

The Litigants' Appointment of the Court

By Rabbi Dovid Markel

In Judaism's strong judicial system the directive to appoint judges is expressed numerous times in the Torah.

"You shall set up judges and law enforcement officials for yourself in all your cities that the Lord, your God, is giving you, for your tribes, and they shall judge the people [with] righteous judgment¹." "If a matter eludes you in judgment, between blood and blood, between judgment and judgment, or between lesion and lesion, words of dispute in your cities, then you shall rise and go up to the place the Lord, your God, chooses²."

This article will examine the concept of choosing your own arbitrator for monetary cases in the Torah judicial system.

The first Mishna of the third chapter of Sanhedrin³ opens with an account of the manner in which to appoint a monetary court. The discussion is regarding the concept of *ze borer lo echad*, the concept that each litigant can choose their own judge—commonly referred to as *zabla*.

The Mishna states:

Civil actions [are to be tried] by three. Each [litigant] chooses one, and the two jointly choose a third: so holds R. Meir. But the sages rule: the two judges nominate the third. Each party may object to the judge chosen by the other, so holds R. Meir. But the sages say: when is this so? Only if the objector adduces proof that they are either kinsmen or [otherwise] ineligible; but if fit or recognized by the Beth Din (court) as *mumchin* (experts) they cannot be disqualified.

The Mishna describes a system in which each party has the right to choose at least one of the parties that is to judge them. After some discussion the Talmud⁴ comes to the conclusion that each participant is to choose one judge and the third is to be chosen by the two judges.

In illustrating the advantage of this system, the Talmud states:

Why should they do so? — They said in 'the West' in the name of R. Zera: Since each selects a judge, and together they [the litigants] select the third, a true judgment will be rendered.

The Talmud suggests that because they each choose their own judge, the judgment will be rendered will be more objective.

¹ Devarim, 16:18

² Devarim 17:8

³ Sanhedrin, 23a

⁴ *ibid*

Rashi explains the advantage of this system is that it helps a) have the litigants comply and b) ensures that true judgement will be rendered.

In his words:

A true judgment will be rendered: The litigants will comply as the culpable party presumes "I myself chose the one. Where he have been able to exonerate me, he would have." The judges as well are disposed to find the merit of *both* of them, as *both* chose them.

Rashi enumerates a twofold advantage in explaining this system of *zabla* that enables the litigants to choose their judges:

- 1) That it eases the minds of the litigants as they know that there is someone that is looking out for them.
- 2) The judges as well are do indeed look for the merit of both of them and therefore it is more probable that a true ruling will be reached.

The above thought is more clearly enunciated in Tosafot⁵:

So that a true judgment will be rendered: Rivan clarifies, that even the culpable party will readily pay and say "they judged me truthfully as I myself chose one [judge]. Were he to have been able to exonerate me he would have." (Another explanation,) it seems from the phraseology that the explanation is that because this one chose his (judge) and this one chose his (judge) and both chose the third the judgment will be true without corruption. As the matter will be equally weighed. There will not be more searching for culpability as searching for exoneration and vice-versa.

Tosafot too describes two advantages of the *zabla* system 1) that it ensures that even the guilty part will agree that the judgment is not corrupt and 2) that the decision will be properly be decided as it will not be more biased towards either party.

What seems from the above is that there is a *subjective* advantage to the litigants choosing their arbitrators, as well as an *objective* advantage. The subjective gain is that emotionally quells the worries of the culpable party that the courts was corrupt, and the objective advantage is that indeed ensures that there will not be corruption.

Between Rashi and Tosafot

There is however a focal difference between Rashi's statement about "true judgement being rendered," and Tosafot's statement about true judgement being rendered which expresses an axiomatic difference in the purpose of the judges.

⁵ *Kdei Shteitze HaDin Lamito*

When Rashi expresses how choosing judges leads to true judgement he states: “.” The judges as well are disposed to find the merit of *both* of them, as *both* chose them.”

However, Tosafot states “because this one chose *his* judge and this one chose *his* judge and *both* chose the third the judgment will be true without corruption. As the matter will be equally weighed.”

There is a central difference between Rashi’s description of the impartiality of the judges and Tosafot’s description.

Rashi describes a truly impartial scenario where each of the judges truly considers the case of both litigants while Tosafot describes a case where two of the judges are subjective.⁶

In Tosafot’s description the only judge that is truly impartial is the third judge who is either equally impartial to both, or equally invested in both—depending on R. Meir or the sages.

Essentially then, the objective of the *ze borer lo echad* holds very different meaning depending on the interpretations of Rashi and Tosafot.

According to Rashi judges *by definition* cannot consider one side over the other—and must therefore truly consider both sides of the case. This is in line with the *tanaaic* statement (Avot 1:8) “When sitting in judgement, do not act as a counselor-at-law.” The objectivity in deciding the case is necessary of *each* of the judges.

However, Tosafot is of the opinion that indeed each member of the court is partial to the litigant that chose them—and that only the third judge is truly impartial.

The difference is whether the court is viewed as a singular unit or as three disparate parts that formulate a united judgment.

If they are viewed as a three distinct sections—as intimated in Rashi—*each* of the judges must retain their complete objectivity towards the case. However, if they are *one* unite, it suffices if as a *whole* they are an objective unit.⁷ It is for this reason that Tosafot is not concerned whether or not the individual judges are partial to one of the litigants—on the contrary, it is the partiality that eventually results in the objective decision.

However, what is expressed is that there is an axiomatic difference in the intention of the judges in Rashi’s opinion and in Tosafot’s.

According to Rashi the point of the *ze borer lo echad* is so that the judges are *invested* in reaching an unbiased decision, while according to Tosafot it is specifically as a result of the bias that an objective decision is reached.

Indirect objectivity

⁶ See as well Yad Rameh, Ramban and Ran who as more clearly enunciate this difference.

⁷ Alternatively it is a difference between the *act* of judging, and the *result* of the case. If the result is objective, it may not matter if the distinct parts were.

It is Rosh was bothered by what seems to be partiality in the court case that he somewhat alters Rashi's simple meaning:

Because there are those senseless individuals that are incorrect in Rashi's words and gather from it that the judge should find merit for the one that chose him, and that he stands in his stead to conceal things *dishonestly*. Many individuals choose a conniving (judge) and hinge on Rashi's word that the judge should find his merit. G-d forbid, they were not careful in his wording, as he wrote "he presumes, I myself chose." He presumes that the judge will attempt to find his merit more than the merit of his fellow, and therefore listens to his judgment. However, the judge himself, G-d forbid that he find a reasoning for merit unless it is completely true judgment. However, if he is able to persuade his fellow to accept his reasoning, although he himself is unsure of it, this is included in (the prohibition of) corrupting judgment. The advantage though (of choosing judges) is that because he chose him he will understand his claim accurately and if he has merit he will discuss it with his fellow judge, so too the other judge does for the second litigant. Accordingly there is no merit that is overlooked by both judges. The third judge listens to the dialogue of the both and deliberates between them and true judgment is rendered.

Rosh understands that according to Rashi a) each judge is indeed partial to the judge that chose them and b) that there is nevertheless and axiomatic difference between the partiality of these judges and the partiality of a lawyer of "counselor-at-law."

The difference is that a lawyer works *completely* for the party that hired them and does not *at all* argue for the merit of both sides. However, a judge that has interest of the litigant that chose him, is inherently different. For, although he is indeed *partial* to the litigant that chose him, he does not—G-d forbid—corrupt the judgement and conceal the merit of the other party.

While Rosh is surely against concocting false defense to exploit the system, he undeniably supports the judge's finding true merits for the party that chose them.

When both judges do their part in supporting their respective party, the most objective ruling will be reached. Indeed, according to Rosh the only judge that is truly impartial is the third judge—that was either chose by both of the litigants—per the R. Meir—or chosen by the two judges per the sages.

Rabbi Meir & the Sages

Rabbi Meir and the rabbis disagree though on the manner in which the third judge is to be chosen⁸. In this is expressed a difference in the definition of impartiality and neutrality.

Each [litigant] chooses one, and the two jointly choose a third: so holds R. Meir. But the sages rule: the two judges nominate the third.

⁸ Mishna, *ibid*

The contention between R. Meir and the sages is who chooses the third judge. According to R. Meir the litigants choose, while according to the rabbis the judges choose.

In discovering the reasoning behind this ruling, the Talmud first suggests one manner of understanding it before rejecting it for another reasoning:

But the sages rule etc.: Shall we say that they differ in regard to the law cited by Rav Yehudah in the name of Rav? For Rav Yehudah said in the name of Rav: Witnesses may not sign a deed unless they are aware who is to sign with them: R. Meir thus disagreeing with the dictum of Rav Yehudah given in the name of Rav, while the Rabbis accept it?

No, all agree with Rav Yehudah's statement in Rav's name and none dispute that the [third judge] must have the consent of his colleagues; they only differ as to whether the consent of the litigants is necessary.

R. Meir maintains that the consent of the litigants is also required, while the Rabbis hold, only that of the judges is required, but not that of the litigants.

The first assumption is that R. Meir is less particular in the judges being careful with whom they sit with. Therefore, he says that it is up to the litigants to choose the judges, as the judges need not have a say.

The Talmud rejects this reasoning and explains that R. Meir is indeed particular whom they sit with. The Talmud concludes by saying: "R. Meir maintains that the consent of the litigants is also required, while the Rabbis hold, only that of the judges is required, but not that of the litigants."

R. Meir believes that the *entire* process of choosing judges is to be done by the litigants while the sages believe that *only* the consent of the judges is what is required.

It would seem though, that already in situations with two judges being chosen by the litigants that impartiality is accomplished—why then does R. Meir believe that the litigants must choose the third judge as well?

In the reverse, if the entire point of *ze borer lo echad* is to accomplish a situation where the litigants are sure that a "true conclusion is reached" why is only the judges needed and not the litigants?

However, the explanation is dependent on the *purpose* of *ze borer lo echad*, and the definition of impartiality.

It would seem that according to R. Meir the main worry that necessitates *ze borer lo echad*, is not the suspicion that the judges may be corrupt⁹, but that a *disinterested* judge will not properly weigh the sides of the issue.

What is accomplished in *ze borer lo echad* is that rather than disinterested impartiality in the judges, it enlists an active interest in the subject—thus ensuring that the case is properly mulled

⁹ See Talmud, Sanhedrin 23a regarding whether one employs this law of *ze borer* in a situation of expert judges, which perhaps sheds light on this issue.

over.¹⁰ According to R. Meir, were the third judge to be picked only by the judges it negates the purpose of *ze borer lo echad*. Essentially, partiality to both sides of the third judge, is what creates the objectivity of the case.

However, the Rabbis—as expressed above—were concerned that the definition of a judge is in *complete* impartiality—which seems lacking in *ze borer lo echad*. Essentially then, there was one judge that must be completely impartial who mediates between the opinions of the other two judges who have some bias. Only then can it be ensured that not to act like a “counselor-at-law.”

Indeed the Medrash (Lekach Tov, Shemot 22:8) interprets that it is essentially the third judge—and is truly impartial—that is the ultimate arbitrator in the case of *ze borer lo echad*.

In the verse (Shemot 22:8) “Whoever the judges declare guilty [shall pay twofold to his neighbor,” there is a missing letter of “vav.” This teaches us that “the judge that declares guilty” is really the third judge as expressed in Talmud (Sanhedrin 23a) “Civil actions [are to be tried] by three. Each [litigant] chooses one, and the two jointly choose a third.” The judgement is decided, whether towards innocence or culpability, according to the decision of a single judge. It therefore states “Whoever the *judge* declare guilty,” this is the [third judge] that decides between the two.

In this description, it is *primarily* the third judge whose impartiality is beyond reproach and therefore it is clear why the sages are of the opinion that it is specifically the judges that choose the third judge—although there is a distinct advantage in the litigants choosing the judges.

¹⁰ Or that it is indeed to negate corruption and therefore it is obviously necessary that third judge be chosen by the litigants.