J. David Bleich

Survey of Recent Halakhic Periodic Literature

THE APPEAL PROCESS IN THE JEWISH LEGAL SYSTEM

I

Establishment of a judiciary is noted in the biblical command "Judges and court officers shall you appoint to yourself in all your gates" (Deuteronomy 16:18). The Jewish judicial system reflected the prescriptions of Jewish law and was comprised of tribunals composed of three judges that heard cases involving monetary disputes, courts consisting of twenty-three judges that were charged with judging persons accused of infractions punishable by death or stripes and a Great Sanhedrin comprised of seventy-one members that sat within the Temple precincts. Although the Great Sanhedrin enjoyed original jurisdiction with regard to certain particular matters, its most critical function was to resolve questions of law that were in doubt or the subject of dispute. Questions of that nature could be certified and brought before the Great Sanhedrin during the course of proceedings before a lower court or could be made the subject of a hearing entirely independent from any proceeding before a court of original jurisdiction.

Other than an interlocutory appeal of such nature to the Great Sanhedrin there is no explicit provision for appeal to a higher court on the basis of allegation of judicial error with regard to either matters of fact or of law. Although no formal provision for an appeals process is recorded in the various codes of Jewish law, a duly constituted rabbinical court of appeals does exist in the present-day State of Israel. The impetus for the establishment of a Supreme Rabbinical Court of Appeals in the State of Israel can be traced to two sources, one historical and the other political.

With the rise of Zionism and promulgation of the Balfour Declaration the *Ha-Mishpat ha-Ivri* Society was established in Moscow. Its stated agenda was to develop a corpus of law based upon Jewish law sources for integration into the legal system of a future secular Jewish state. In 1909-10 a judicial body known as *Mishpat ha-Shalom ha-Ivri* was established in Jaffa. The celebrated writer S.Y. Agnon served as the first secretary of that body. Later, tribunals were established in other cities in Palestine as well. Those tribunals had no official standing under either the Ottoman or British governments but functioned as arbitration panels.[1] Those bodies were composed of persons who, in general, lacked legal or rabbinic training and did not consider themselves bound by any particular system of law. Judgments were rendered on the basis of generally conceived "principles of justice, equity, ethics and public good."[2] Nevertheless, beginning in 1918, regulations were promulgated with regard to matters of procedure, evidence and the like. Lay arbitration is certainly not unprecedented in Jewish law.[3] However, the judicial system instituted by the *Mishpat ha-Shalom ha-Ivri* was innovative in its institution of a formal appellate forum.

There can be little doubt that, despite the limited scope and underutilization of the judicial system established by the *Mishpat ha-Shalom ha-Ivri*, the very establish-

ment of a court of appeals within a system purporting to align itself with principles of Jewish law served to create or to reinforce a desire for an appellate system and to generate an aura of ideological acceptance. However, the proximate cause of the institution of a rabbinical court of appeals was governmental pressure in conjunction with the establishment of the Chief Rabbinate under the aegis of the Mandatory authority. On 15 Shevat 5681, in his opening address at the very first meeting of the committee appointed to convene a representative assembly for the purpose of electing a Chief Rabbinate, Mr. Norman Bentwich, Secretary of Justice in the Mandatory government and chairman of the meeting, emphasized that "one of the most important matters" to be addressed by the electoral body was the establishment of a rabbinical court of appeals.[4] At the time, the Mandatory authority was considering granting Batei Din autonomous jurisdiction with regard to matters of personal status upon the establishment of a Chief Rabbinate. Mr. Bentwich made it very clear that the British government "strongly insists upon the need for creation of an institution for appeals as a condition for enhancement of the jurisdiction of Jewish Batei Din."[5]

That proposal met with immediate opposition. At a subsequent meeting held on 17 Shevat a document prepared by the "Office of the Rabbinate of Jaffa" was presented. The final paragraph of that document states, "There is no place for an appellate Bet Din according to the laws of the Torah. . . ."[6]

The meeting of the assembly charged with naming electors to designate the members of the proposed Chief Rabbinical Council met in Jerusalem on 14-16 Shevat 5721. The opening address was delivered by the British High Commissioner, Sir Herbert Samuel. In his charge, he exhorted the assemblage to consider the proposal of the preliminary committee for the establishment of a rabbinic court of appeals. He explicitly stated, "It is proposed that from among the [Chief Rabbinate] Council of eight there be formed a supreme religious court to which it will be possible to bring an appeal from any Bet Din in *Erez Yisra'el*. I support this proposal. . . ."[7] That proposal was reiterated by Mr. Bentwich in declaring that the Chief Rabbinate Council "would also be the officially recognized Bet Din of Jerusalem" and "if the proposal finds favor in your eyes, [the Chief Rabbinate Council] will establish a Bet Din for appeals. . . ."[8] Subsequently, a number of resolutions were presented for consideration by that assembly, including a resolution establishing a "Bet Din of appeals to be composed of six members of the Rabbinate Council under the chairmanship of one of its presidents,"[9] i.e., the Chief Rabbis would alternate as presidents of the Court.[10] Although, at the assembly, both Sir Herbert Samuel and Norman Bentwich spoke of establishment of an appellate court as a "proposal," a certain Joseph Penigel, described as the secretary of the Office of the Rabbinate, asserted that the Mandatory authorities insisted upon establishment of such a body as "a necessary condition for enhancing the authority of the Batei Din and for granting legal effect to their decisions."[11] Apparently, that assembly did not formally act upon the resolution for the establishment of a rabbinic court of appeals.[12] Nevertheless, such a court was established by the Chief Rabbinate Council within a matter of months of its election.

The question of whether or not there exists a halakhic basis for a rabbinic court of appeals notwithstanding,[13] it is clear, as a matter of historical fact, that such judicial bodies did exist both during the medieval period and in modern times as well.[14] Whether the right to appeal is grounded in statutory law or was established in some jurisdictions on the basis of local communal *takkanot* is an entirely different matter.

There is some support for the position that Scripture itself provides for a system of appeals. The sixteenth-century Italian exegete, R. Ovadiah Sforno, in his commentary on the Bible, presents an analysis of Exodus 18:21 indicating that the purpose of designating "rulers of thousands, rulers of hundreds, rulers of fifties and rulers of tens" was to establish a multi-layered system of appeals. According to Sforno's analysis, the "rulers of tens" had original jurisdiction. Successive appeals could be taken to higher levels and, ultimately, if the litigant remained unsatisfied, to Moses himself. Although, in terms of biblical exegesis, Sforno's analysis is not at all farfetched, even if accepted, it does not establish a right of appeal as a matter of Halakhah. The officials appointed by Moses with jurisdiction over ten, fifty, one hundred and one thousand persons did not occupy offices designed to be preserved in perpetuity. Apparently, the appointments, and the particular offices themselves, were designed only to ease Moses' burden and, accordingly, were limited to the period of wandering in the wilderness. Hence, granted that these officials served as appellate judges, the right to lodge appeals before them may have been temporary in nature and limited to the generation of the wilderness.

The earliest record of the existence of an appellate court appears to be that found among the enactments promulgated by a synod of Castilian communities convened in 1432. These enactments provided that any litigant had the right to appeal to the *Rab de la Corte*, i.e., the Chief Rabbi appointed by the King. The costs of the appeal were to be borne by the appellant if the latter did not prevail and he was required to take measures to assure that prompt payment of those expenses would be forthcoming. The appellant was also required to affirm that the appeal was based on belief in the justice of his cause rather than designed to serve as a means of evasion or procrastination.[15]

At roughly the same time, at least some communities of Aragon appointed judges to hear appeals. R. Isaac ben Sheshet refers by name to certain appellate judges, known as *"dayyanei ha-silukin"* who sat in Calatayud,[16] Hueska,[17] and Saragossa.[18] Assaf asserts that it is unlikely that such an institution should have arisen during the period of decline of Iberian Jewry.[19] Consequently, he assumes that the written record reflects a practice of much older vintage.

Establishment of a formal system of appeals in Italy is found in an enactment promulgated by R. Moshe Zacutto in 1676 and accepted by an overwhelming majority of delegates to a synod of Italian Jewry. That ordinance provided that, unless the right to appeal was waived by the litigants at the time of submission of their dispute to the Bet Din, they were entitled to appeal to the *"Ba'alei Yeshivah"*[20] within eight days after issuance of a decision. The procedure does not seem to have provided for relitigation or presentation of additional allegations of fact or law by the litigants but provided that the *"Ba'alei Yeshivah"* summon the *dayyanim* who issued the ruling for an explanation of the grounds upon which it was based.[21]

Procedures governing appeals in the communities of Moravia are recorded by R. Menachem Mendel Krochmal, author of *Teshuvot Zemah Zedek*, in his *Takkanot ha-Medinah*, nos. 213-218. Appeals were permitted only in cases involving a value of ten "gold coins" or more and had to be lodged within forty-eight hours of issuance of the Bet Din's decision. If he did not prevail, the appellant was held liable for losses and expenses sustained as a result of the appeal.

In some Polish communities a person found liable by the Bet Din was permitted to demand that the Bet Din be enlarged and a new hearing be scheduled. This practice was decried by *Ateret Zevi, Hoshen Mishpat*, no. 87.[22] Appellate procedures are

also known to have existed in White Russia (Reisin). The protocols of the community of Petroviski of 1777 include a regulation promulgated with regard to appeals taken from decisions of the local Bet Din.[23] Appeals were permitted only with regard to decisions involving a sum of twenty-five rubles or more and only "in accordance with the ordinances of the land." Assaf notes with regret that there are no cognate sources that provide information with regard to the ordinances governing such appeals or with regard to the identity and composition of the appeals court.[24]

In more recent times, an appellate court was established in Bulgaria in 1900. With the establishment of the office of chief rabbi provision was also made for the appointment of "two or more judges" who together with the Chief Rabbi would constitute a "Bet Din ha-Gadol" who would hear appeals of decisions issued by local Batei Din.[25] In a letter addressed to R. Chaim Hirschensohn[26] R. Ya'akov Meir, who served first as "Hakham Bashi" and later as the first Sephardic Chief Rabbi of Palestine, reported that "there always were appellate courts in all the cities of Turkey" and at the same time asserted in a somewhat contradictory manner that a displeased litigant presented his appeal in writing to the chief rabbi of the city who forwarded the appellant's petition together with the decision of the local Bet Din to Constantinople "and there there was a Bet Din ha-Gadol that investigated the decision and was empowered [either] to set aside the decision and issue another judgment or to confirm the judgment."[27] Rabbi Meir further reports that when he served as Chief Rabbi of Salonika he sought and received permission from the Bet Din in Constantinople to establish an appeals court in his own jurisdiction.[28] Rabbi Meir further claimed that there also existed an appeals process in Jerusalem and in many other Oriental communities.[29] Assaf relates that when he expressed astonishment at the absence of any reference to such procedures in the responsa of Sephardic scholars Rabbi Meir replied that instances of appeal were quite rare because of the distance and expense involved and that many people were unaware of the possibility of appeal.[30]

II

Although, as earlier indicated, appellate courts as such were unknown in talmudic times and the relevant talmudic discussions neither speak of a formal appeals process nor spell out conditions upon which appeals are allowed, the Gemara does present an elaborate discussion of setting aside judgments on grounds of judicial error. The Mishnah, *Sanhedrin* 32a, declares that a decision of a Bet Din can be set aside on grounds of judicial error and the Bet Din must then issue a new decision. The Gemara, *Sanhedrin* 33a, cites an apparently contradictory statement found in the Mishnah, *Bekhorot* 28b, declaring that an erroneous judgment must be allowed to stand but that the judge is liable for any financial loss suffered as a result of his error and yet a further statement indicating that a qualified judge is granted immunity while the judgment is not disturbed. In the ensuing discussion various *amora'im* resolve the contradiction by distinguishing situations in which the decision is reversed from situations in which the judgment is allowed to stand while the members of the Bet Din are either held liable for judicial malpractice or granted judicial immunity.[31] According to Rashi's analysis of that discussion,[32] Rav Nahman declares that a decision of a Bet Din can be set aside by a Bet Din "greater in wisdom and number." It is evident that, in offering alternative resolutions of the contradiction, some of Rav Nahman's colleagues did not accept the notion of an appeal to a court

"greater in wisdom and number" and considered only the possibility of a rehearing by the court of original jurisdiction with the result that a new verdict might be obtained only when the first Bet Din became convinced of its error. According to the analysis of that discussion advanced by *Yad Ramah* and Me'iri, *ad locum*, as well as by other authorities, who interpret Rav Nahman's statement in an entirely different manner, there are no grounds for assuming that even Rav Nahman permits an appeal to a Bet Din "greater in wisdom and number."[33] Moreover, numerous authorities, including Rif, *Milhamot ha-Shem* and Me'iri in their respective commentaries *ad locum*, regard Rav Nahman's position as having been rejected in the ensuing discussions and his opinion is not cited by either Rambam or *Shulhan Arukh*.[34]

The Gemara, in one of the proffered resolutions of the contradiction that serves as the basis of the entire discussion, distinguishes between error in "black letter law" (*ta'ut be-devar mishneh*) and error in "judgment" (*ta'ut be-shikul ha-da'at*) defined as a judgment based upon reliance upon a minority or rejected opinion.[35] According to Rashi's analysis, both Rav Yosef, who presents an alternative resolution of the apparent contradiction between the Mishnah in *Sanhedrin* and the Mishnah in *Bekhorot*, and Rav Nahman recognize the ostensive cogency of a litigant's refusal to accept the judge's acknowledgement that a decision in his favor is based upon error on the plea that it is entirely possible that it is the reconsidered decision that is in error and that the original finding was entirely correct. It may well be argued that such a plea is cogent not only with regard to an alleged error of "judgment," but also with regard to putative errors of "black letter law." Rav Yosef maintains that only an "expert" judge can force a reconsidered view upon an unwilling litigant; Rav Nahman asserts that only the opinion of a more erudite authority should prevail.[36] Nevertheless, *Tosafot* indicates that the discussion is limited to errors of "judgment" but that all concede that errors of "black letter law" may be reversed. *Tosafot*, however, does not spell out criteria of competence to reverse an already announced decision nor does *Tosafot* state whether admission of error on the part of the judge who issued the decision is necessary.

As codified by Rambam, *Hilkhot Sanhedrin* 6:6-9, it is only a plaintiff who, if he has some credible evidence, may demand that the defendant appear for a hearing before the Great Sanhedrin; a defendant does not enjoy that prerogative. Nevertheless, Rambam, *Hilkhot Sanhedrin* 6:6, rules that either litigant is entitled to demand a written decision setting forth the findings of the local court. The clear implication is that either the plaintiff or the defendant will then be entitled to lodge an appeal with the Great Sanhedrin based upon the written record. Rambam makes no reference to any mechanism for appeal other than to the Great Sanhedrin. It would therefore appear that when there is no possibility of appeal to the Great Sanhedrin, e.g., in a historical epoch in which that judicial body does not exist, there is no basis for a demand for a written decision upon which an appeal may be based. Nevertheless, Rema, *Hoshen Mishpat* 14:4, rules explicitly that, even in our day, the litigants are entitled to such a document.[37] Indeed, Rema indicates that such a document may be demanded only for an appearance before "a greater court."[38] It is thus evident that Rema recognized a right of appeal to a "greater court" although he provides no guidance with regard to how a determination of the relative scholarly ranking of different courts is to be made or with regard to who is empowered to make such a determination.[39]

There are, however, a number of earlier sources that clearly indicate that Jewish law does not recognize a right of appeal. *Teshuvot ha-Rosh, kelal* 85, no. 5, cited

by *Bet Yosef, Hoshen Mishpat*, chapter 12, declares, ". . . subsequent to the decision of the judges that has already been rendered with regard to the orphan . . . the judgment that has been rendered with regard to the orphan stands. Why have you asked for another decision with regard to a case that has already been adjudicated? 'A Bet Din does not scrutinize [the actions] of another Bet Din' (*Baba Batra* 138b). Therefore . . . it is incorrect (*lo yitakhen*) to write another decision with regard to a case that has already been adjudicated by great and eminent men."[40] *Sema, Hoshen Mishpat* 19:2, and *Shakh, Hoshen Mishpat* 19:3, cite *Teshuvot ha-Rosh* as establishing the principle that a decision of a Bet Din cannot be overturned by another Bet Din.

Rema's position is particularly problematic. As has been noted, in *Hoshen Mishpat* 14:4 Rema rules that a litigant is entitled to a written verdict while in his commentary on *Tur Shulhan Arukh, Darkei Mosheh, Hoshen Mishpat* 25:6, he records the view of *Teshuvot ha-Rosh* indicating that a second Bet Din cannot retry a case in which a decision has already been issued by a previous Bet Din. The latter position is also espoused by Rema in *Darkei Mosheh, Hoshen Mishpat* 20:2, in the citation of a similar ruling in the name of another work authored by Rosh, *Sefer Hazeh ha-Tenufah*.[41]

R. Ovadiah Hedaya, *Teshuvot Yaskil Avdi*, IV, *Hoshen Mishpat*, no. 2, distinguishes between a situation in which a Bet Din has issued a written decision that includes reasons and sources and a situation in which the reasons underlying a decision have not been committed to writing. When a record of the considerations leading to a decision are not available, declares *Yaskil Avdi*, the principle "A Bet Din does not scrutinize the actions of another Bet Din" is applied. However, when reasons and arguments are spelled out, the decision may be overturned. At first glance it appears paradoxical that the decisions of a Bet Din should be sacrosanct when issued autocratically with no attempt at justification but subject to reversal when a detailed explanation is provided. Nevertheless, *Yaskil Avdi* cogently reasons that when grounds for a verdict are spelled out and are found to be patently wrong it is obvious that the decision must be set aside, whereas when no reasons are given it is improper for a second Bet Din to reverse the decision because the second Bet Din cannot state definitively that error has been committed.[42]

It is, however, quite clear that the considerations upon which a decision is based are not routinely provided even in situations in which a written verdict is issued. R. Joseph Karo, *Teshuvot Avkat Rokhel*, no. 17, declares that explication of reasons and explanations is unnecessary.[43] Similarly, Rema, *Hoshen Mishpat* 14:4, rules that the document must recite only the claims and the final ruling but need not indicate the Bet Din's reasoning and justification because, as explained by *Sema, Hoshen Mishpat* 14:26, if the decision is correct, any other court will reach the same decision since "there is [but] one Torah for all of us." *Sema, Hoshen Mishpat* 14:25, indicates that, if requested, the Bet Din must nevertheless make oral disclosure of its reasoning. However, if *Yaskil Avdi* is correct in his assumption that a judgment can be overturned only if the written decision incorporates reasons and explanations, it stands to reason that litigants should be entitled to a written decision containing such information as a matter of right. Rambam, *Hilkhot Sanhedrin* 6:6, states explicitly that litigants may demand a written verdict because they are entitled to say to the Bet Din, "Perhaps you have erred." Clearly, a demand for a written verdict is in contemplation of a reversal by another Bet Din and it is the right to such a reversal that justifies the demand. Consequently, a decision that cannot be used as the basis

for an appeal is of no value to a litigant. Accordingly, if *Yaskil Avdi* is correct in his contention, the same consideration that compels issuance of a written decision should compel issuance of a reasoned decision.

III

Rabbinic scholars who deny that Jewish law recognizes a right of appeal adduce the dictum recorded in *Baba Batra* 138b, "A Bet Din does not scrutinize the actions of another Bet Din," as the touchstone of their position.[44] That principle is adduced by Rambam in two separate contexts.

In *Hilkhot Edut* 6:4 Rambam writes:

> [If] a Bet Din has written "We were assembled as a tribunal and this instrument was authenticated before us" [the instrument] is authenticated even though [the Bet Din] has not made explicit in which of the five manners it has been authenticated for one does not say that a Bet Din may have erred. But it has been the practice of all Batei Din that we have observed and of whom we have heard to write the manner in which [the instrument] has been authenticated before them.

With regard to the particular matter of authentication of instruments, Rambam clearly rules that, as a matter of normative law, details need not be spelled out; explication would be purposeless because the action of the Bet Din in authenticating the instrument is not subject to review by any other body. Nevertheless, it has become an established practice to indicate the mode of authentication employed, presumably as a means of assuring confidence in the competence of the Bet Din and its fidelity to established rules of procedure.

In *Hilkhot Edut* 6:5, Rambam codifies the general rule:

> A Bet Din never examines [the actions] of another Bet Din. Rather, it assumes them to be proficient and not susceptible to error. Witnesses, however, are examined.

Rambam's language is somewhat ambiguous. It is unclear whether Rambam is simply stating that a Bet Din is entitled to give full faith and credit to the actions of another Bet Din on the presumption that all Batei Din are competent, but should a Bet Din choose to conduct its own independent investigation, it is entitled to do so, or whether Rambam's statement constitutes a declaration that the second Bet Din must rely upon the determination of the first Bet Din and is precluded from conducting its own inquiry. Rephrased, the issue is whether there is no provision for an appeal for a rehearing before a second Bet Din as a matter of right but that an appeal for a rehearing may nevertheless be granted at the discretion of the second Bet Din or whether an appeal is entirely precluded.

The principle "A Bet Din does not scrutinize the actions of another Bet Din" is formulated by the Gemara, *Baba Batra* 138b, in its analysis of a rule pertaining to the issuance of a certificate of *halizah* and the like:

> Rava said, "*Halizah* may not be performed unless the [Bet Din] knows [the widow and her brother-in-law]. Consequently, [the witnesses] may write a certificate of *halizah* . . . even though they do not know [the parties].

That principle is enunciated in response to a query with regard to whether the prohibition against performing *halizah* unless the parties are known and recognized by the Bet Din was instituted to protect against an "erring court," i.e., lest a second court permit the women to remarry without determining that *halizah* was indeed performed by the proper parties. In posing this question, the Gemara assumes that every Bet Din is obligated to conduct its own investigation into the identity of the parties and that the restriction placed upon the Bet Din performing the *halizah* is a precautionary measure designed to protect against an "erring court" that does not properly discharge its duties by undertaking such an investigation. To this query the Gemara responds, "No, a Bet Din does not scrutinize the actions of another Bet Din."[45]

Rashbam, commenting on the concluding statement of the Gemara, observes:

> Therefore, they ordained that *halizah* not be performed unless the identity of the parties is known for, if you say that *halizah* may be performed even if the identity of the parties is not known, there would certainly be reason to be concerned lest a Bet Din act in error in permitting her remarriage without examination [i.e.], a second Bet Din might err in thinking that the first Bet Din properly identified the [parties] when they performed *halizah* since a second Bet Din does not examine the actions of the first Bet Din.

Rashbam's comments serve only to establish that a Bet Din *may* extend full faith and credit to the actions of another Bet Din and hence it was necessary to promulgate an ordinance forbidding *halizah* by unidentified parties. In effect, the Sages had to choose either to permit unidentified parties to perform *halizah* and consequently to require subsequent substantiation of the relationship between the parties by a second Bet Din before permitting the widow to remarry or to prohibit *halizah* without prior identification by the Bet Din before which *halizah* is performed and thereby create a presumption of validity that might be relied upon by any subsequent Bet Din. In order to facilitate remarriage, the Sages ordained that the investigation be conducted by the first Bet Din. It is evident that in order to establish such a policy it was necessary to require an investigation by the Bet Din performing the *halizah* but that it would not have been necessary to *forbid* a subsequent investigation by a Bet Din that felt prompted to confirm the validity of the prior *halizah*.[46]

Nevertheless, as has been cited earlier, *Sema, Hoshen Mishpat* 19:2, declares that when a defendant has been exonerated, a second Bet Din is forbidden to hear the complaint of a plaintiff. The source of that position is the Mishnah, *Rosh ha-Shanah* 25a:

> It occurred that two [witnesses] came and said, "We saw [the moon] in the morning in the east and in the evening in the west." R. Yohanan ben Nuri said, "They are false witnesses." When they came to Yavneh, Rabban Gamaliel accepted them. Also, two [witnesses] came and said, "We saw [the moon] in its proper time but on the following night it was not seen" and Rabban Gamaliel accepted them. R. Dosa ben Horkanos said, "They are false witnesses. How can people testify that a woman has given birth when the next day her abdomen is between her teeth?" R. Joshua said to him, "I accept your words." Rabban Gamaliel said to him, "I decree that you come to me with your staff and your money on the day on which *Yom Kippur* falls according to your reckoning." R. Akiva went and found [R. Jo-

> shua] in distress. [R. Akiva] said to him, "I can derive that everything Rabban Gamaliel has done is valid as it says, "These are the appointed seasons of the Lord, holy convocations which you shall proclaim in their appointed seasons (Leviticus 23:4), i.e., whether [they are proclaimed] at their proper times or other than at their proper time, I have no appointed seasons other than these." [R. Joshua] came to R. Dosa ben Horkanos. [R. Dosa ben Horkanos] said to him, "If we examine [the decisions of] the Bet Din of Rabban Gamaliel we must examine the decisions of every single Bet Din that has existed from the time of Moses until the present."

Both R. Akiva and R. Dosa ben Horkanos recognized the possibility of error on the part of Rabban Gamaliel. R. Akiva cited Scripture in support of the principle that, with regard to sanctification of the New Moon, even an erroneous decree of the Bet Din is endowed with validity. That principle, however, is limited to matters pertaining to the calendric system. R. Dosa ben Horkanos, on the other hand, justified Rabban Gamaliel's citation on the basis of a broad, universal principle establishing that the announced decision of a Bet Din is not subject to further scrutiny.

The problem, however, is why should an erroneous decision not be rescinded? Indeed, as evidenced by the Mishnah, *Sanhedrin* 32a, there does exist a contrary rule establishing that a decision based upon a patent error of law is to be set aside. The principle announced by R. Dosa ben Horkanos contradicts the rule established by the Mishnah, *Sanhedrin* 32a, unless each of these ostensibly conflicting principles is of limited application. If so, the question that must be resolved is when is a decision of a Bet Din final even though it is in error and when is it to be set aside?

Rabbenu Nissim, *Avodah Zarah* 7a, cites a statement of Ra'avad dealing, not with a matter requiring adjudication by a Bet Din, but with a non-adversarial matter involving a determination of religious law. Ra'avad declares that upon issuance of a negative ruling by a rabbinic decisor with regard to a foodstuff of questionable *kashrut* or the like "[the decisor] has rendered it an object of prohibition and it cannot subsequently be rendered permissible, and even if a second decisor declares it to be permitted it is not permitted."[47] Ra'avad declares this to be the case even if the second decisor is acknowledged to be a more erudite scholar than the first. In effect, Ra'avad declares the ruling of a competent decisor to be *res judicata* and not subject to review. However, Ra'avad's position is limited to situations involving a legitimate matter of doubt or requiring adjudication between conflicting opinions or precedents. Ra'avad concedes that the decision must be overruled when it is based upon a patent error of law.

Ra'avad's view reflects an extreme application of the principle enunciated by R. Dosa ben Horkanos. In his dictum, R. Dosa ben Horkanos establishes the principle that a decision in a matter requiring a Bet Din, once issued, acquires standing and validity even if it is in error, at least until such time as it is reversed. Accordingly, the principle "A Bet Din does not scrutinize the actions of another Bet Din" may be understood as meaning simply that the second Bet Din is lacking in standing and authority to initiate such review with the result that the first decision remains in effect and, even if erroneous, is, as a matter of law, entirely valid.

But why is a Bet Din not empowered to review the action of another Bet Din? R. Dosa ben Horkanos declares that, if such review were to be undertaken, consistency would require examination of the actions of every Bet Din going back to the time of Moses. The Mishnah does not say that such review is precluded or prohibit-

ed. The phraseology of the Mishnah indicates only that such review is unnecessary and superfluous. That principle, however, entails postulation of a logically antecedent principle to the effect that a decision, once issued, acquires validity at least until such time as it is set aside. Only when reviewed and overturned is the previous decision nullified retroactively.[48]

The conditions for review become apparent from the discussion of the Gemara, *Baba Batra* 130b:

> Rava said to R. Papa and to R. Huna the son of R. Joshua, "If a judgment of mine comes before you and you see a refutation, do not tear it up until you come before me. If I have a reason I will tell it to you; if not, I will reverse myself. After my death, do not tear it up but neither should you derive [any matter of law] from it. Do not tear it up since, had I been there, perhaps I would have told you the reason. Do not derive [any matter of law] from it because a judge has nothing other than what his eyes behold."[49]

Clearly, this discussion envisions a review of an earlier announced decision. How did this situation differ from cases to which the general principle that a Bet Din does not review the decision of another Bet Din is applied? Undoubtedly, the answer is in the words "and you see a refutation," i.e., the general principle "A Bet Din does not scrutinize the actions of another Bet Din" serves to extend full faith and credit to the decisions of a qualified Bet Din on the basis of a presumption of competence and freedom from error. That principle is, in turn, but a derivative of the more general principle, *"lo mahazakinan rei'uta,"* i.e., matters are presumed to be in good order unless there is reason to suspect otherwise. That presumption is, however, rebuttable. Accordingly, when an irregularity is perceived, the decision becomes subject to review. Nevertheless, an erroneous decision, unless and until it is reversed, remains valid in the sense that a person who accepts funds on the basis of such a decision is, even in the eyes of Heaven, not guilty of theft or extortion.

Thus, the principle "A Bet Din does not scrutinize the actions of another Bet Din" must be qualified with the caveat "unless there is reason to suspect error or irregularity." Accordingly, a litigant cannot simply petition for a rehearing in the vague hope that he will prevail in a different forum. However, a litigant who advances a claim of identifiable judicial error is entitled to be heard even by a second Bet Din because he has identified a *rei'uta*, i.e., he has advanced a specific and cogent allegation of error and thereby rebutted the presumption that the existing decision is error-free.

It is precisely this distinction that is formulated by *Teshuvot Hatam Sofer*, VI, no. 50. The matter brought to the attention of *Hatam Sofer* involved a ruling of a communal rabbi recorded in the protocols of the community. The ruling stated that the oath of a certain individual was not to be accepted because he had been found guilty of a grave transgression. Subsequently, the rabbi died and another rabbinic figure, apparently the religious authority of another city, sought to set aside the disqualification or to reinvestigate its basis. In a short responsum, *Hatam Sofer* cites the Mishnah in *Rosh ha-Shanah* as establishing that a decision of a rabbinic court constitutes *res judicata* and points to the apparent contradiction of that principle inherent in the discussion recorded in *Baba Batra* 130b. *Hatam Sofer* resolves the contradiction by noting that the narrative recorded in *Baba Batra* refers to a decision incorporating an ostensive error. When error is apparent "a judge can act only in accor-

dance with what his eyes behold." However, in the case brought to the attention of *Hatam Sofer* there existed only a memorandum of the ruling of the rabbinic authority without any indication of either the factual allegations or the halakhic considerations upon which it was based. *Hatam Sofer* stresses that, were error to be discovered, the deceased rabbi's ruling might indeed be set aside but that, in the absence of a record of the testimony or the halakhic provisions relied upon, the decision must be accepted at face value and is not subject to challenge.

Hatam Sofer notes that this principle is further reflected in the Mishnah, *Makkot* 7a, that declares, "Wherever two [witnesses] arise and declare, 'We testify that so-and-so was found guilty in such-and-such a court and that X and Y were the witnesses,' the [condemned] is to be executed." It is evident, declares *Hatam Sofer*, that testimony establishing that sentence has been pronounced results without further ado in the carrying out of the sentence of the Bet Din and, in the absence of specific evidence to the contrary, there is no basis to withhold imposition of punishment because of fear of either substantive or procedural error.

Similarly, R. Zevi Hirsch Kalisher, *M'oznayim le-Mishpat, Hoshen Mishpat* 19:2, asserts that a second Bet Din may hear a previously adjudicated dispute, but only if the Bet Din has found an error of law in the written decision of the first Bet Din.

This analysis is entirely consistent with a further statement of *Teshuvot ha-Rosh* in his previously cited responsum (*kelal* 85, no. 5) to the effect that a second Bet Din may examine any ambiguity present in an already issued decision of an earlier Bet Din and the matter need not necessarily be referred back to the Bet Din of original jurisdiction because clarification of ambiguity represents a novel and as yet undecided issue. But the review must focus upon clarification of the ambiguity rather than upon adjudication of the issue *de nouveau*. In effect, the new proceedings are designed solely to clarify the intent of the earlier Bet Din.

Noteworthy is the fact that *Teshuvot ha-Rosh*'s citation of the dictum "A Bet Din does not scrutinize the actions of another Bet Din" occurs in the context of a discussion of a petition for a rehearing of the selfsame arguments presented to the Bet Din rather than in reference to an appeal on the basis of allegation of a particular error. This is apparent from Rosh's rhetorical query "Why have you asked for another decision with regard to a case that has already been adjudicated?" Thus, accoding to this analysis, Jewish law parallels other systems of law in providing for an appeal upon allegation of specific error but not simply for a rehearing of the original arguments and evidence before a different judicial body. It does, however, differ from other systems in permitting an appeal before any properly constituted tribunal rather than in formally providing for separate judicial bodies charged with the specific function of hearing appeals.

The distinction between a rehearing and an appeal is often obfuscated in discussions of the role of formal rabbinic courts of appeal that have appeared in recent times. The "appeals" permitted by the *Mishpat ha-Shalom* simply afforded a disgruntled litigant an opportunity for a rehearing. As earlier indicated, the quasi-judicial panels established by the *Mishpat ha-Shalom* did not apply a clearly defined corpus of law and hence their judgments are readily classified as arbitration awards. In Jewish law, as in other systems of law, arbitration decisions are generally not subject to appeal. Decisions of arbitrators cannot be appealed because they are inconsistent with provisions of law for the obvious reason that arbitrators are not bound to rule in accordance with the letter of the law. The procedures of the *Mishpat ha-Shalom* were innovative not only in establishing a formal appeals panel but in insti-

tuting a system of appeal with regard to decisions of arbitrators. Consistent with halakhic norms, the Chief Rabbinate, in instituting a Supreme Rabbinic Court of Appeals, provided for appeal only upon allegation of error and did not at all provide for a right of appeal when, in their original submission, the parties agree to *pesharah* or arbitration.

Recognition of a distinction between a rehearing and an appeal, despite occasional proclivity on the part of rabbinic writers for use of imprecise nomenclature, yields a clearer understanding of the comments of R. David Pakiano, *Hoshen ha-Efod, Hoshen Mishpat*, no. 42. *Hoshen ha-Efod* reports that, with the institution of the office of crown rabbi in Bulgaria in 1900, a number of communal ordinances were promulgated including a provision for the appointment of "two or three" judges who together with the crown rabbi would constitute a "*Bet Din ha-Gadol.*" Thereupon, any litigant who was dissatisfied with the decision of a local Bet Din was permitted to relitigate before the "*Bet Din ha-Gadol.*" This procedure, *Hoshen ha-Efod* informs us, "is called 'appeal' in common parlance." The issue addressed by *Hoshen ha-Efod* involved a defendant who lost a case before the local court and demanded a hearing before the "*Bet Din ha-Gadol.*" The plaintiff who had prevailed before that tribunal argued that, since he had already appeared before a properly constituted court and his adversary had no new complaints or additional evidence he should not be compelled to expend additional time and energy relitigating the case.

Hoshen ha-Efod responds that, in terms of the applicable rules of law, the demurring litigant is correct. Nevertheless, there are ample sources demonstrating that such matters may be varied on the basis of *takkanah* or communal legislation. Accordingly, since, in Bulgaria, communal ordinances made provision for such a procedure, the plaintiff may be compelled to relitigate his complaint. *Hoshen ha-Efod* adds that no objection can be made on the basis of inherent disrespect to members of the first tribunal since all persons "know that this is a city ordinance there is no demeaning of the first Bet Din and from the beginning they entered with this awareness." Despite his use of the term "appeal" the procedure described by *Hoshen ha-Efod* is actually a rehearing. Accordingly, *Hoshen ha-Efod* should not be understood as asserting that appeals can be entertained only on the basis of *takkanah*. The issue of an appeal on the basis of allegation of judicial error is not at all addressed by that authority. His position with regard to the issue he does address, i.e., relitigation of the issues already resolved by an earlier court, is unexceptionable.

IV

The authority of the Supreme Rabbinical Court of Appeals to sit as a court of appeals in accordance with the provisions of Jewish law was challenged in a number of proceedings before that body. Although a court of appeals was instituted immediately upon establishment of the Chief Rabbinate Council, apparently its powers and procedures were not formally set forth by the Chief Rabbinate Council until the publication of its *Takkanot ha-Diyyun be-Batei ha-Din ha-Rabbaniyim* in 5703.[50] In a matter brought before the Supreme Rabbinical Court in 5702, the appellee apparently argued that the Court's authority was derived from, and therefore circumscribed by, the Rabbinical Courts Act. Accordingly, it was argued, the appellate power of the Supreme Rabbinical Court must be regarded as limited to appeals in cases heard by the rabbinical district courts on the basis of the authority vested in

such judicial bodies by the law of the civil government. However, it was argued, in actions in which the parties were not bound to the jurisdiction of that body by virtue of the provisions of civil law but had recourse to rabbinic courts of their own volition, no appeal can be allowed. The argument seems to have been that the appellate powers of the Supreme Rabbinical Court are entirely a matter of civil law, without basis in Halakhah, and hence do not extend, even as a matter of civil law, to matters over which the law does not grant judicial authority to the rabbinical courts.[51] The Court rejected this argument declaring:

> We have already made known many times that the *takkanah* [establishing] a Bet Din for appeals has been accepted without any reservation. Such was the practice introduced by our predecessors and we are not permitted to change [the practice] since all who appear for adjudication appear on that basis. This argument was presented before the [civil] court in Haifa and rejected; therefore we are obliged to accept all appeals even as a point of [civil] law.[52]

The Supreme Rabbinical Court herein advances two separate grounds for its appellate jurisdiction: 1) powers derived from *takkanah*, i.e., rabbinic legislation promulgated by the Chief Rabbinical Council[53]—a body that in the early years of its existence did not hesitate to assert legislative power as the designated rabbinical authority of the *yishuv*;[54] and 2) voluntary acceptance of its appellate authority by the parties to the litigation. In formulating the latter argument, the Supreme Rabbinical Court presumably reasons that such acceptance is implied by the appearance of the parties since the right of appeal is commonly known to be acknowledged by the rabbinic courts. That argument is, however, subject to challenge, at least in the first such appeal brought before the Supreme Rabbinical Court, on the grounds that a right of appeal in matters not governed by the Rabbinical Courts Act had as yet not been established. The weakness inherent in any argument based upon voluntary acceptance of such procedures by the litigants is that, at the time of their original submission to the authority of the Bet Din, either party might disavow any such acceptance and thereby deny his adversary the right of appeal.

In a subsequent decision handed down in 5734 the Supreme Rabbinical Court formulated the argument somewhat differently:

> In every decision there are two principles upon which the Bet Din for Appeals nullifies the decision of the district Bet Din: First, on the strength of the *Takkanot ha-Diyyun* and with that knowledge the parties litigate, [*viz.*,] that if there is an erroneous judgment the Bet Din of Appeals will examine the problem anew. . . . Secondly, since such was established by the *Takkanot ha-Diyyun*, it may be said that the [district] Bet Din ruled *ab initio* with that intention [i.e., that its judgment be given effect only if there is] no appeal to the Supreme Rabbinical Court.[55]

In this decision, the two grounds set forth in the 5702 decision are folded into a single argument in which the legislative authority relied upon is the explicit provisions of the *Takkanot ha-Diyyun* of 5703 rather than the earlier amorphous legislative action implied by the *ad hoc* establishment of the appellate court in 1921.[56] Implied acceptance of the authority of the appellate court, posited as an independent argument in 5702, is here incorporated in the first argument. The second argument