

## The Judicial Process

It is interesting to note the way the rabbis related to capital cases. On the one hand they realized that it was their duty to prosecute capital cases, on the other hand, they were deeply concerned lest they take a life unnecessarily. These conflicting impulses come to the fore as they examine the witnesses, when the court passes judgement and finally, as the defendant who is found guilty is being taken out to be punished.

משנה סנהדרין ד:ה

כיצד מאיימין את העדים על עדי נפשות היו מכניסין אותן ומאיימין עליהן שמא תאמרו מאומד ומשמועה עד מפי עד ומפי אדם נאמן שמענו או שמא אי אתם יודעין שסופינו לבדוק אתכם בדרישה ובחקירה הווי יודעין שלא כדיני ממונות דיני נפשות דיני ממונות אדם נותן ממון ומתכפר לו דיני נפשות דמו ודם זרעיותיו תלוין בו עד סוף העולם שכן מצינו בקין שהרג את אחיו שנאמר (בראשית ד') דמי אחיך צועקים אינו אומר דם אחיך אלא דמי אחיך דמו ודם זרעיותיו דבר אחר דמי אחיך שהיה דמו מושלך על העצים ועל האבנים לפיכך נברא אדם יחידי ללמדך שכל המאבד נפש אחד מישראל מעלה עליו הכתוב כאילו איבד עולם מלא וכל המקיים נפש אחת מישראל מעלה עליו הכתוב כאילו קיים עולם מלא ומפני שלום הבריות שלא יאמר אדם לחבירו אבא גדול מאביך ושלא יהו מינין אומרים הרבה רשויות בשמים ולהגיד גדולתו של הקדוש ברוך הוא שאדם טובע כמה מטבעות בחותם אחד וכולן דומין זה לזה ומלך מלכי המלכים הקדוש ברוך הוא טבע כל אדם בחותמו של אדם הראשון ואין אחד מהן דומה לחבירו לפיכך כל אחד ואחד חייב לומר בשבילי נברא העולם ושמא תאמרו מה לנו ולצרה הזאת והלא כבר נאמר (ויקרא ה') והוא עד או ראה או ידע אם לא יגיד וגומר ושמא תאמרו מה לנו לחוב בדמו של זה והלא כבר נאמר (משלי י"א) באבוד רשעים רנה:

How would the court admonish the witnesses in capital cases: The court would admit them to the judicial chambers and would caution them: perhaps your inferring facts, or heard it from someone else, or know someone who witnessed the incident, or you think that you heard about it from someone who is trustworthy. Know, that we will examine you closely. Further, you should know that capital cases are different than monetary ones. In financial cases, a person can make restitution

for a mistake and all is forgiven, but in capital cases, this person's life and the lives of all the possible descendants of this person depends on the outcome. For we find it recorded in regard to Cain that the verse reads, "The blood of your brother cries out to Me from the earth," (Genesis 4:10). The word "blood" is not singular but plural, implying that it is not only his blood but the blood of all his possible descendants. (Another possible interpretation is that blood was splattered all over the trees and rocks.)

Therefore the first human being was created alone in the world, to teach us that anyone who destroys one human being it is as if that person has destroyed an entire world. And anyone who sustains a single life, it is as if that person had sustained an entire world. Also, for the sake of maintaining peace among God's creation so that no one can say to his or her neighbor, "My ancestor is greater than yours." Also that the heretics should not say, "There are many divinities in heaven." This tells us of the greatness of the Sovereign of the universe, the Holy One who is blessed, for a human being creates coins out of a single mold and they all are comparable to one another, but the sovereign of the universe, the Holy One who is blessed, fashions each person in the image of the first human, but no one is like another. Therefore each one of us can say, "The world was created for me."

Now perhaps you will say, "Why do I need this trouble?" but the biblical verse has already warned, "If someone is a witness, either seeing something or knowing something, and does not testify, that person will carry his or her sin." (Leviticus 5:1) Or perhaps you will say, "How can I take responsibility for the deprivation of life." but the biblical verse has already warned, "When evil people are obliterated, there is joy." (Proverbs 11:10)

*What do you think was the effect of this series of admonitions on the witnesses?*

*How does this compare with the swearing in of witnesses in an American court?*

*In the end, the mishnah has to exhort the witnesses not to hold back their testimony though it may lead to the prosecution of the defendant. Clearly the Mishnah is worried that its admonitions will lead to the reluctance on the part of any witness to testify. How do you feel about the conflicting motives in this Mishnah? Which has priority in your mind?*

משנה סנהדרין ה:ה

אם מצאו לו זכות פטרוהו ואם לאו מעבירין דינו למחר היו מזדווגין  
זוגות זוגות וממעטין במאכל ולא היו שותין יין כל היום ונושאים  
ונותנין כל הלילה ולמחרת משכימין ובאין לבית דין המזכה אומר  
אני מזכה ומזכה אני במקומי והמחייב אומר אני מחייב ומחייב אני  
במקומי המלמד חובה מלמד זכות אבל המלמד זכות אינו יכול לחזור  
וללמד חובה טעו בדבר שני סופרי הדיונין מזכירין אותן אם מצאו לו  
זכות פטרוהו ואם לאו עומדים למנין שנים עשר מזכין ואחד עשר  
מחייבין זכאי שנים עשר מחייבין ואחד עשר מזכין ואפילו אחד עשר

מזכין ואחד עשר מחייבין ואחד אומר איני יודע ואפילו עשרים ושנים  
מזכין או מחייבין ואחד אומר איני יודע יוסיפו הדיינן עד כמה  
מוסיפין שנים שנים עד שבעים ואחד שלשים וששה מזכין ושלשים  
וחמשה מחייבין זכאי שלשים וששה מחייבין ושלשים וחמשה מזכין  
דנין אלו כנגד אלו עד שיראה אחד מן המחייבין דברי המזכין:

If the court finds the defendant not guilty, he or she is discharged, if not, then the court is adjourned till the following day. During that time the judges go about in pairs and practice moderation in food, drink no wine that day and discuss the case throughout the night. Early the next morning they reassemble in court and any judge who is in favor of acquittal states that he is in favor of acquittal and has not changed his opinion and any judge in favor of finding the defendant guilty states that he is favor of finding the defendant guilty and has not changed his opinion. A judge who has declared the defendant innocent [the previous day] can not change his opinion, but a judge who has argued for the guilt of the defendant can change his opinion. If they misremembered, the court clerks remind them of the matter.

If they find the defendant innocent they release him immediately. If not they take a formal count. If twelve find the defendant innocent and eleven guilty the defendant is released, but if twelve find the defendant guilty and eleven find him or her innocent, or if eleven declare the defendant innocent and eleven find the defendant guilty and one says, "I do not know," or even if twenty-two of the judges find him or her guilty and one says, "I do not know<sup>1</sup>," they then add more judges. Up to how many might they add? They add by two's till they reach the limit of seventy-one. If thirty-six vote for acquittal and thirty-five find the defendant guilty, then he or she is innocent. If thirty-six find the the defendant guilty and thirty-five innocent then they argue the case back and forth till one of those who voted for guilt changes his mind and agrees to vote, "Not guilty."

*Note the care the judges must take in their deliberations e.g. they can't drink alcohol the night before their final deliberations. In this is there any equivalent between American secular law and religious law?*

*The court needs to have a majority of two to find the defendant guilty and if the decision is unanimous then the defendant is let go. How does this compare with our jury system? In our system, what do you think are the pressures placed on the minority of jurors who vote for innocence? on those who can't make up their minds? How does that compare with this system?*

*In the American and British legal systems it is the defense attorney and the prosecution who argue the case, here it is a panel of twenty-three judges. Is there a preference to one system or the other?*

*Note that common to both systems are the need for judges (and jurors) to hear both sides of the argument. In these legal systems the notion of a fair hearing is that pro's and con's need to be laid out before the judges (and jurors).*

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1. The rabbis said that if the court is unanimous in finding the defendant guilty then the case is dismissed since if not a single judge could argue for his or her innocence then the court really didn't have a way of coming to grips with the reasons for and the reasons against execution.

נגמר הדין מוציאין אותו לסקלו בית הסקילה היה חוץ לבית דין שנאמר (ויקרא כ"ד) הוצא את המקלל אחד עומד על פתח בית דין והסודרין בידו ואדם אחד רוכב הסוס רחוק ממנו כדי שיהא רואהו אומר אחד יש לי ללמד עליו זכות הלה מניף בסודרין והסוס רץ ומעמידו ואפילו הוא אומר יש לי ללמד על עצמי זכות מחזירין אותו אפילו ארבעה וחמשה פעמים ובלבד שיש ממש בדבריו מצאו לו זכות פטרוהו ואם לאו יוצא ליסקל וכרוז יוצא לפניו איש פלוני בן פלוני יוצא ליסקל על שעבר עבירה פלונית ופלוני ופלוני עדיו כל מי שיודע לו זכות יבא וילמד עליו:

When the vote had been taken, the condemned was led to be stoned; The place of stoning was outside the precincts of the court, as it is written, "Take the person who has cursed God outside of the camp." (Leviticus 24:14) A man stood at the entrance to the court with a signal flag in his hand and a man on a horse was some distance away but within view. If someone said, "I have something that I want to say in his favor," the signal man waves the flag and the man on the horse stops the proceedings. Even if he himself says, "I have something I want to say in my defense," he is brought back to court. Even four or five times, we do so; however, these have to be substantive reasons. If they then find him innocent, he is released, but if not he is taken out again to be stoned. And a crier calls out before him, "So and so is being led away to be stoned for such and such a crime, anyone who can say anything in his or her defense should come and offer his or her reason."

*Note that possibility of an appeal process on the basis of new information is a necessary part of the judicial system.*

*Note too how every opportunity of finding reasons not to execute the defendant is exploited. What does this say about the care one needs to take in taking a human life even when the party may be guilty of a heinous crime?*

*Is the same kind of care exercised in our system of law?*