoi Teshuva* *ibid.* 54). However, the *Baruch Ta'am* (in his comments on the *Tiferes l'Moshe*) contends that his position is also taken by the *Sefer Chasidim*. As we shall see, there are contradictions in the *Sefer Chasidim* in this regard. In Chapter 169 he writes:

*In the case of people at sea when a storm arises and threatens to damage their boat or cause it to sink, if other boats are traveling peacefully, it can be assumed that there is somebody on this ship who is accountable. They may cast lots and the person upon whom the lot falls three times consecutively may be cast into the sea. And they should Daven that the lot will not fall upon an innocent person, but upon the guilty person. As the Pasuk states, "Hashem the God of Israel produces a flawless [verdict]" (Shmuel I 14:41). And it is written, "And the lot fell upon Yona" (Yona 1:7). And it is written, "He said to them, 'Pick me up and heave me into the sea'" (*ibid.* 1:12). Why did they not tell Yona to cast himself into the sea? It must have been the case that he did not want to cast himself in. Moreover – there were non-Jews on the ship – it was better that they be the ones to cast him in... And this is what they should say before they set out to sea. "If storm winds accost us – a person who has committed a sin for which he is liable to stoning, even accidentally – we will cast lots and the person upon whom the lot falls, will be thrown into the sea."*

However, in Chapter 255 he appears to conclude otherwise:

*If there are people on a boat, and there are storm winds – they may not cast lots to determine that the person upon whom the lot falls will be cast into the sea. They shall not do what was done to Yona ben Amitai. For if an "Asmachta" (a promise based on the occurrence of a certain result) is not binding in monetary matters, they may certainly not rely on it for matters of life and death. As for the Pasuk which states, "And Shaul said 'Cast [a lot] between me and my son Yonasan', and Yonasan was singled out" (Shmuel I 14:42), there they had the Aron of Hashem, and their judgment came from Hashem, and they also knew how to cast a Goral. Nowadays one should not rely upon a Goral.*

It is far from clear that we can adduce any support from the *Sefer Chasidim* to the ruling of the *Tiferes l'Moshe*. According to the *Sefer Chasidim*, people stricken on a ship must be certain that they have been imperiled due to the sins of one of their passengers - the proof being that surrounding boats are not being troubled by the storm at all, as was the case with *Yona* (see *Pirkei d'Rebbi Eliezer* 9). Their *Goral* must



also fall upon the same person three times consecutively before they may act on its results. Then they may consider the individual a “*Rodef*” and may be put to death.

The *Sefer Chasidim* implies that the use of a *Goral* in a time of distress is a means of determining the will of Hashem at that moment, like a minor prophecy. Therefore, this method may be used by those on a stricken boat **only when they are certain that the danger that accosts them is a message to remove the sinner from their midst. Thereafter, the use of a *Goral* is merely a means of revealing who the sinner is.** This is not the case when a community casts a *Goral* to decide whom to send out to be killed to save themselves from obliteration. The potential “*Korban*” is not guilty of anything – the *Goral* is merely intended to resolve the ethical dilemma of saving an entire community by sending one individual to his death by identifying the one to be sacrificed by lottery.

The *Baruch Ta’am*, who did compare the cases of the *Tiferes l’Moshe* and the *Sefer Chasidim*, appears to have understood that utilizing a *Goral* to decide who should be sacrificed to save the community is also a means of revealing the will of Hashem. Rather than being merely a communal action that circumvents the issue of directly selecting a “*Korban*” out of its midst, the *Goral* only identifies which individual Hashem expects to sacrifice himself for the sake of others. His submission to the enemy is now a fulfillment of his personal obligation rather than an action of the communal leadership.

According to the *Baruch Ta’am*, the *Sefer Chasidim* is a source that a *Goral* is a legitimate means of revealing the will of Hashem. However, this gives rise to an obvious question: Why, in many instances in *Tanach*, was the *Urim v’Tumim* consulted rather than conducting a simple *Goral*? For instance, the *Navi* relates regarding the battle that was initiated by eleven tribes against the tribe of Binyamin, a *Goral* was conducted in order to select the soldiers who would go into battle (*Shoftim* 20:9). However before they set out for the battlefield they consulted with the *Urim v’Tumim* to determine which tribe should lead the troops into battle (*ibid.* 20:18). The *Ramban* (*Bereishis* 19:8) explains:

*Both parties were worthy of punishment. Binyamin was accountable for not bothering to punish the evil members [in its midst], nor rebuke them at all. The rest of Yisrael was accountable for conducting an illegitimate war – indeed they did not ask Hashem about it. Rather they merely asked, “Who should go into battle first against the people of Binyamin?” for they had decided among themselves that they were going to battle regardless. They also did not ask [the*



*Urim v'Tumim] "Whether You will give them into my hands", for they had faith in their might, as they were numerous and they had ten or more times [the numbers of the enemy]. They merely asked, "Who will go into [battle] for us first" **which was a form of Goral between them.** Perhaps each tribe would say, "I will not go into battle first", or would say "I will be first". Hashem replied to them, "Yehuda is first", meaning to say that Yehuda is always first, for Yehuda was chosen by Hashem as the leader. Hashem did not say to them, "Yehuda **shall go up**" as He did in other cases (see Shoftim 1:2) for He did not in fact permit them. But he also did not prevent them and did not say to them "Do not go up and do not go into battle", due to the punishment that was due to Binyamin. Hashem treated both sides with indifference and left them to chance.*

The *Ramban* implies that the casting of a *Goral* is fundamentally a mundane method of determination and has no connection with Hashem's will. Moreover, when the tribes asked the *Urim v'Tumim* who should lead them into battle, since they did not intend to discern the view of Hashem (as they had decided to go into battle "regardless"), their consultation with the *Urim v'Tumim* was "a form of *Goral*" and they received a misleading yet literal answer to the flawed question.

It seems that according to this reading of the *Ramban*, the *Sefer Chasidim* would only permit the use of a *Goral* in a case where it was being used to reveal or clarify the will of Hashem. In other words, where it is clear that Hashem wants to single out a member of the group for punishment, it would be unethical for the group to select an individual, but the *Goral* can be used to reveal the identity of the individual Hashem desires to punish. However, the *Goral* can not be used to resolve the ethical conflict between allowing an entire community to perish and actively sacrificing an individual in order to save them.

Therefore, we would conclude that a *Goral* could not be used by a group of people to select an individual whose life will be sacrificed to save the lives of the others. The *Goral* does not eliminate the basic prohibition to sacrifice one person on behalf of many. If this prohibition did not apply, there would in fact be no need for a *Goral* in the first place – they could randomly choose one person for sacrifice. In the case of the *Sefer Chasidim*, the fact that only the ship in question was in danger (while the others were sailing safely), revealed that there was someone on board who was guilty and deserving of being thrown overboard. Therefore, aside from the unique and specific scenario of the *Sefer Chasidim*, a *Goral* is not an appropriate tool for these sorts of decisions.



The *Chazon Ish* (*Sanhedrin* 69) also disagrees with the *Tiferes Moshe*:

*[His ruling is] astounding, for if so why do the Tosefta and Yerushalmi rule, "They should all be killed and not hand over [somebody to be killed]"? They should have stated, "They should cast a Goral and hand over the person upon whom the Goral falls". And in the case of Yona – the Goral merely revealed to them who was the cause of the storm, and Yona instructed them to cast him into the sea. And in the case of the [Goral of] the sons of Shaul – David conducted it prophetically, but regular people do not have permission to decide by means of a Goral. However, if all parties agree to cast a Goral, and that the person upon whom the Goral falls agrees to sacrifice himself – it is permissible, as an individual may sacrifice his life voluntarily in order to save everybody else as we find in the case of those who were killed in Lod."*

The *Chazon Ish* evidently opposes the use of a *Goral* in these sorts of cases, but doesn't clearly explain why. Reading between the lines, perhaps the distinction between a *Goral* conducted in a prophetic fashion **and that conducted by a regular person** is that it is unethical to conduct a *Goral* without Divine indication that it is appropriate for the situation. In the absence of prophesy, it would be unethical to use a *Goral* for we have no way of knowing that *Hashem* wants us to utilize one. However, were it not for this consideration, a *Goral* may have been a legitimate means of saving a group who are threatened while avoiding the direct sacrifice of one person to save the many. We see this also in his approval of a *Goral* that has been agreed upon in advance by the group such that the individual upon the *Goral* falls will sacrifice himself<sup>3</sup>.

If our reading of the *Chazon Ish* is correct and a *Goral* is not an inherently illegitimate means of determining such matters<sup>4</sup>, we need to explain how the use of a *Goral* does not constitute a prohibited act of sacrificing a Jewish person (as ruled in the *Yerushalmi* and *Tosefta*).

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<sup>3</sup> Our understanding is that, according to the *Chazon Ish*, a *Goral* is a **legitimate form of discerning the correct outcome** but only in the scenario where selecting an individual is already permissible (e.g. **the prerogative of an individual to sacrifice his life to save others**). If the group agrees to perform a *Goral* and abide by its decision, the results would be binding.

<sup>4</sup> I.e., the objection is to the use of the *Goral*, not to the validity of its outcome when using a *Goral* is acceptable



One possibility may be that the *Issur* is the **act of selection**, not the **act of handing him over**. Sacrificing one person in order to save many others is not inherently problematic, rather, it is unethical to assign a lower value to one individual relative to the others by selecting one person from the group to be sacrificed. Therefore, if a *Goral* is conducted it does not constitute a forbidden "**act of selection**".

Alternatively, the reason that a *Goral* is permissible is that by conducting it we do not actively place any one person in greater danger than the others. When the entire community is threatened, each individual is in equal danger. If an individual is arbitrarily selected to be sacrificed to rescue everyone else, we are effectively removing the risk for everyone else at the expense of that individual. It is therefore analogous to directly murdering him, as someone else could have been selected and he would have been saved. But by conducting a *Goral* we initially place the entire community in the same degree of danger by placing them all in the *Goral*. Though we then select one of their number - that is not an arbitrary, cruel act of selection - it is a random act.<sup>5</sup>

Secondly, and perhaps more pertinently, as opposed to arbitrary selection which **directly and wrongly impacts upon one individual**, by conducting a *Goral* we initially **improve the chances of survival of every person in the community**.<sup>6</sup> Therefore, this does not constitute the cruel act of handing an individual over to the enemy.

The condition of the *Chazon Ish* that the individual upon whom the *Goral* falls must hand himself over voluntarily clearly dismisses the notion of forming a committee (voted for by the majority) who would coerce the minority to accept the results of a *Goral*. The right of each individual is such that he cannot be made a *Korban* on behalf of the majority. A *Goral* can only be legitimate if he voluntarily sacrifices himself.

Returning to our original question of choosing between patients when the availability of lifesaving medical equipment is limited, a *Goral* would not identify an individual from a group but rather would choose between one person and another. Even the *Tiferes l'Moshe* and *Baruch Ta'am* only seem to approve of using a *Goral* when we can save many people at the expense of one person, as the *Goral* only identifies who will die to save the others and relieves us of the ethical challenge of

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<sup>5</sup> In other words the element of a *Goral* that is our "choice" is the initial act of choosing whom to place in the *Goral*. The selecting of a person from the *Goral* is not our act of choice.

<sup>6</sup> As initially they were all in danger of death from the enemy and thanks to the *Goral*, each individual is overwhelmingly likely to survive.



selecting an individual out of the group. However, it seems probable that a *Goral* would not be a legitimate tool in our scenario as there is no true basis to give precedence to either one of them. Just as the Gemara (*Pesachim* 25b) rules that a person may not murder another person in order to save his own life due to the reasoning of “*Why do you believe that your blood is redder, perhaps the other’s blood is redder?*”, one can similarly not make a legitimate choice between the lives of two individuals who require medical assistance. Only where the lives of a group of people can be saved by the sacrifice of one person, might there be justification for a *Goral* according to some.

Although it is true that casting a *Goral* “**improves the chances of survival of each of the parties**” as we explained above, and certainly in this case we will certainly avail one of the parties with treatment so that at least one of them will survive. Nevertheless, the choice cannot be made via a *Goral*.

This essay does not cover all of the considerations that must be accounted for in this weighty matter. For further discussion, see the *Yabia Omer* (6, C.M. 4) and *Minchas Asher* (*Bamidbar* 72).