

THE CENTER FOR WOMEN IN JEWISH LAW

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## THE CENTER FOR WOMEN IN JEWISH LAW

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## THE SCHECHTER INSTITUTE OF JEWISH STUDIES

The Schechter Institute of Jewish Studies is one of the leading academic institutions of Jewish studies in the State of Israel. The unique approach of Schechter combines traditional and modern methods of study. Historical and textual discussions of Jewish sources are accompanied by cultural and topical discussions, which grapple with the ethical and social dilemmas of Israeli society today. The Schechter Institute offers courses of study towards an interdisciplinary M.A. degree in Jewish studies in classic fields such as Bible, Jewish Thought and Jewish History alongside innovative fields of study, which examine Gender, Education, the Community and Art from a Jewish perspective.

The students from all over the country who study at Schechter represent a broad spectrum of beliefs and world-views within Israeli society. They are attracted by the warm, open and pluralistic atmosphere at the Institute.

In the fields of applied research, the Schechter Institute runs the Institute of Applied Halakhah, the Center for Judaism and the Arts and the Center for Women in Jewish Law.

## THE CENTER FOR WOMEN IN JEWISH LAW

The Center for Women in Jewish Law was established at the Schechter Institute of Jewish Studies in 1999 with the assistance of a grant from the Ford Foundation. The first purpose of the center – to study the status of women in the synagogue – is presented in my book *The Status of Women in Jewish Law: Responsa* published in 2001. The second purpose is to find halakhic solutions to the problem of modern-day *agunot* (anchored women) who are compelled to wait many years to receive a *get* (religious divorce) from their husbands. Since Jewish law requires that the husband must grant his wife a divorce, a shameful situation has developed whereby some greedy and vindictive husbands withhold their consent. In most *agunah* cases, the husband refuses to give his wife a *get* until she pays him a substantial amount of money. Should she be unable or unwilling to give the husband the cash or property he demands, the woman remains an *agunah*, or “anchored woman”, forbidden to remarry or have children with another mate until the husband agrees to release her.

The Center for Women in Jewish Law presents solutions to the problem of modern-day *agunot* in two ways: in a book entitled *Halakhic Solutions to the Agunah Dilemma*, which will appear shortly; and in the bi-annual *Jewish Law Watch*, which examines actual *agunah* cases that have languished for years in the rabbinic courts without resolution.

The goal of the *Jewish Law Watch* is to pressure the rabbinic courts to publish their decisions in a timely and orderly fashion, much as civil court decisions are

published, and to encourage rabbinic courts to use the halakhic tools which are at their disposal in order to free modern-day *agunot*.

As our Sages have taught: “the rabbis were lenient in order to prevent *agunot*” (*Yevamot* 88a). Maimonides ruled (Laws of Divorce 13:28) that “one does not examine the witnesses thoroughly in *agunah* cases because the Sages said to be lenient in order to release *agunot*”. Rabbenu Asher, the Rosh, stated that “it is worthy for every halakhic authority to examine all sides [of the case] in order to allow [an *agunah* to remarry]” (*Responsa of the Rosh* 51:2). These sources dealt with a husband who disappeared, but in our day there is a new type of *agunah* – women who are blackmailed by their husbands – and there is no doubt that the Sages and the rabbis would have examined all sides of each case in order to allow them to remarry. Indeed, that is one of the main goals of The Center for Women in Jewish Law.

### THIS BOOKLET

In this issue of *Jewish Law Watch*, the last in the series, we have decided to discuss the general topic of *dayanim* (rabbinic court judges) and rabbinic court procedures, as a result of the election of Advocate Dr. Sharon Shenhav to the “Committee for the Appointment of *Dayanim*” in December 2002. She was chosen as one of the two representatives of the Israel Bar Association. Adv. Shenhav, who is also the Legal Advisor of the “Center for Women in Jewish Law”, asked the Center’s staff to study “The Appointment of Judges, their Attributes and Court Procedures in Jewish Law” in order that the “Committee for the Appointment of *Dayanim*” utilize this booklet in its deliberations.

Our thanks to Adv. Shenhav who supplied some of the bibliography, to Dahlia Friedman for the initial English translation, and to Prof. Alice Shalvi who corrected the English style.

It is our hope that the *Jewish Law Watch* has made public the anguish of modern-day *agunot* and will spur Rabbinic Courts to free these women from their chains. We welcome the responses of rabbis, religious court judges (*dayanim*), judges, lawyers, scholars and the public at large.

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# THE APPOINTMENT OF JUDGES, THEIR ATTRIBUTES AND COURT PROCEDURES IN JEWISH LAW\*

by

**Rabbi David Golinkin**

## I. APPOINTMENT OF JUDGES

It is clear from Rabbi Prof. Simha Assaf's research that the method of appointing rabbinic court judges has changed constantly throughout the generations.<sup>1</sup> During the Talmudic period, judges in the Land of Israel were appointed by the *Nasi*<sup>2</sup> and judges in Babylonia were appointed by the Exilarch. At the end of the period of the *Geonim*, the power of the Exilarchs weakened and the Great Court of Sura and Pumbedita appointed judges for every region. In Spain, the communities appointed the judges every year.<sup>3</sup> In Poland and Lithuania too, judges were chosen once a year during the intermediate days of Passover.

It is, therefore, difficult to determine that there is one correct and traditional way to appoint judges. On the other hand, it may be stated with certainty that it is prohibited to appoint a judge who is not knowledgeable and was chosen due to extraneous considerations. *Sifrei Devarim* (*Piska* 17, ed. Finkelstein, pp. 27-28) teaches:

“You shall not be partial in judgement” (Deuteronomy 1:17) – this refers to the person responsible for appointing judges.

Lest you say “so-and-so is handsome – I will appoint him judge;

so-and-so is mighty – I will appoint him judge;

so-and-so is my relative – I will appoint him judge;

so-and-so lent me money – I will appoint him judge”.

The result will be that he acquits the guilty and convicts the innocent, not because he is wicked, but because he does not know.

Scripture considers it as if he [= the appointer]

“was partial in judgement”.

\* For a list of abbreviations used in this issue, see below, p. 20.

1 Assaf, Chapter 4, pp. 38-46.

2 For problems which arose regarding this issue during the Talmudic period in the Land of Israel, see Alon's article.

3 Cf. Don Yitzhak Abarbanel's commentary to Deuteronomy 16:18, Jerusalem edition, 5724, p. 154, which is also cited by Bazak, p. 15.

And so ruled Maimonides on the basis of the *Sifrei* and additional sources in his *Mishneh Torah* (Laws of the Sanhedrin 3:8):

Every Sanhedrin or king or Exilarch who appointed over Israel a judge who is unsuitable and is not a Torah scholar and is unworthy to be a judge, even though "all of him is delightful" [see Song of Songs 5:16] and he has other fine attributes – the one who appointed him transgresses a negative commandment, as it is said: "You shall not be partial in judgement" (Deuteronomy 1:17). They learned from tradition that this refers to the one responsible for appointing judges. The Sages said: Lest you say "so-and-so is handsome – I will appoint him judge; so-and-so is mighty – I will appoint him judge; so-and-so is my relative – I will appoint him judge; so-and-so knows every language – I will appoint him judge". The result will be that he acquits the guilty and convicts the innocent, not because he is wicked, but because he does not know; that is why it says: "You shall not be partial in judgement"...

## II. ATTRIBUTES OF THE IDEAL JUDGE

### 1. SEVEN ATTRIBUTES OF JUDGES

There are a number of ancient sources which describe the ideal judge.

- a) In the weekly Torah portion of Jethro (Exodus 18:21-22), in the first Biblical passage describing the court system, God commands Moses as follows: "You shall also seek out from among all the people **capable men, who fear God, men of truth, who hate unjust gain...** let them judge the people at all times..."
- b) At the beginning of Deuteronomy (1:13), in a passage that parallels Exodus 18, Moses says: "Pick from each of your tribes men who are **wise, discerning, and known among your tribes**, and I will appoint them as your heads..."<sup>4</sup>

The Midrash also contains various lists of the attributes of the ideal judge which are based on the above-mentioned verses:

- a) *Sifrei Devarim* (*Piska* 15, ed. Finkelstein, p. 24) states:

"Wise men and known" (Deuteronomy 1:15) – this is one of the seven attributes which Jethro had told Moses about. He went and only found [three: "capable men"], "wise and known".

4 See also II Chronicles 19:6-9, but that passage was not quoted by the *poskim* (*halakhic* authorities).

## NUMBER SEVEN

In other words, the above two verses in Exodus and Deuteronomy contain a total of seven attributes of the ideal judge. Exodus 18:25 states that “Moses chose **capable men** out of all Israel” and Deuteronomy 1:15 states: “So I took... **wise men and known...**”. Thus, Moses found judges with only three of the seven attributes.<sup>5</sup>

b) *Midrash Tannaim* to Deuteronomy 16:18 (ed. Hoffman, p. 95 = *Midrash Hagadol* to Deuteronomy, ed. Fish, p. 370) states:

“Judges and officers”. Why was this passage stated? Because he says (Exodus 18:21) “You shall also seek out from among all the people capable men”, just as in the past [= in the days of Moses and Jethro] they were not qualified until they had seven attributes as desired by the selector (*borer*),<sup>6</sup> so too in the future [when you appoint judges] they shall not be qualified until they possess seven attributes as desired by the selector. Therefore, the text reads “**you** shall appoint” – everything is according to **your** judgement.

In other words, this *midrash* assumes there are seven ideal attributes that a judge should have, based on the above-mentioned two verses. The selector, i.e., the appointer, must select a judge on the basis of those same seven attributes, but it is all at the discretion of the selector.

c) *Devarim Rabbah* 1:10 on the above-mentioned verse (Deuteronomy 1:13) states:

Rabbi Berekhya said in the name of Rabbi Hanina: judges must possess seven attributes and they are: “Wise, discerning, and known”, and four as he wrote elsewhere (Exodus 18:21) “You shall also seek out from among all the people [capable men, who fear God, men of truth, who hate unjust gain] – this makes seven. And why were the seven attributes not written together [in the same Torah portion]? So that if judges possessing all seven attributes are not found, they select one who possesses four, and if one

5 Cf. similar but not identical *midrashim* in *Erwin* 100b = *Nedarim* 20b; *Shemot Rabbah* 30:10; *Midrash Hagadol* to Deuteronomy 1:15; ed. Fish, p. 23 = *Midrash Tannaim*, ed. Hoffman, p. 8; *Midrash Alfa Beta D'rabi Akiva*, ed. A. Yellinek, *Bet Hamidrash*, third section, p. 19; and Rashi to Deuteronomy 1:15.

I have corrected the text of the *Sifrei* according to the *Midrash Hagadol* = *Midrash Tannaim* which Prof. Finkelstein also cited in the variant readings. That version perfectly suits the explanation suggested by Prof. Finkelstein *ibid.* – and later by H.D. Chavel, *Rashi's Commentary on the Torah*, Jerusalem, 5742, p. 517 in the notes and by Prof. Reuven Hammer in his English translation of the *Sifrei*, New Haven and London, 1986, p. 396 – but all three do not highlight this point.

6 Cf. the language of the Mishnah in *Sanhedrin* 3:1 “one litigant selects (*borer*) one judge, and the other litigant selects one judge, and the two litigants select a third judge”.

who possesses four is not found, they select one who possesses three, and if one who possesses three is not found, they select one who possesses one, as it is written [“capable men out of all Israel” Exodus 18:25].<sup>7</sup>

In other words, our Sages, as mentioned, discerned that Exodus lists four attributes of an ideal judge and Deuteronomy lists three and they combined them into a list of seven attributes. *Devarim Rabbah* adds that, before the fact, one must look for a judge with seven attributes, but after the fact, it is possible to make do with four or three or one, since Moses himself made do with just one in Exodus 18:25.

Maimonides in his *Mishneh Torah* (Laws of Sanhedrin 2:7) devoted a lengthy *halakhah* to our topic, as follows:

A court of three, even though one does not insist upon [the attributes of the Sanhedrin members listed above] – each judge should have seven attributes, to wit: wisdom, humility, fear [of God], a hatred of money, a love of truth, be beloved by the people, and have a good reputation. And all of these attributes are explicitly mentioned in the Torah. He says: “Wise and discerning men” (Deuteronomy 1:13) – that refers to wise men. “And known among your tribes” (ibid.) – these are the ones who find favor with their fellow man... And elsewhere he says: “capable men” (Exodus 18:21) – those who are strong in the performance of the commandments, strict with themselves, overcome their inclinations, and whose character is above reproach even in their youth. “Capable men” also means that they should have a brave heart to save an oppressed person from his oppressor, as it is written, “And Moses arose and saved them” (ibid. 2:17). And just as Moses was humble – so too, every judge must be humble. “Who fear God” – just as it sounds. “Who hate unjust gain” – they do not even worry about their own money, and they do not pursue wealth – because whoever is eager for wealth, want will come upon him [cf. Proverbs 28:22]. “Men of truth” – that they will pursue justice of their own accord, love the truth, abhor violence and flee from all injustice.

This *halakhah* begs for an explanation. First of all, we do not know its source. Rabbi Avraham di Boton speculated in the sixteenth century (in *Lehem Mishneh*

7 I have corrected the text according to Rabbi Moshe Aryeh Mirkin’s commentary, *Midrash Rabbah*, vol. XI, Tel Aviv, 5727, p. 14. The scribes shortened the Hebrew verse “אנשי חיל מכל ישראל” (“able men from among all of Israel”) (Exodus 18:25) and wrote “א’ח’מ’י”. Later scribes and printers mistakenly interpreted the abbreviation as “אשת חיל מי ימצא” (“a woman of valor who shall find”) (Proverbs 31:10) and that is what appears in the printed editions of *Devarim Rabbah*, even though that verse is not at all relevant to the matter.

ad loc.) that Maimonides derived this *halakhah* from a passage in the Jerusalem Talmud cited in the *Sefer Mitzvot Gadol*, but our editions of the *Sefer Mitzvot Gadol* quote from Maimonides and then quote *another* passage from the Jerusalem Talmud (*Sefer Mitzvot Gadol*, Positive Commandment no. 97, fol. 186d). In the nineteenth century, Rabbi David Zvi Hoffman speculated that Maimonides based himself on a paragraph in *Midrash Tannaim* (see *ibid.*, p. 8), but that paragraph has not reached us.<sup>8</sup> On the other hand, it is possible that this *halakhah* is based on numerous sources (see *Rambam La'am* ad loc.).

Furthermore, the list of attributes at the beginning of this *halakhah* does not follow the order of attributes in Exodus and Deuteronomy or the order of the verses that Maimonides cites later on. Here is the list of attributes according to Maimonides, alongside the respective sources cited by him:

- 1) Wisdom – “wise and discerning men” (Deuteronomy 1:13)
- 2) Humility – like Moses (see Numbers 12:3)
- 3) Fear [of God] – “who fear God” (Exodus 18:21)
- 4) Hatred of money – “who hate unjust gain” (*ibid.*).
- 5) Love of truth – “men of truth” (*ibid.*).
- 6) Beloved by the people – “And known among your tribes” (Deuteronomy 1:13). Maimonides understands “and known” as beloved – cf. Genesis 18:19 and Rashi *ibid.*
- 7) And with a good reputation – “capable men” (Exodus 18:21).

In other words, Maimonides’ list is similar, but not identical, to the lists of attributes which appear in the Torah.

## 2. *DIN EMET LA’AMITO* – BEYOND THE LETTER OF THE LAW, ACCORDING TO THE TIME AND THE SUBJECT

The Hebrew phrase *din emet la’amito* (= a true judgement according to its truth) – which is unique and apparently has no equivalent in other languages<sup>9</sup> – appears in the Mishnah (*Peah* 8:9) and six times in the Babylonian Talmud: *Shabbat* 10a, *Eruvin* 54b, *Megillah* 15b = *Sanhedrin* 111b, *Hagigah* 14a, *Bava Batra* 8b, and *Sanhedrin* 7a.

<sup>8</sup> Rabbi Louis Ginzberg apparently agreed with Rabbi David Zvi Hoffman. See *Legends of the Jews*, Vol. 6, Philadelphia, 1928, p. 27, n. 162.

<sup>9</sup> See Elon, p. 21. This phrase, which occurs over 200 times in *midrashim* and *responsa*, merits further study.

This is a strange expression. Is there a true judgement which is *not* true?! Rabbi Yehoshua Falk Katz (Poland, seventeenth century) responds to this question in his commentary to the *Tur* (*Drishah* to *Tur Hoshen Mishpat* 1, subparagraph 2):

It further seems to me to explain that when they said “a true judgement according to its truth”, their intention was that he judged **according to the time and place** in a manner that would be “according to its truth”, so he should not always rule a *din Torah* (Torah ruling), **because sometimes the judge must rule beyond the letter of the law according to the time and the subject**, and when he does not do so, even though it is a true ruling – it is not according to its truth. As the Sages said (*Bava Metzia* 30b): Jerusalem was destroyed only because they judged according to the Torah and did not go beyond the letter of the law.

### 3. *DIN EMET LA'AMITO* – FAMILIARITY WITH THE NATURE OF THE WORLD

The Vilna Gaon (eighteenth century) also related to the phrase “a true judgement according to its truth”, deriving from it another attribute of judges, based on an explanation of the Tosafists.

So says the Gaon in his commentary to Proverbs (6:4):

... However, the judges must be familiar with the nature of the world, so that there will not be a fraudulent judgement, because if he is not familiar with these matters, even if he is learned in the laws of the Torah, the judgement will not emerge according to its truth. In other words, even though he rules the truth, it will not be according to its truth, because it may be fraudulent and therefore the judge must be familiar with both. And that is why it is written (Deuteronomy 16:19) “For a bribe blinds the eyes of the **wise**” and it is written (Exodus 23:8) “For a bribe blinds the eyes of the **perceptive**” – meaning “wise” in the ways of Torah and “**perceptive**” in the ways of the world...

He reiterates this in *Aderet Eliyahu* to Deuteronomy 16:19 (cited in Bazak, p. 19):

Because the judge must be expert in these two areas: in Torah – he must be an expert in all aspects of Torah; **and in the ways of the world – he must be perceptive in all the ways of deceit, so that he may understand the truth.**

The Vilna Gaon’s commentaries are based on the Tosafists. They determined in three places (in *Shabbat*, *Megillah* and *Bava Batra* mentioned above) that “a true

judgement according to its truth” is the opposite of a case where the court suspects fraud, when there are witnesses who offer false testimony and nevertheless the judges know that the witnesses are lying.<sup>10</sup> The Vilna Gaon explains that a judge familiar with the nature of the world can discern when there is fraud and can judge a true judgement according to its truth. A judge who is not familiar with these matters – even if he is a Talmudic scholar – will fall into the trap and will not succeed in judging a true judgement according to its truth.

#### 4. A JUDGE MAY NOT ACT IN A DOMINEERING AND HAUGHTY FASHION

According to Rav (*Rosh Hashanah* 17a), “Any communal leader who instills excessive fear in the public that is not for the sake of Heaven will not have a son who is a Talmudic scholar...”. On the other hand, according to Rabbi Elazar, “any communal leader who leads the public with mildness will be privileged to lead them in the next world [too]” (*Sanhedrin* 92a). Maimonides chose to include these statements in the laws pertaining to judges (Laws of Sanhedrin 25:1):

A **person** may not lead the public in a domineering and haughty fashion, but rather with humility and fear. And any communal leader who instills excessive fear in the public that is not for the sake of Heaven – is punished and does not merit a son who is a Talmudic scholar, as it is written (Job 37:24): “Since men fear him, he will not see any wise people”.

In the *Shulhan Arukh*, Rabbi Yosef Karo replaced the word “person” with the word “judge” (*Hoshen Mishpat* 8:4):

A **judge** may not lead the public in a domineering and haughty fashion, but rather with humility and fear. And any communal leader who instills excessive fear in the public that is not for the sake of Heaven – will never have a son who is a Talmudic scholar...

Therefore, in the opinion of R. Yosef Karo, a judge may not treat the public in a domineering and haughty fashion; he must act with humility and fear.

#### 5. EXEMPLARY BEHAVIOR

Lastly, there is one more source – *Bava Batra* 15b – worth mentioning in the context of the ideal judge:

<sup>10</sup> For legal fraud, see *Sanhedrin* 32b top and Rashi *ibid*.

“In the days when the judges ruled” (Ruth 1:1) – a generation that judges its judges. [The judge] says to [the accused] : “take the chip out of your eye!” [The accused] says to him: “take the beam out of your eye!”<sup>11</sup>

And Rashi explains (catchword “*sheshofet*”):

Since the judges themselves were corrupt, there was an opportunity for the one being judged to chide his accuser. If the judge said to him “take the chip out of your eye” – stay away from the minor sin which you have committed; then the [accused] could say “take the beam out of your eye” – stay away from the serious sin which you have committed!

In other words, “if cedars have caught fire, what will the moss on the wall do” (*Mo’ed Katan* 25b) – i.e., if the judges are corrupt, how can they demand moral behavior from those being judged?

### III. COURT PROCEDURES

#### 1. HOURS FOR COURT SESSIONS

We have learned in *Bava Kamma* (82a) that Ezra enacted that the courts should be in session on Mondays and Thursdays. According to Rav Shmuel bar Yitzhak (*Ketubot* 3a), before Ezra’s enactment the courts met every day.<sup>12</sup> In any event, Rabbi Ya’akov ben Asher ruled as follows (*Tur Hoshen Mishpat*, section 5):

And nowadays, all days are equal and so wrote Rabbi Yehudah Albargeloni [Barcelona, 11<sup>th</sup>-12<sup>th</sup> century]: even though the main court days are Mondays and Thursdays, if there is a city which needs a court to sit there every day, then they sit there every day, all according to the needs of the hour.

On the other hand, the Sages prohibited court sessions on Shabbat and Festivals lest they write (*Mishnah Beitzah* 36b and the *Gemara* *ibid.*, 37a) and they also forbade court sessions on the eve of Shabbat and Festivals because they are busy preparing for Shabbat and Festivals (*Yerushalmi Beitzah* 5:2, 63a, and *Yerushalmi Sanhedrin* 4:7, 22b). Nevertheless, there are halakhic authorities who think that a court may sit on Shabbat, and how much the more so on Shabbat eve, if it is a matter of great need, such as freeing an *agunah* (anchored woman).<sup>13</sup>

11 And cf. the parallel source in *Ruth Rabbah* 1:1, ed. Vilna, fol. 2d.

12 For a summary of the comments of the *Rishonim* on this passage, see *ET*, p. 169.

13 See Shochetman, p. 35 and notes 101-103.

NUMBER SEVEN

Regarding the hours of work, it says in the tractate of *Shabbat* (10a) "Until when do they sit in judgement? Rav Sheshet said: until the mealtime" and we have learned in a *beraita* (ibid.) that Talmudic sages eat in the sixth hour. This led to a dispute – some rule that a court sits until the end of the **fifth** hour and others rule that a court sits until the end of the **sixth** hour (see ET, p. 170, for a summary of the views).

Nevertheless the court **may** sit all day on the basis of three sources or explanations:

- 1) Rabbi Yosef Halevi ibn Migash, Hari Migash (Spain, 1077-1141) – a disciple of the Rif and the teacher of Rabbi Maimon, the father of Maimonides – testifies in his responsa (no. 127) that there were courts in Spain that used to sit all day long.
- 2) Rabbi Ya'akov ben Asher ruled (*Tur Hoshen Mishpat*, par. 5) that "the time for judges to sit is from the morning until midday; from then on it is not **necessary** to sit". Rabbi Yoel Sirkish explained (*Bayit Hadash*, ibid., based on *Shabbat* 10a cited above) that it is not **necessary**, but there is also no **prohibition** against doing so because of time taken away from Torah study, and anyone "who judges a true judgement according to its truth, Scripture considers it as if he had engaged in Torah study the entire day".
- 3) Professor Eliav Shochetman adds another explanation in his book, *Seder Hadin* (pp. 31-32):

It seems that these things were said only from the perspective of the *mitzvah* that is given to the judges to judge, and it was determined that as far as the *mitzvah* is concerned, they are not required to sit in judgement after midday. But when it comes to a judge who is appointed to his position by the public, his work hours are determined by mutual consent or according to the regulations in effect at the time he took office. In the State of Israel, this matter is regulated by the Administrative Procedures for Rabbinic Courts, 5743/1983. Section 1 establishes the following: "(1) The hours for hearing cases in a Regional Rabbinic Court will be not later than from 9:00 until 13:30 at least, with a half hour break sometime around 11:00, as the court sees fit. (2) In the Supreme Rabbinic Court, the President will determine the court procedures and their times".

Since according to the simple law, the reason for limiting the courts' sessions is the judges' need to eat, then after the meal, the judges may continue to sit in judgement. Indeed, the judges are not **obligated** to

continue the court session beyond the working hours which the law requires of them, but as there is no **prohibition** barring judges from reconvening after the meal, if [they wanted] to continue their session afterwards – the litigants must accept this decision....

Moreover, it behooves them to try to finish discussing the cases designated for hearing at that session, in order to avoid unnecessary inconvenience to the public. For that reason, Section 4 of the Administrative Procedures for Rabbinic Courts, 5743/1983 stipulates the following: "In order to prevent, to the extent possible, the need to again summon litigants and witnesses who were summoned for a given day, the court will discuss all the cases scheduled for that day and will hear all the witnesses summoned to testify that day, even if the appointed time cited in Sections 1–2 has passed".

## 2. EQUAL TREATMENT OF THE LITIGANTS

The Torah has warned us on numerous occasions not to favor one litigant over another:

"Nor shall you show deference to a poor man in his dispute" (Exodus 23:3).

"You shall not subvert the rights of your needy in their disputes" (ibid., 6).

"You shall not render an unfair decision, do not favor the poor, or show deference to the rich" (Leviticus 19:15).

"You shall not be partial in judgement, hear the small as well as the great" (Deuteronomy 1:17).

Our Sages drew some practical conclusions from these verses about giving equal treatment to both litigants. And so we have learned in *Torat Kohanim (Sifra, Kedoshim 4:4, ed. Weiss, 89a)*:

"Judge your kinsman fairly" (Leviticus 19:15) – so that there is not a situation where one party talks as much as he needs to and to the other you say: "Be brief!". So that there is not a situation where one party stands and the other sits. Said Rabbi Yehudah: I have heard that if they wanted to seat both, they may... (and cf. the parallel source in *Shevuot 30a*).

And so ruled Maimonides (Laws of Sanhedrin 21:1-3)<sup>14</sup> in the wake of the *Sifra* and additional sources:

NUMBER SEVEN

- 1) It is a positive commandment for the judge to judge fairly, as it is written: "Judge your kinsman fairly" (Leviticus 19:15) – what is fairness in judgement? It is treating both litigants equally in every respect. There should not be a situation where one talks as much as he needs to and to the other you say: "Be brief!". And he shall not be pleasant to one and speak softly to him, while being mean to the other and speaking harshly.
- 2) If there are two litigants and one is dressed in expensive clothes and the other is wearing shabby clothes – say to the elegantly dressed one: "Either dress him as you are dressed before you litigate against him, or dress as he is dressed until you are equal, and only afterward be judged".
- 3) There shall not be a situation where one party sits and the other stands, rather both should be standing; and if the court wants to seat them both – they may. And they should not be seated with one higher up and the other lower down, but rather side-by-side...

The desire to equalize the litigants is reflected in an extreme fashion in the practice of Rabbi Moshe Birdugo, which is mentioned by Rabbi Hayyim Ben Attar (Morocco and Israel 1696-1743), in *Or Hahayim* to Deuteronomy 1:16:

... and when he says "Hear [out your brothers, and decide justly]" – the way of hearing shall be among your brothers. If you raise your eyes, raise them to both; and if you lower them, lower them from both. Or it is possible that God will command him not to look at them at all, because it may mislead one of them into thinking that the judge looked more favorably on the other and his arguments will be blocked. And I heard from a great Sage, a pious man and scholar in Israel, who is dearly beloved to me, Rabbi Moshe Birdugo z"l, who was careful when sitting in judgement to keep his eyes to the ground and not raise them at all, and who felt that if he would raise his eyes out of necessity to one of the litigants, the opposing [litigant] would become confused.

There are reasons to disagree with Rabbi Moshe Birdugo's practice,<sup>15</sup> but this story teaches us to what extent that judge made an effort not to favor one litigant over the other.

<sup>14</sup> Cf. *Hoshen Mishpat* 17:1.

<sup>15</sup> See Shochetman, p. 199, note 30 who cites Rabbi Hayyim David Halevy in *Torah Shebe'al Peh* 22 (5741), pp. 35-36 in the note, that it is important for a judge to look at the faces of the litigants in order to determine whether they are speaking the truth or not.

### 3. THE REQUIREMENT OF WRITING A PROTOCOL

According to the simple law, the court must issue its ruling based on **oral** testimony and arguments (*Hoshen Mishpat* 13:3; 28:11 and Shochetman pp. 288 ff.), but after hearing the arguments of the **litigants** “[the court] shall command the scribe to record them” (*Hoshen Mishpat* 13:3).

As to recording the testimony of the **witnesses**, there is ostensibly a problem when a long time elapses after the recording of the protocol and the details of the testimony have been forgotten by the judges, or when the protocol is transferred for discussion in another court. For in those cases, the court relies in the end on **one** witness, i.e., the court scribe.

The solution to this problem already appears in the *Shulhan Arukh* (*Hoshen Mishpat* 28:23): “If the public desired... that the scribe’s signature be equal to that of two witnesses – their enactment is valid”. And the Rema adds: “Because in all such matters, the public has the right to enact [regulations] in its own city as it sees fit”. Indeed, writing a protocol is considered an obligation in the Administrative Regulations of the Rabbinic Courts:

60. The court scribe will write down the words of the litigants... the court will sign the protocol after it has been read aloud; the reading shall be written in the protocol...
76. The scribe will write down the name and personal details of the witness and whether he was warned as required by law and will also write down the entire testimony...
82. After the testimony has been heard, the scribe reads the protocol of the witnesses’ testimony to the court and then writes that the testimony was read, and the court will confirm with its signature that the testimony was heard by it (Shochetman, p. 347).

### 4. WRITING A REASONED RULING

According to the simple law, there is no requirement to write a ruling unless one of the parties requests it (*Hoshen Mishpat* 19:1-2). However, regulations have already been enacted in various communities requiring a written ruling (Shochetman, p. 368, note 59).

And thus they enacted in the Administrative Regulations of the Rabbinic Courts (Nos. 101, 103):

One should not declare any decision or ruling as long as it is not written and signed by the court. Every decision issued during the course of the trial must be written and explained... (Shochetman, p. 368)

## NUMBER SEVEN

Regarding the obligation to provide an explanation, the *Shulhan Arukh* demands an explanation in cases where one of the litigants seeks to appeal the verdict to a higher court (*Hoshen Mishpat* 14:1), or when the judge sees that a litigant feels that the court slanted the case in favor of the other party (*ibid.*, 14:4). Therefore, in the past, most rulings were not explained. But when an Appellate Court was set up in Israel, it was necessary to explain rulings so that the Appellate Court could discuss the reasons behind the first court's decision. And therefore the Administrative Regulations (No. 104) stipulate:

Every ruling must also include, in addition to the decision in the case under discussion, (a) a concise summary of the parties' arguments; (b) a determination of the important facts; (c) an explanation of the decision (Shochetman, p. 369).

Moreover, nowadays, there is another reason to write reasoned rulings – because that is the practice in all secular courts in Israel and around the world. As the Rishon Letzion, Rabbi Ben-Zion Meir Hai Uziel wrote in *Mishpitei Uziel* (Part 3, *Hoshen Mishpat*, No. 1, p. 13):

This obligation is greater in our time, because every secular court of law explains its decisions with proofs to justify its ruling, and this endears their judges to the people and why should we not do the same to endear the court and increase its honor and prove its justness and the justness of its judges to the litigants themselves and through them to the entire nation?... From this perspective, which in my opinion is correct and certain, it is only fitting that all of our rulings, except the regular ones that are simple and self-understood, be written with a concise summary of the arguments and the explanations of the ruling, in order to offer them the possibility of review by the higher courts and the [opportunity of] teaching the laws of the Torah to the entire people.

## IV. SUMMARY AND PRACTICAL IMPLICATIONS

The following is a summary of what we have learned thus far:

### **Appointment of Judges**

Knowledgeable judges should be appointed; judges should not be appointed on the basis of extraneous considerations.

### **The Attributes of Judges**

- 1) There are seven attributes of an ideal judge. According to the Torah, judges must be capable men, who fear God, men of truth, who hate unjust gain, wise, discerning and known among your tribes. According to Maimonides, judges must have wisdom, humility and fear of God; hate money, love truth, be beloved by the people and have good reputations.
- 2) According to Rabbi Joshua Falk Katz, a judge must judge a true judgement according to its truth, i.e., beyond the letter of the law according to the time and the subject.
- 3) According to the Vilna Gaon, a judge must be well-versed in Torah matters and perceptive about the nature of the world in order to be able to detect cheaters and judge a true judgement according to its truth.
- 4) A judge is prohibited from acting in a domineering or haughty fashion.
- 5) The judge's behavior must be exemplary.

### **Court procedures**

- 1) The court must sit from Sunday through Thursday from 9:00 to 13:30 at least.
- 2) The court may sit all day long, and it is desirable for it to conclude discussion of the cases designated for that session on the same day, in order to avoid inconveniencing the public.
- 3) The court may sit on Shabbat and Festival eves, and even on Shabbat and Festivals, in order to free *agunot*.
- 4) The court must treat all litigants equally. In other words, in the case of a couple seeking to divorce, there can be no preference for the husband over the wife or vice versa.
- 5) The court must write an orderly protocol.
- 6) The court must write a reasoned ruling.

Unfortunately, we learn from the media and we have seen in previous issues of *Jewish Law Watch* that many of the above *halakhot* and regulations are not upheld in practice. We hear of judges who were appointed because of their party affiliation or because of their closeness to another rabbi and not because of their

NUMBER SEVEN

abilities.<sup>16</sup> We have seen judges who judged accorded to the law of Torah and did not judge a true judgement according to its truth beyond the letter of the law.<sup>17</sup> We have seen judges who are not perceptive about the nature of the world and therefore require an abused woman to return to the home of her violent husband in order to seek *shlom bayit* (marital harmony).<sup>18</sup> We have heard of courts that are in session for only a few hours a day, because the judges are engaged in other activities.<sup>19</sup> We have seen a court that did not equalize the litigants – it favored the husband and discriminated against the wife, and therefore tried to annul a *get* (bill of divorce) a year and a half after it was given in order to force the wife to educate her children in a religious school.<sup>20</sup> We have seen incomplete and carelessly executed protocols.<sup>21</sup> And we have seen rulings which are too brief and insufficiently explained.<sup>22</sup>

Correcting these distortions is not “in the heavens”; these are distortions which can be corrected. The Committee for the Appointment of *Dayanim* must be more careful in its appointments and the judges must be more careful about their behavior and about court procedures. May it be God’s will that we see the fulfillment of the verse “Zion shall be redeemed with judgement and those that return to her with righteousness” (Isaiah 1:27).<sup>23</sup>

16 See *Ha'aretz* 16.6.02; 17.9.02; 20.3.03; *The Jerusalem Post Magazine*, 18.8.2000, pp. 10-13.

17 See *Jewish Law Watch*, Nos. 1, 2, 3.

18 See *Jewish Law Watch*, No. 2.

19 See *Makor Rishon, Yoman Shvu'ee*, 29.5.98; *The Jerusalem Post Magazine*, *ibid.*; Ariel Rosen-Zvi, *Dinei Hamishpahah B'yisrael: Bein Kodesh L'hol*, Tel Aviv, 1990, p 177; Joel Wolowelsky, *Akdamos* 13 (Nissan 5763), p. 202.

20 See *Jewish Law Watch*, No. 6.

21 In almost every case discussed in issues of *Jewish Law Watch*; and cf. Wolowelsky.

22 See *Jewish Law Watch*, No. 1, p. 9; and cf. Wolowelsky.

23 The Hebrew side of this issue contains an Appendix, which surveys the current Israeli regulations regarding the appointment of rabbinic court judges.

### Abbreviations

Albeck	Shalom Albeck, <i>Batei Hadin Biyimey Hatalmud</i> , Ramat Gan, 1981
Alon	Gedalyahu Alon, "Those Appointed for Money", <i>Jews, Judaism and the Classical World</i> , Jerusalem, 1977, pp. 374-435
Assaf	Simha Assaf, <i>Batei Hadin Vesidrethem L'ahar Hatimat Hatalmud</i> , Jerusalem, 1924
Bazak	Jacob Bazak, <i>Hashofet Badin Ha'ivri</i> , second edition, Jerusalem, 1985
Elon	Menachem Elon, "Hadin, Ha'emet Vehashalom" in: <i>Tziyon Bemishpat Tipadeh</i> , Jerusalem, 1996, pp. 17-25
ET	<i>Entziklopedia Talmudit</i> , s.v. "Bet Din", Vol. 3, Jerusalem, 1951, pp. 151-152, 164-174
Shochetman	Eliav Shochetman, <i>Seder Hadin Le'or Mekorot Hamishpat Ha'ivri, Takanot Hadiyun Upesikat Batei Hadin Harabaniyim B'yisrael</i> , Jerusalem, 1988



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## **Halakhic Solutions for the *Agunot* of Our Time**

### Contents

Introduction

### **Part One: Solutions in Order to Prevent *Igun***

Chapter One: Prenuptial Agreements

Chapter Two: Using the *Ketubah* to Prevent *Igun*

Chapter Three: Conditional Marriage

Chapter Four: Appointing an Emmissary at the Time of Marriage to Write a *Get*

Chapter Five: Concubinage

Chapter Six: “In the Manner of Betrothal” Instead of Betrothal

### **Part Two: Solutions to Release *Agunot* After the Husband Refuses to Give a *Get***

Chapter Seven: Coerced Divorce

Chapter Eight: A Mistaken Transaction

Chapter Nine: Annulment of the Betrothal

An Afterward

Subject Index

English Summaries

(This book will be published in Hebrew with English summaries.)