

MAY A *DAYAN* RETRACT HIS DECISION?

(37 *Tehumin* 5777-2017, 343)

The subject of deciding the *halakhah*, or of the halakhic decisor, arises from time to time, the central question being this: who is qualified to decide the *halakhah*, and may a halakhic decisor disagree with those of his generation or of past generations who are of greater stature than he? Another question is whether the halakhic decisor is permitted to change his decision when other great authorities oppose it.

A. WHO IS QUALIFIED TO DECIDE THE *HALAKHAH*?

1. Minimum Age

The *gemara* in *Sotah* (22a) and in *Avodah Zarah* (19b) states:

What is the meaning of that which is written, “for many victims has she felled” – this is a student who has not reached [the level of maturity] to decide the law, and he decides the law [nonetheless]. “And mighty are all she has slain” – this is a [Torah] student who has reached [the level of maturity] to decide the law, and [yet] he does not decide the law. [The Gemara inquires]: And until how many [years must a scholar wait until he is qualified to decide the law]? [The Gemara answers:] Until forty years.

Rashi commented: “Until forty years after he was born.” However, the Tosafot on *Sotah* (22b) state that the forty years are counted from when he began to study.

According to the Tosafot, it is almost impossible for a person to become a halakhic decisor unless he has reached an advanced age. According to Rashi, too, a person must wait until the age of 40. Rif, in *Avodah Zarah*, as well as Maimonides, who cited this *halakhah* in *Hil. Talmud Torah* (Laws of Torah Study) (Chap. 5), indeed refrained from citing the restriction of 40 years. *Lehem Mishne* (*ad loc.*, no. 4) wrote that this referred only to a time when people learned from rabbis, but not from books, “but now, when Torah is written and we learn from books, we do not need all of this, and therefore our teacher [Maimonides] did not cite the 40 year limit as a necessary criterion, but only that he should be a great scholar.” Neither did *Shulhan Arukh* (*Yorah Deah* 242:13-14) cite any restriction to the age of 40.

2. Receiving *Smikhah* (Rabbinical Ordination) and Authority

Remah (*Yoreh Deah* 242:14) wrote:

The purpose of *smikhah* as practiced at present is so that it will be widely known that he has reached the age of instruction, and that his rulings are on the authority of the rabbi who ordained him. Therefore if his rabbi dies, he does not need ordination ... and even though according to the laws of ordination in ancient times the law was not thus, since today all we have is formal permission to issue rulings, the above law no longer applies

According to Remah, the *smikhah* as practiced at that time established the distinction between a person who was not qualified to decide the *halakhah* and one who was. And although

Remah held that if the rabbi died, the student did not require ordination, nevertheless at this time when most study is from books and not from rabbis, a certificate of ordination is necessary in order to determine the level of competence of that person.

From Maimonides' ruling in *Hil. Sanhedrin* 4:8, it appears that ordination is not sufficient; it is also necessary to receive authorization:

Such judges may appoint whoever they desire for particular matters, provided he is fit to adjudicate all matters. What is implied? A *beth din* has authority to give *semikhah* to a remarkable judge who is fit to issue rulings with regard to the entire Torah and limit his authority to the adjudication of financial matters but not to what is forbidden and permitted. Conversely, they may grant him authority with regard to what is forbidden and permitted but not to adjudicate cases involving financial matters. Or they may give him license with regard to adjudicating both such matters, but not laws involving financial penalties.

The authorization is given by the ordaining *beth din* or by the Exilarch, in the words of Maimonides (*Hil. Sanhedrin* 4:14):

Any judge who is fit to adjudicate cases and was given license to serve as a judge by the Exilarch has the authority to act as a judge throughout the entire world Any judge who is fit to adjudicate cases and was given license to serve as a judge by the court in Eretz Yisrael has the authority to act as a judge throughout Eretz Yisrael ... but in the Diaspora the license granted him does not afford him the authority.

In fact, there are two stages: the qualification to rule and to adjudicate, which is determined by the *beth din*, and the authorization to do so which is conferred by the *beth din* or by the president or by the Exilarch. The difference between the qualification and the authorization is elucidated at length in my article, "*Da'at Torah Behalakhah*" (*Lev Shome'ah LeShlomo*, pt. 2).

In the Diaspora, qualification is determined by ordination from a recognized rabbi and service on a *beth din*, and authority to rule is conferred by a *beth din* or by the members of the community.

In the past, it was sufficient for a halakhic decisor to have a certificate of ordination from a recognized rabbi, but when it became apparent that there were rabbis who issued certificates of ordination without examinations, the Chief Rabbinate instituted regular examinations for city rabbinates, or for other minor rabbinical positions, and without the examination there would be no recognized ordination. For *dayanim*, a system of regular examinations has existed since the early years of the State, conducted by the Committee of Dayanim. I myself served as an examiner for 14 years. Indeed, a person who has not passed the examination may be appointed to the position of *dayan*, if he has been recognized by the Chief Rabbinate as a "renowned authority". But this is very rarely invoked, and it constitutes an opening for an unfair appointment. The Law allows for the appointment of the Chief Rabbis of Israel as *dayanim*, without examinations – most of them have been worthy of this by virtue of their greatness in Torah learning (most – although not all ... enough said! On this Maimonides wrote [*Sanhedrin* 4:15]: "When a person is not fit to act as a judge because he is not knowledgeable or because he lacks proper character and an Exilarch transgressed and granted him authority or the court erred and granted him authority, the authority granted him is of no consequence unless he is fit, for when a person consecrates an animal with a physical blemish to be sacrificed on the altar, the holiness does not encompass it").

B. THE VALIDITY AND FORCE OF A JUDGMENT

1. Concern about Mistake

Even regarding a person who has taken regular exams and has been appointed as a *dayan*, there is still room for concern that he may not have reached the level required for issuing rulings; and in particular, rabbis and *dayanim* from abroad who do not take regular examinations. How can the wise man test himself to determine whether he has reached the level of judicial competence?

Rabbi Moshe Feinstein z"l (Introduction to *Iggrot Moshe*) mentions his struggle in relation to issuing practical judgments, and he writes:

And even though it would be appropriate to refrain from issuing practical judgments, for many of the greatest and most G-d-fearing scholars refrained from doing so due to concern for the statement of Rav Aba who said in the name of Rav Huna who said in the name of Rav, ... "For many victims she has felled..." this [refers to] a Torah scholar who did not reach [the stature necessary] to render halakhic decisions, yet he issues halakhic decisions [nonetheless. And he also said, "and mighty are all she has slain", this [refers to] a Torah scholar who has reached [the stature necessary] to issue halakhic decisions, yet he does *not* issue halakhic decision Therefore even though a different level pertains in each generation, it is impossible to achieve in later generations those decisors of *halakhah* as they were in the earlier generations.

Therefore, Rabbi Feinstein ruled as follows:

But the truth in relation to deciding the *halakhah* is that it has been said that it is not in Heaven, but as it appears to the sage after he has studied appropriately to understand the *halakhah* in the Talmud and in the Responsa to the best of his ability, with seriousness and reverence, and it appears to him that the ruling must be thus – that is the true ruling, and he must rule thus, even if it is apparent to Heaven that this is not the explanation. Of this it is said, that these too are the words of the living G-d, since to him the explanation appears to be in accordance with his ruling and there is no contradiction in his words, and he will be rewarded for his judging, even though the truth is not in accordance with his explanation. Strong proof for this can be adduced from the *gemara* in *Shabbat* (100a): "R. Yitzhak said, There was one city in the Land of Israel whose inhabitants acted in accordance with R. Eliezer's [rulings], and [the Lord rewarded them greatly] and they would die only in their proper time. And not only that but once, the evil regime issued a decree on all of Israel against circumcision, and on that city [that adhered to R. Eliezer's rulings] they did not so decree." This was so even though in fact, the [actual] law was not in accordance with R. Eliezer, and a person [acting in accordance with his ruling] ought to have been stoned if he did so advertently, and ought to have brought a sin-offering if he did so inadvertently...

Here we have a clear rule: a halakhic authority who has reached the level of competence required of a *dayan* and was properly ordained by great scholars and is G-d fearing may issue judgments after having studied the Talmud and the Responsa to the very best of his ability, and has nothing about which to be concerned. His judgment will be valid and effective, even if in the eyes of Heaven he is not correct, because the Torah is not in Heaven, and it has been

given to men in order that they study it properly and make halakhic rulings in accordance with what they have studied, even if others disagree with them, and even if [strictly] the *halakhah* is not in accordance with them.

And see *Sefer Hahinukh* (Precept 496) in relation to the obligation to obey the Sages:

Even if they say to you that right is left, do not turn away from their commandments, in other words even if they are mistaken in one detail of their words, it does not befit us to dispute them, but we should act in accordance with their mistake. And it is better to suffer one mistake and to be committed to their constant good guidance, rather than that each and every person should act as he thinks, for this would be the destruction of religion and a split in the heart of the nation and the total dissolution of the nation.

Rabbi Nissim (*Derashot HaRan, drush 11*) too, held that the obligation of obeying the Sages also applies in the case of a clear error. Abarbanel in this Commentary on the Torah cites the words of Ran and adds to them:

For in most cases, this is a positive arrangement, since the majority of decisions are correct and the mistakes of the great sages are few ... and if it happens that in those few cases they say that right is left, the Torah was not concerned about that small defect, and saw fit to tolerate it due to the fact that the system in general is sound.

And see my article, *Da'at Torah Behalakhah* (chap. 14).

Thus we see that a halakhic ruling by a great and competent sage is valid and binding, even if the ruling is mistaken! (I dealt at length with this subject in my above article).

2. Competence to Disagree with Those of Greater Stature

According to Rosh (*Sanhedrin* chap. 4:6), the Rishonim may disagree with the Geonim, “if what they said does not appear to him to be correct and he brings support for his opinion that is acceptable to those of his generation – Jephthah in his generation as Samuel in his generation.”

On this matter, Rabbi Naftali Zvi Yehuda Berlin of Volozhin (*Ha-amek Davar*, Deuteronomy 1:3) wrote as follows:

When there was a Sanhedrin in the place chosen by the Lord, it had to be obeyed. But today, when this does not exist, then if [the decision] complies with the statement, “according to the law that they shall teach you,” i.e. when proof is furnished, they must be obeyed, but there is no obligation to obey when they rule on the basis of general reasoning.

In relation to a rabbi who was concerned about living in Bene Brak for fear that he would disagree with the Hazon Ish (Rabbi Avrohom Yeshaya Karelitz), Rabbi Moshe Feinstein wrote (in *Iggrot Moshe* 3, 68):

I cannot understand such a concern; on the contrary, it is an honor that his approach to Torah matters is mentioned and his words studied, even if the conclusion of the scholar who is studying them is not the same as his. And it did not occur to Hazon Ish

z"l that there would never be Torah scholars who disagreed with him, and it makes no sense to be fearful of this, for on the contrary, you should love truth and peace ... one need not be concerned about questioning and disagreeing with the great sages of our generations, but it must be done with respect.

The Introduction to *Nishmat Avraham* (pt. 4, a letter with the imprimatur of Rabbi S.Z. Auerbach and Rabbi J. Neuwirth) quoted Rabbi J.S. Elyashiv:

In applied *halakhah* it is not permitted to depart from the opinion of the leading sage of the generation, unless the decisor has specific proof, and only after he presented his proof to that sage, and the latter accepted it. If it is not possible to present the proof to that sage, then if the proof is accepted by other important sages, he may decide according to his understanding.

And see Rabbi Chaim of Volozhin in relation to his principal rabbi and mentor, the Gaon of Vilna (*Hut ha-Meshulash* 9):

And even though I was a close disciple of my teacher and master the High Priest , and I am totally committed to respecting and honoring him ... nevertheless I heed that which our Sages said (*Bava Batra* 130): When a document containing a judgment of mine comes before you, and you see a flaw in [my judgment] ... [but] neither should you learn from it, for a judge has only what his eyes see. And I have already been cautioned by my teacher the Gaon of Vilna not to be swayed in judgment.

The above passages suffice in order to clarify the position of Rabbi Moshe Feinstein z"l in relation to the halakhic decisor and his obligation to rule according to his view and his understanding, without being swayed by another regarding the *halakhah*.

C. RETRACTION OF A JUDGMENT BY A *DAYAN* WHO STANDS BY HIS JUDGMENT

A *dayan* who hands down a judgment, and later wishes to retract the judgment because other authorities oppose him, even though in his opinion his decision was in accordance with the *halakhah*, is in violation of the *halakhah*. Maimonides (*Sanhedrin* 10:1) ruled:

When one of the judges in a case involving capital punishment rules to acquit the defendant or to hold him liable, not because this is his own opinion at which he arrived upon the basis of his own decision, but rather he was swayed after his colleague's words, he commits a transgression, as implied by [Exodus 23:2](#): "Do not respond to a dispute with an inclination."

Minhat Hinukh (Commandment 77) wrote that this rule applies in civil law as well, but there it does not involve a prohibition; rather, the *dayan* who retracts his decision is considered to be perverting the law and is an evil person. In *Keren Ora* (*Sanhedrin* 33) he wrote: "If he relies on the opinion of his colleague and does not say what he thinks, then it is worthless. However, in capital cases, each person must elucidate his opinion, and in civil law it is sufficient if he says that he agrees with a particular person's opinion."

The Rules of Procedure for the Rabbinical Courts (chap. 4) allow the *beth din* to retract its judgment only when it believes that it was mistaken. As stated in Regulation 128:

In the event that the Beth Din is concerned that its judgment was mistaken, it will summon the parties for an additional hearing, and in this case the Beth Din is authorized to stay execution of the judgment until such hearing ...

It is not possible for a judgment to be set aside on the initiative of the *beth din*, unless the *beth din* is concerned that it was mistaken. Similarly, it is not possible to stay execution of a judgment that has already been carried out, such as a *get* that was arranged and delivered, and the execution has already occurred. Similarly, it is not possible for another *beth din* to set aside the judgment of the first *beth din*, other than in the process of an appeal, or if the first *beth din* believes that it erred, as aforesaid.

The only possibility of setting aside a judgment is by means of an appeal brought by one of the parties. When none of the parties appeals, there is no possibility of an initiated appeal by a third party, or by the Supreme Rabbinical Court. The judgment stands and is valid, even if the *dayan* was mistaken in relation to the *halakhah*.

There is a rarely-invoked possibility of staying execution of a judgment other than by way of appeal, when the judgment is handed down by a regional *beth din*, and the *beth din* itself orders that execution of the judgment be stayed until it is approved by the Supreme Rabbinical Court. However, when a final judgment is handed down by a regional *beth din*, even if it is extremely innovative, and the *beth din* did not order that the judgment be deferred until approved by the Supreme Rabbinical Court, then the judgment stands and is valid. There is, of course, the possibility of an initiated discussion of the judgment on the part of judges or halakhic authorities, but this is a purely academic discussion, which cannot invalidate or change the judgment that was handed down. I would mention that I cannot recall that this rare possibility was invoked in all the years in which I was involved in the rabbinical court system.

It is noteworthy that opening the doors of the *beth din* to appeals by people external to the case – including great authorities – is liable to bring about the collapse of the whole system. There is virtually no judgment with will not be disputed by some scholar somewhere. If that scholar were able to appeal, particularly after a considerable period of time has elapsed, the *beth din* could be closed down, because every decision would be liable to be invalidated in this way. Judgments which have been handed down to compel the giving of a *get*, even by *dayanim* who rule strictly – in those cases in which they too saw that there is no option but to compel – have often aroused heated debate amongst external authorities who have opposed them. It never occurred to any of the *dayanim* who heard these cases that they should defer or retract their judgments because of attacks or published opinions on the part of external authorities, including important Torah authorities. It is worthwhile recalling here the *gemara* in *Rosh Hashana* (25b) on the great debate between Rabbi Yehoshua and Rabban Gamliel concerning the fixing of the holy days : “... and to the judge who will be in those days... You need not go to any judge other than [the one] that is in one’s own days.” Rabbi Shimon Strashun commented:

This means, that even if there are greater authorities than the judge, you should not go to them, but **to the judge**. And know this, that the emphasis in the verse is on **the judge**, rather than on [whoever is greatest] **in those days**.

Retraction of a judgment due to external pressure – including pressure applied by great sages – is contrary to *halakhah*. This is especially so with respect to an outstanding *dayan* whose past judgments have been worthy.

* Note from the editors at *Tehumin*: Following a judgment concerning the release of an Agunah, handed down by a panel of *dayanim* presided over by Rabbi Uriel Lavie, there was extensive discussion in Torah circles, and it was reported that pressure had been exerted on the panel of the *Beth Din* to retract its judgment. *Tehumin* approached veteran retired *dayan*, Rabbi Shlomo Dichovsky, asking whether a *beth din* is permitted to retract its judgment in such circumstances. Rabbi Dichovsky sent the above pages out of a comprehensive article on “The Halakhic Decisor.” The title was provided by *Tehumin*.