Rabbinic-lay relations in Jewish law

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There is a governing presumption in Jewish law that the *halakhah* has no gaps. The revelation given to Moses at Sinai covers every contingency, either directly or through analogy. For this reason, it is understood, the courts and judges who adjudicate disputes in Judaism do not in fact make law, as we seem to take for granted in the American judicial system. Rather it is the goal of the court and its judges to discover the proper precedent for the case at hand. Legislation is a matter of the Divine. What is left in human hands is merely the application.

It has become an unquestioned, widely accepted, and wrong assumption today that the only valid institution for such an adjudication of disputes within the Jewish community was the *beit din* and that all such decisions were to be made only by scholars. This assumption has been pushed, of course, by the Orthodox rabbinate in its attempt to delegitimize any attempt by non-Orthodox rabbis, scholars or laypeople to make any pronouncements whatsoever as regards what might count as proper Jewish practice. In fact another institution existed outside the *beit din*, an institution which was always given *halakhic* recognition. This institution is the arbitration court. I want to describe this little known institution of Jewish law, pointing out in the process that the *halakhah* until modern times was much more diverse, open and tolerant that the current Orthodox myth allows. The *halakhah*, the arbitration court shows, was hardly "orthodox" at all.

The origin of this legal mechanism, that is, arbitration, as a parallel to the formal *batei din*, is lost in the mists of history. The general consensus is that is has its roots in the Greco-Roman legal system.[1] In all events, it was already taken, more or less, for granted by the time the Mishnah was compiled. The fact the Tannaim saw the two types of courts as essentially equivalent. In either case the litigants come before a panel that elicits testimony

from approved witnesses and then issues a ruling in line with accepted practice and custom. It thus comes as no surprise that the early rabbinic literature makes no distinction between setting up a *beit din* and setting up a court to handle an arbitration, since the two procedures are in fact identical. The identification of these two court systems in the minds of the Tannaim is clear from the Mishnah,[2] which discusses the makeup of the court, but which is also the *locus classicus* for the arbitration board. It describes the procedure as follows:

"Property cases are [decided by] three [judges]. 'This litigant chooses one [judge], and that litigant chooses one judge, and then the two of the [litigants] choose one more,' the words of R. Meir. And the sages say, 'The two judges choose one more.'"[3]

What we have here is a normal three-judge panel, of the type that adjudicates all civil disputes in Judaism. The arbitration is conceived as no different from any other court case. The only apparent difference is that an arbitration panel is not a sitting court, but is appointed by the litigants on an *ad hoc* basis. In this way the arbitration panel is different from the Sanhedrin which was presumably a permanent body made up of scholars.

The more informal nature of the arbitration panel raises immediately the practical question of how its members are to be chosen. Can anyone serve on such a panel or are there some qualifications or limitations? The Mishnah[4] seems to assume that anyone can serve if appointed. The question is addressed more directly in the same Mishnah, which describes the grounds for dismissing a proposed panel member:

"This party has the right to invalidate the judge chosen by that one, and that party has the right to invalidate the judge chosen by this one, the words of R. Meir. And sages say, 'Under what circumstances? When he brings evidence about them, that they are

relatives or [otherwise] invalid [to serve as judges]. But if they are valid [judges] or experts recognized by a court he does not have the power to invalidate them."[5]

The above dispute may seem trivial but in fact concerns a major conceptual difference between Meir and the sages over the nature of the arbitration panel. The point around which the dispute revolves becomes clear in light of the discussion presented in the Yerushalmi. The question is asked as to why Meir asserts that each litigant has the right to choose one of the judges. The answer, given in the name of R. Zira, is that "since the litigant chooses the judge, he takes for granted that his choice will seek cause in his own behalf."[6] Meir's idea, then, is that the judges are not so much meant to serve as a fact finding board as a panel of advocates. This view of law is much more familiar to us from the Anglo-American tradition, where, let us say, judges on the Supreme Court are simply assumed to hold certain positions and the appointment of one is a matter of public politics. The sages reject this theory, holding instead that the members of the panel are in fact like regular court judges; that is, neutral observers open only to the facts of the case. For this reason, a nominee may be excluded from serving on the arbitration panel only if he has a personal interest in the outcome, the same criterion that enters into the acceptance of witnesses. In other words, once a judge is deemed impartial he cannot be challenged on grounds of personal politics. What is also interesting in the case of an arbitration panel is that there is no requirement that the nominee be a recognized scholar. Any disinterested party may be nominated. I will return to the implications of this.

Although some of the rules of the formal *beit din* apply to the arbitration panel, it is also clear that the decision reached in arbitration need not be in conformity with the strict requirements of *halakhah* in order to be deemed valid. This is, I believe, of major significance. The arbitration panel is free to do as it deems

best, and its decision has formal *halakhic* recognition. A good example of the legal status of arbitration comes from the *Shulhan Arukh*, in connection with what we might call plea bargaining; that is, an argument to reach a solution before a formal verdict is rendered. The relevant passage from Hoshen Mishpat reads as follows:

"It is a *mitzvah* to say to the litigants at the start of the trial, 'Do you want a legal judgement or a compromise (*p'sharah*)?' If they want a compromise, they come to a compromise between them. And just as one is warned not to bias the law, so is one warned not to bias the compromise toward the one side over the other. And any court that always forges compromises is to be praised. When is this the case? Before all the evidence has been presented. Even if the judge has heard their arguments and knows which way the law inclines, it is still a *mitzvah* to execute a compromise. But after the evidence has been presented and the judge has said, 'So-and-so you are acquitted and so-and-so you are liable,' then they are not authorized to enter into a compromise between them."[7]

This passage throws some light on the legal status of a compromise. For once the evidence is formally known, then the force of formal law takes over. The judge can no longer allow a settlement or compromise. Before the trial has run its course, however, the litigants can agree to end the proceedings and come to a private agreement. This agreement will be outside the law, as it were. That is, it might be quite different from what the applicable legal paradigm would require. Nonetheless, the court is encouraged to effect such a compromise. And further, while the creation of a compromise is a way of avoiding the strict application of the law, it nonetheless has the force of *halakhah*, as the *Shulhan Arukh* goes on to make clear. The point is that the judge as arbiter in this case is acting in a very different capacity than he does when he formally announces a verdict after a completed trial.

What is interesting about such binding arbitration is that it was allowed to continue as a form of conflict resolution alongside, but distinct from, the formal institution of the *beit din*. The fact that arbitration panels were an alternative system of justice seems to have been already recognized in Roman times. Asher Gulak cites an example of a Roman law that recognizes the right of Jews in the empire to go to their own courts rather than Roman courts if they agree to arbitration. Presumably the sides would choose judges according to the pattern enunciated by the Mishnah and could reach a solution in this way outside the bounds of Roman law.[8] According to Gulak this type of court was generally recognized as having jurisdiction in the Jewish community even when in all other cases Jewish legal self-rule was restricted by the governing power. Thus the Roman recognition of arbitration as a legitimate alternative to formal court proceedings provided an important precedent for the future struggle to maintain Jewish institutional and legal autonomy. Although the subject has not been researched sufficiently, it seems that Jewish communities routinely resorted to such arbitration courts when outside powers restricted the jurisdiction of formal Jewish courts.[9] Thus some semblance of Jewish communal autonomy was retained. I want to investigate this phenomenon a bit more closely.

This resort to arbitration courts in order to get around imperial restrictions developed especially in post-Talmudic times. The basic structure of these panels was developed in Sassanian Babylonia; notwithstanding the fact that the Jewish community was generally allowed legal autonomy within the late Persian empire. The rabbis and gaonim of Babylonia knew of the Roman legal tradition and adopted it to their own needs. For the Babylonian masters, this sort of litigation, in which both parties agreed to a compromise, was deemed superior to the imposition of a legal ruling. On this we can cite, for example, the following Talmudic passage:

"R. Judah b. Korha says: Settlement by arbitration is a meritorious act, for it is written: 'Render judgement of truth and peace in your gates.'[10] Surely where there is strict justice there is no peace, and where there is no peace, there is no strict justice! But what is that kind of justice with which peace abides? -- We must say: arbitration."[11]

For the Babylonians, then, arbitration, rather than being a legal fiction for avoiding court trials, turns out to be a preferable mode of solving disputes. The reason is, of course, that both sides concur in the settlement and so will be willing to see matters through in good faith. In fact, I think it is fair to say that the framers of the Talmud not only preferred arbitration to full-blown legal action, but actually were prepared to say that arbitration had stronger legal warrants than an imposed settlement:

"R. Simeon b. Gamaliel says: Legal judgement is by three; arbitration is valid if made by two. And the force of arbitration is greater than that of legal judgement, for if two judges decide a case, the litigants can repudiate their decision, but if two judges arbitrate, the parties cannot repudiate their decision."[12]

Despite its possible origin as an extra-legal institution, then, it is clear that arbitration courts quickly became a recognized and even honored element of Jewish communal structure. As such, these courts continued to function throughout the Middle Ages. Gulak, for example, has collected number of "arbitration documents."[13] These give us a good idea of how the procedure worked. Responsa from the Middle Ages also indicate the procedure was given full legal recognition. At times, arbiters were deemed equivalent in all respects to regular judges.[14] A few differences did persist however. In some cases the case brought to arbitration had to be argued with 24 hours.[15] Rules of evidence

could be much more relaxed than in a formal hearing and with few exceptions the arbiters did not have to issue a formal brief explaining their decision.[16] Overall, then, the arbitration procedure was faster and less complicated than a court case, and yet was of the same legal weight.

Over time, as I mentioned, these special courts, called on occasion "*beit din hedyotot*, " were encouraged as a way for Jewish litigants to avoid going to non-Jewish, government courts and thereby keep the resolution of community disputes within the Jewish community. This seems to have been especially the case in which a small community had no recognized legal authorities who could constitute a formal *beit din*. As an example of how this worked, note the citation from the Codes:

"Whoever appoints a judge, one who is not qualified or is not knowledgable in the knowledge of Torah and is not suitable to be a judge, even if he is very observant and he has other positive attributes, lo the one who appoints him violates a negative command. GLOSS: and it is forbidden to appoint an *am ha-aretz* even on condition that he will confer regularly with a sage. But as for villages that do not have sages suitable to be judges or in which everyone is an *am ha-aretz* but which need judges to adjudicate between them so that they will not go to courts of the gentiles should appoint the best and wisest among them even if they are not suitable to be judges. Since the villagers agreed among themselves to accept these appointees, no one is able to countermand their rulings. Thus any community can accept for itself a court that is not suitable according to Torah."[17]

The practice in Europe, then, as reflected in Isserles' gloss is that non-rabbinic courts could be empaneled, and their decisions had legal weight if no alternative was readily available. In such a case, it was possible to appoint a court of non-judges, but arbiters, whose decision would still be binding. In this case the *halakhah*,

as it were, was legitimately articulated by non-rabbinic community members not acting as a *beit din*.[18] This introduces a flexibility in making and shaping local *halakhah* that has rarely been recognized in the recent polemics over what constitutes an *halakhic* Judaism.

Such courts gradually became an accepted feature of the Jewish legal landscape.[19] The institution was in fact adopted early in the twentieth century by the Zionist movement in an attempt to establish some kind of Jewish legal autonomy in the *Yishuv*. The institutional basis was established by the Palestine office of the Zionist Organization in 1909, under the name "*Mishpat HaShalom HaIvri*." Interestingly its first secretary was S. Y. Agnon.[20] This body continued to function into the 1930's.

What this brief survey shows us is that there is a long tradition in rabbinic Judaism of accepting arbitration outside the formal rabbinic *beit din* and of according those decisions, even if promulgated by lay leaders, *halakhic* status. The *halakhah* was not seen to be only the professional legal creation of the rabbinic elite, but just as much the creation of the community in its day-to-day dealings. It offers a perfectly acceptable source of Jewish practice and norms that could exist outside the formal rabbinate. The openness and flexibility represented by this arrangement has unfortunately been totally ignored in the contemporary debate as to the character of the *halakhic* process. Such panels may offer a productive model for how progressive Judaism might undertake the task of creating its own *halakhah*.

Notes

1. On this see Boaz Cohen, *Jewish and Roman Law*, Vol. 2, New York, pp. 651ff.

2. M. Sanhedrin 3.1f.

3. According to Asher Gulak, *Yesodei HaMishpat Halvri*, Vol IV, Jerusalem, 1923, p. 30, the creation of this type of court, technically called a *beth din shel bor'rim*, was devised by R. Meir in response to the repression of Hadrian who enacted a series of measures to restrict Jewish autonomy.

4. M. Sanhedrin 3.1.

5. *Ibid.*, 3.1.

6. J. Sanhedrin 3.1 (21a). The translation is by Jacob Neusner in *The Talmud of Jerusalem: A Preliminary Translation and Explanation, Vol 31*, Chicago, 1984, pp. 96-97.

7. Hoshen Mishpat 12.2; See also Elliot Dorff and Arthur Rosett, *A Living Tree: The Roots and Growth of Jewish Law*, Albany, 1988, p. 294.

8. Asher Gulak, *op. cit.*, p. 26.

9. "At different times and in different countries of the Diaspora, arbitration continued to serve as a substitute for judicial autonomy, in particular where such autonomy had been weakened." Menahem Elon, "Arbitration" in *EJ*, Jerusalem, 1972, Vol. 3, p. 295.

10. Zechariah 8.16.

11. B. Sanhedrin 6b; translation based on Neusner, *op. cit.*, p. 292.

12. B. Sanhedrin 5b; translation based on Neusner, *op. cit*, p. 293.

13. *Otzar HaShatarot HaNehugim BeYisrael*, Jerusalem, 1926. A selection of these are presented in translation in Dorff, *op. cit.*, pp. 295-298.

14. For example, *Panim Me'irot* II: 159. Cited by Elon, *op. cit.*, p. 297.

15. One example of this is found in Majer Balaban, "Die Krakower Judengemeinde - Ordnung von 1595 und ihre Nachtraege" in *JJLG*, Vol. X, 1912, pp. 333-334. The passage is in Yiddish and stipulates that "when the litigants appoint arbiters (*nehmn bor'rim*), the arbiters must sit within twenty-four hours (*miet laet*) and they must make and end of matters within 3 days...."

16. Elon. *op. cit.*, p. 299, cites one salient exception allowed by M. M. Krochmal in the seventeenth century.

17. *Shulhan Arukh*, Hoshen Mishpat 8.1.

18. Salo Baron argues that there was even encouragement for lay participation. See his *A Social and Religious History of the Jews*, New York, 1952, Vol II, p. 267.

19. A fuller discussion is in Menahem Elon's Introduction to *The Principles of Jewish Law*, Jerusalem, 1975, pp. 21f. The rules of the Krakow community mentioned in the preceding note did place some restrictions on who could be appointed to such a court. In particular it banned community leaders. Baron, *op. cit.*, p. 334.

20. See Elon, *op. cit.*, p. 38.