

Introduction to Tractates Sanhedrin and Makkot

The name *Sanhedrin* (Greek συνέδριον, “council”) originally referred to the council of the High Priest as head of state. Talmudic tradition, which carefully obliterated all references to political institutions, turned the word into a name for the supreme judicial authority centered at the Temple. This reflects the reality of life under the last Hasmoneans, Herod and his successors, and the Roman governors before the Jewish revolt when the people essentially considered the political powers as alien forces irrelevant to private and religious lives. Whether this council, which for example set the calendar, was a generally accepted Jewish or a sectarian pharisaic institution is difficult to decide. By the time of the formulation of the Mishnah, under the Severan emperors, popular idealization of the past had turned the Synhedrion into a Supreme Court of 71 members, successor to Moses’s Council¹, directing a full judicial system of courts of 23 members each, which eliminated the need for any political administration. In this popular remembrance, King David was imagined as head of the council, executing its decrees.

The greater part of Tractate *Sanhedrin* together with its appendix *Makkot* is devoted to the hypothetical construction of a system of criminal courts and rules of criminal justice. Neither the New Testament nor Josephus or any other contemporary ancient source give any indication that the full system ever was in actual use; the Ben Shetah legend detailed in Chapter 6 indicates the same. The notice in the Talmudim that criminal jurisdiction was taken from the Jews 40 years before the destruction of the Temple refers to the jurisdiction of the political powers, not the pharisaic-rabbinic courts.

In the absence of a historical record, the theory is developed that procedural law may be disregarded in emergency situations², and only

1. *Num.* 11:16,17,245,25.

2. Cf. Chapter 6, Note 96.

emergency situations make it to the historical record. In addition, the Tractate institutes courts of three judges for civil matters. There one really considers two very different institutions: First, communal courts to adjudicate both matters of personal status and of civil disputes. These are considered only implicitly in the Tractate; their development is Babylonian, in particular from Gaonic Babylonia where each Jewish community had a court subject to the supervision of one of the great Yeshivot. We do not know the exact meaning of ordination and the title “Rebbi” expressing ordination in the 150 years between its introduction at Jabneh and the formulation of the Mishnah. But in Mishnaic and later Talmudic times, this title and the corresponding Babylonian title “Rav” designated a person competent to act as communal judge with powers of compelling attendance, in Palestine in matters of personal status and in Babylonia in all intra-communal matters³.

While one may assume that these courts developed their own formal procedures, there is little evidence of their procedural law in any of the Talmudim. This makes it difficult for rabbinic courts to function in a modern world unless they develop their own written procedures as happened with the system of rabbinic courts in Israel. The other aspect, panels of arbitration, is more prominent and better developed, reflecting the actual situation in Mishnaic and Talmudic times, and is in continuous use since Talmudic times, amply documented in the Responsa literature.

The first Chapter mainly determines the competence of each court, whether of 3, 23, or 71 members. Since one of the competences of a court of three members is fixing the calendar (Halakhah 2), and this competence essentially determined the status of the Patriarch in Mishnaic times, the prerogative of the Patriarch’s court and his power of ordination, i. e., appointing judges, are detailed in Halakhah 2. The later Halakhot clearly are an attempt to project the Mishnaic theory into the situation of the First Commonwealth.

The second Chapter discusses first the status of the High Priest as a consequence of the biblical restrictions imposed on him. This is followed by

3. Cf. *Gittin* 4:2 Note 17, the Introduction to Tractate *Neziqin* (pp. 4-5) and in the following, 3:10.

similar rules regarding the King. The first part of these rules clearly refers to the non-Davidic Kings of the Second Commonwealth who considered themselves to be above the law and who, therefore, are considered unfit to administer justice. Later Mishnaïot (5,6) and the corresponding Halakhot again are an attempt to describe First Commonwealth situations.

The first part of the third Chapter takes up the constitutions of panels of arbitration. These are supposed to render binding verdicts; committees to work out compromises may have an even number of members. The basic rule is that each party appoint one judge, subject to rules of eligibility. The two then together choose an independent third member. A party may also choose to bring the case before a local permanent rabbinic court. If one tries to bring the matter before a far-away court of higher standing, he can be forced to go before the local court who then has to present written protocols to the far-away authority for final determination. This rule turned out to be a very efficient way to guarantee the functioning of communal courts or panels of arbitration in the absence of any official courts of appeal but a general possibility of submitting a case to a recognized authority⁴. It has been suggested that the disappearance of government-sanctioned courts can be dated to the appearance of the ban (נְדָי, נְזָר) as a way of enforcing religious discipline, probably starting from the time of Simeon ben Šetah. Therefore, the ban in its forms and rules is not treated in Sanhedrin.

Persons can be disqualified as judges or witnesses either because they are relatives of one of the parties (Halakhah 7), or because they are convicted felons (a biblical disqualification), or because their honesty is suspect since they earn their livelihood dishonestly (a rabbinic disqualification, Halakhah 6). This leads to a digression about the observance of the (today purely rabbinic) institution of the Sabbatical year and the parameters of the obligation to prefer martyrdom to breaking biblical law under Gentile oppression.

The second part of the Chapter discusses the interrogation of witnesses, mostly in criminal cases. The biblical decree that a verdict must be based on the testimony of two witnesses calls for rules about how two witnesses for the

4. Chapter 3, Note 13.

same circumstance are treated and how “same circumstance” is defined. In addition the Halakhah states that eavesdropping evidence in general is rejected (it is admitted as a great exception in a charge of missionary activity for idolatry.) The Chapter ends with the possibility of asking for a retrial in a civil suit if new evidence is uncovered. There is no provision for a superior appeals court.

The Fourth Chapter starts by emphasizing the differences between criminal and civil trials. Civil cases are decided by a simple majority of the judges; criminal convictions need a qualified majority. Since it is emphasized that criminal trials need a detailed written report of all proceedings, one may infer that such a report is not needed in civil cases. In criminal cases, the most junior judges are polled first about their verdict, to avoid them being influenced by the opinions of their senior colleagues.

The final part of the Chapter treats the interrogation of witnesses. Oaths are admitted in rabbinic courts only by parties to civil suits, either to deny or to affirm monetary claims. Witnesses testify without oaths; therefore, judicial admonitions about the importance of testimony and the severity of the crime of perjury are absolutely necessary.

Chapter five is devoted to the details of procedure in criminal cases; in particular the difference between facts that must be determined without ambiguity (the identity of persons, place, and date of the crime) and those where discrepancies between testimonies might be reconciled by judicial arguments. The main rule in such cases is that criminal intent can be proven only by testimony of two witnesses to the effect that the accused was warned not to commit the crime just before he actually committed it. This practically excludes convictions by biblical standards and turns the long list of death penalties in the Pentateuch into lists of sins which might deprive the unrepentant sinner of his part in the Future World.

Chapter six is devoted to the (hypothetical?) details of the stoning procedure, in particular the convict’s confession before execution which assures him of being admitted to Paradise. This indicates that the Chapters to the end of the Tractate should be read as theological treatises and pleadings against the imposition of any death penalty. In addition, the Chapter contains

the Simeon ben Šetah legend (which most historians accept at face value) and a shortened version of the Gibeonite story from *Qiddušin* 4:1.

Chapter seven starts with a systematic description of the death penalties prescribed in the biblical text: stoning, burning (which is explained as not burning), decapitation, and an unspecified death penalty which is identified as strangling. Just as a conviction needs two separate testimonies about warning and action, so a prohibition must be mentioned twice in the biblical text, once for the prohibition and once for determination of the penalty. This leads to a discussion of a number of hermeneutical principles needed for the understanding of the biblical text. The second part of the Chapter is devoted to discussion of crimes connected with idolatry, such as Moloch worship and sorcery.

Chapter eight is devoted to the rules of the deviant and rebellious son⁵, a case which in the opinion of the Babli never happened in practice. On a more practical level, it also discusses the rules by which one may protect one's house by killing a stealthy intruder⁶.

Chapter nine discusses the cases punishable by "burning", mostly of incest, and by decapitating, of murder. In addition, it is recognized that dangerous criminals who clearly cannot be sentenced to death by biblical standards must be kept in jail even though there is no biblical sanction for jail sentences.

The first part of Chapter ten (in most Babli sources Chapter eleven) asserts that all of Israel, including those who committed deadly sins, have part in the Future World. The Mishnah quotes exceptions to this rule; all of these are refuted in the Halakhah. The only persons excluded are those who deny the existence of a Future World and probably those who die unrepentant. Even people guilty of capital crimes have part in the Future World. This certainly holds for those executed for their crimes (Chapter 6:3) but also for those who confess on their death bed. This denies part in the Future World to evildoers who die suddenly and painlessly. Rabbinic Judaism (except for some Medieval aberrations) always rejected systematic theology. This Chapter is

5. *Deut.* 21:21.

6. *Ex.* 22:1.

the closest approximation one has to such a theology and its theodicy as far as is possible in a world of thought based on aphorisms⁷. In this setting, Aramaic texts are sermon concepts, homiletics. Hebrew texts should be considered as serious theological arguments.

The second part of the Chapter deals with the detailed rules for destroying a town which publicly adopts idolatry⁸, a case that in all likelihood never happened.

The eleventh Chapter returns to the topics of Chapters seven to nine in discussing the death penalty cases in which the biblical text does not specify the method of execution, which by rabbinic tradition means execution by strangulation. One topic is that of the lower court judge who disregards the decision of the High Court⁹. This does not establish the High Court as an appeals instance but requires that differences of opinions in lower courts, acting as judges and jury, be brought to the High Court *before* verdict is rendered⁴.

The last Mishnah of the Chapter introduces the topic of the first Chapter of *Makkot*. In the Babli, the Savoraic introduction to *Makkot* clearly states that it is a separate Tractate following *Sanhedrin*. The Genizah text of *Makkot* and some ancient references treat *Makkot* as *Sanhedrin*, Chapters Twelve to Fourteen. Since it is good Mishnaic style to introduce a change of topic in the middle of a Chapter, the fact that the last Chapter of *Sanhedrin* in the Leiden ms. introduces the topic of the first Chapter of *Makkot* indicates that the separation of the text into two Tractates is due to the influence of the Babli.

Biblical law requires that a perjured witness be subject to the penalty which would have been imposed on the accused had his testimony been true¹⁰. But there are cases in which this cannot be done. The case treated in *Sanhedrin* is that of an adulterous daughter of a Cohen. The adulteress cannot be convicted unless the adulterer also be convicted. But the adulterer's penalty is strangulation while the adulteress's is burning which is more severe

7. Cf. H. Guggenheimer, *Die dialektische Philosophie im Talmud*, Proceedings of the XIth International Congress of Philosophy, Bruxelles 1953, vol. XII, pp. 190-194.

8. *Deut.* 13:13-19

9. *Deut.* 17:8-12.

10. *Deut.* 19:18-21.

than strangulation. The perjured witness can be sentenced to the adulterer's penalty, but not the adulteress's.

The first Chapter of *Makkot* (*Sanhedrin* 12) deals with cases in which the prospective penalty awaiting the accused cannot be imposed on the perjured witness; then the perjurers are whipped. The main example are two witnesses who accuse a Cohen of being desecrated as son of a woman forbidden to his father. If the accusation stands, the man is stripped of his priestly status and all his descendants also are desecrated¹¹. If the perjured accusers are not priests, they cannot be declared desecrated. But even if the accusers are priests, it is impossible to declare them desecrated since there is no reason to declare their children as desecrated but qualified priests cannot be children of disqualified ones. In all such cases, the perjured accusers are whipped.

Chapter two (*Sanhedrin* 13) treats the rules of exile for the homicide and the cities of refuge¹². The treatment implies that actual vendetta killings for homicide were no longer considered real possibilities. What in the Bible is protection against clan vendetta becomes a very restricted form of punishment.

In the Leiden ms., Chapter Three (*Sanhedrin* 14) has only the Mishnah. The Genizah text has a theologically important homiletic Halakhah to the last Mishnah, the existence of which was deduced by S. Lieberman¹³ from early Medieval quotes long before the Genizah text was identified.

11. Since his daughters may legally marry Israel husbands, their sons will be Israel without any disabilities; Mishnah *Qiddušin* 3:14.

12. *Num.* 35:9-34; *Deut.* 19:1-10.

13. *Tarbiz* 5 (5694), pp. 109-110.

