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CONFLICT RESOLUTION AND
THE LEGAL CULTURE:
A STUDY OF THE RABBINICAL COURT

Harvey J. Kirsh*

“At the present as well as at any other time, the center of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decision, but in society itself.”**

INTRODUCTION

It can be argued that man's domination of his world relates to his unique quest for order and stability in his other-relations. More often than not, though, the natural balance of his affairs, which he has strived to maintain and contain, is thrown out of step by some conflict or dispute, developing from an interception and cessation of some form of ideological harmony (or coexistence, at least). To deal with this problem, he has created various mechanisms of resolution, bridging the range from informal social coercion and sanctions, to formalistic structures, "legal systems".

A legal system has, among other functions, the intention of promulgating a certain set of expectations by means of the normative regulation of affairs between individuals, groups, or other such entities. But the system is raw and ineffectual, unless it is considered in a type of milieu which creates that germane ingredient of authority, legitimation; and it is in this context that the concept of "legal culture" becomes significant.

Briefly, "legal culture" acts as the barometer of popular attitudes toward law and the legal system, giving resultant reasons as to, for example, why some persons will utilize these formal structures and others will not; what people feel about the dispensation of "justice"; and so on. Whether the system is created by a public body, e.g., the State, or a private one, e.g., an interest group, and whether or not it is part of a plurality of systems within a singular polis, does not diminish the fact that it must be analyzed in the contextual framework of this "culture".

Parenthetically, it might be remarked that this is not the only approach, but is the one with which this article intends to deal. The study of a legal system from the historical-evolutionary point of view indeed has its merits; but its methodology is somehow too inhibiting, having the marked tendency to deal with the subject-matter as fixed and static, rather than fluid and processual.

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The central part of this paper purports to be an analysis of one privately-created "legal system", the Rabbinical Court, particularly as it is seen to exist in contemporary America. It is an institution of which few persons even know the existence. It is hoped that, by an examination of the underpinnings of the legitimacy of this court of Jewish law and its relation to the whole system, certain insights into the legal culture can be gleaned.

I. THE RESOLUTION OF CONFLICT

Conflict is an activity that is found almost everywhere in the world of man. This theme is manifest in the ideologies of politics, economics, and philosophy, to name but several.

Max Weber suggested that one who pursues his own values necessarily interferes with the values of others. And Roscoe Pound found a similar theme when he wrote:

"There is a conflict of values to be organized and harmonized, where Kant saw a conflict of wills, Post a conflict of instincts, Jhering a conflict of interests, Stammler a conflict of ends or purposes, Marx a conflict or overlapping of material wants, and William James an overlapping of desires or demands."

Even in the affairs of everyday life, disputes and hostilities often arise, and may even be viewed as a function of the frequency of interpersonal contact.

Conflict can be, and often is, necessary and significant in terms of the promotion of an acuteness of sensitivity to the issues involved, the determination of ultimate rights, and hopefully, an amelioration of the human condition. At the same time, though, it must be kept in the overall perspective of certain societal goals, one of which is the maintenance of order by normative regulation. "Laws" act as a means of restraint and control, and are used as instruments which provide a way of accommodating and channeling conflict. Without the normative regulation of laws, social interaction is all but impossible.

Behaviour, consistent with the current applicable norms, can be distinguished in terms of whether it is "proper" or "improper". While norms do not dictate the difference between right and wrong, nor between moral and immoral, they nevertheless do set boundaries of action.

1 E.g., Republicans vs. Democrats; "conservatives" vs. "liberals"; activities of the Weathermen, Black Panthers, etc.

2 Consider e.g., K. Marx and F. Engels, Manifesto of the Communist Party (2nd ed. Peking: Foreign Languages Press, 1968) 30-1, where the authors outlined the theme of conflict in economic and social terms:

The history of all hitherto existing society is the history of class struggles. Freeman and slave, patrician and plebian, lord and serf, guild-master and journeyman, in a word, oppressor and oppressed, stood in constant opposition to one another, carried on an uninterrupted, now hidden, now open fight...

3 Consider, e.g., the fact that many of the pre-Socratic philosophers were exponents of a conflict-oriented cosmology, such as Heraclitus' "War" (fire-water) analogue. This trend has been similarly advanced in the present-day philosophical literature (see J. Fowles, The Ardis (Toronto: Little, Brown, 1964) 9, for a discussion of the "eternal conflict" between "Law" and "Chaos").


Norms establish role differentiation, and out of this comes the notion of “complementary expectations”\(^6\), which presupposes a reciprocity of interaction. The action of one party to an interaction process is based on a series of tacit cues. If actions between persons are to be integrated, they must obey the same rules. Complementarity of roles dictates what the person is supposed to do in order to fit into the integrated system. An example often used in this context is speech. In order for person “A” to communicate an idea or thought to person “B”, there must be a precision of particular vocal noises, called speech. The noises cannot be random, but must be meaningful if speech is to be integrated. Thus, if language is a medium of communication, it must be normatively governed, and there must be a distinction maintained between correct and incorrect noises. Any deviation from the normative pattern causes a dilution of that integration, leading to a situation of potential incoherence (in this example), or conflict.

Despite its aforementioned advantages, conflict has most often turned out to be counter-productive. As a result, certain resolution mechanisms have developed, especially for the sake of maintaining the harmony of interpersonal relations. These mechanisms may be informal, such as social sanctions, pressures, coercion and ostracism;\(^7\) or formal, such as laws, regulations, and equity, as dispensed or created by legislative, judicial, or quasi-judicial bodies. Formality would represent the institutionalization of conflict, for it provides social means of resolving the specified disputes and in some sense reconciling the more general conflicts of interests and values within a society.\(^8\)

It should be parenthetically mentioned that, although the “formal”-“informal” distinction may be valid on its face, nonetheless it is one, which, in practical terms, can not be so dichotomized. Almost all formal situations carry with them a set of informal pressures, moving toward that mutual end of dispute resolution, only using different means. For example, the formal process of litigation, or even the threat of it, often gives rise to a particular set of informal reactions, such as a certain degree of animosity between litigants, coercion to settle, and other assorted restraints, both latent and manifest. These, when taken together, act as a sort of springboard for the maintenance of order and the promulgation of resolution.

As anthropologists might suggest, informal dispute-resolving mechanisms antedated formal ones. In the so-called pre-history of law, there were, as yet, no courts. Eugen Ehrlich, in tracing a jurisprudential development of adjudication, affirmed this fact when, in 1922, he wrote:

> Quarrels are either peacefully settled through compromise or dragged out in bloody feuds. Generally, they are based on murder, mayhem, kidnapping, rape,  

\(^6\) T. Parsons and E. Shils, \textit{Toward a General Theory of Action} (1951), at 64; see also, E. Ehrlich, \textit{The Sociology of Law} (1922), 36 Harv. L. Rev. 130 at 131 where he writes:
> The Social Order rests on the fundamental social institutions: marriage, family, possession, contract, succession ... \(P\)ersons who stand in social relations to each other act in their dealing according to established norms.

\(^7\) In M. Gluckman, \textit{Politics, Law and Ritual in Tribal Society} (1965), at 234-5, he wrote:
> All societies have bodies of accepted rules: in this sense they all have law. Some have courts, to apply this law: they have what we call 'forensic' institutions. But most obligations even in these societies are observed without forensic compulsion: other sanctions, positive and negative, are effective ....

theft, cheating. Courts began to appear later. When the parties under the pressure of their environment reach the point of taking it for granted that their quarrel must be peacefully settled and yet cannot arrive at an agreement as to the compensation for which the injured party should abandon the feud, they submit to the judgment of one or more men in whom they repose confidence. The duty of these is to mete out the compensation which will serve as damages.9

In this same context, Weber distinguishes these adjudicators as being part of a "coercive apparatus"10 — that is, there are one or more persons whose special task it is to hold themselves ready to apply specially provided means of coercion (legal coercion) for the purpose of norm enforcement.

The conclusion reached by Ehrlich in 1922, and which Weber wrote of three years later, is essentially the same today. The difference lies, though, in the adroit skills of third parties to whom the disputants submit their differences. Because of such factors as crowded dockets, lack of expertise in certain specialized areas, and a lack of desire to be "regulatory" (as opposed to "adjudicative"), courts have tended to develop increased reliance on administrative agencies and other specialized tribunals, which often exercise regulatory, and judicial or quasi-judicial functions.

II. THE "LEGAL CULTURE"

These laws, these sanctions, these mechanisms, in the past, have been generally discussed using the historical and evolutionary approach, in which a particular law or body of laws is "explained" on the basis of a narration of its political history. As previously mentioned, it is the intention of this paper to experiment with an alternate approach, one put forward by Professor Lawrence Friedman.11

It is his belief that the paucity of the explanations afforded by the historical approach could be supplemented by articulation of a new model of legal systems. Such a model would embody two essential aspects of the system — its processual nature and its components. The former would focus on the demands made upon legal systems, their responses to those demands, and the effect of the response on both the initial demander and society at large. Focusing on the components of the system would involve an examination of the form and internal work processes of the system's institutions (i.e., "structure"12), and the state of the existent laws themselves (i.e., "substance"13). Most important, though, would be the cultural component, an examination of which would entail a description of the values and attitudes which bind the system together. Hopefully, such a description should detail the source of the impulse to either seek out, or avoid, legal (or particular sorts of legal) solutions to the problems at hand. In this way, law would be viewed as a process, and its system would be transformed from the "static bundle of traits",14 by which the historical-evolutionary model is so wont to describe it,

9 Ehrlich, supra note 6, at 133-34.
12 Id. at 34.
13 Id.
14 Id. at 33.
to “the living law of society”. Given a particular set of cultural variables, we might be able to begin to answer whether a “legal” solution is appropriate to this problem in this particular milieu and, if so, what shape the solution should take. It is in this special regard that a sense of encouragement evolves from Professor Friedman’s approach.

The concern is, then, to attack the problem of a legal system’s creation, maintenance, modification, and rejection of rules; and then to try to zero in on some of the components of the relevant culture, particularly, in this context, habits, values, beliefs, and language.

Since there are very few people in modern times who adopt the view of the State as a monistic controller of all activity, it does not seem illogical to posit the suggestion that there may exist, within a pluralistic society, a number of systems which might meaningfully be labelled as “legal sub-systems”. To comprehend what this phrase means, it is necessary to elucidate, in general terms, the features of a legal system. Firstly, modern societies possess institutions with authority to make and amend rules of law — legislatures. Secondly, there are specialized institutions to decide disputes on the basis of these rules of law — courts. Thirdly, there are institutions to maintain observance of the rules of law, and to make sure that the decisions of the courts are enforced — police and certain court officials (e.g., the sheriff). And fourthly, there are special institutions whose occupation it is to advise people as to the meaning of the rules (so that they can plan their affairs accordingly), and to assist the court in the conduct of disputes — the legal profession.

In this conceptual framework (which of course is not absolute in every society, but subject to relative needs), one can tentatively assert that the features of a legal sub-system are a refracted, but microcosmic, parallel of those of the legal system. That is to say, for example, that a body of laws does exist, although it may not have been created by a “legislature”; “courts” do exist, but their procedures and processes might be different; the enforcing function does exist, but might be administered by forces other than physical; and a “legal profession” does exist, but its role in the process might be distinctive. Hopefully, this seemingly vague and imprecise definitional statement will be illuminated upon allusion to the example of one such “sub-system”, the rabbinical court.

It must be recognized that many such sub-systems exist within a pluralistic society. The theory of law, as based on Austinian positivism — that the source of law was to be found in the commands of an identifiable sovereign, and that only a single legal system could exist within each sovereign jurisdiction — has been discredited by modern neo-positivists. Clearly, as the famous example goes, the quality of the legal rule is somehow different

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15 Id. at 34.
16 See generally, J. Austin, Lectures on Jurisprudence (1885).
17 The views of Austin, supported by those of Dicey, see generally, Dicey, The Law of the Constitution (10th ed. 1961), have, in this area, both been rejected by Sir Arthur Goodhart, see Goodhart, English Law and the Moral Law at 56; by the Swedish jurist, Olivercrona, see K. Olivercrona, Law as Fact (1934), at 32-33; and by the former Chief Justice of the Ontario Supreme Court, J. C. McRuer, see IV Royal Commission Inquiry into Civil Rights (Ontario) (1969), at 1532.
from the purely coercive nature of the command of the gunman. For, not only do legal systems ally themselves with moral systems in such a way as to enhance their acceptability, but the sovereignty of command in the complex State is found not in an individual person or institution, but in certain fundamental rules of recognition, through which societal groups test the validity of that which purports to be "law".

The thrust of this is merely to say that it is not necessarily a contradiction in terms to speak of more than one legal system within a State. Indeed, ecclesiastical and canonical law, and the institutions appended thereto, not only antedated, but also existed alongside the more conventional structures for many years, particularly in European history. In England, Church and State grappled for centuries in a power struggle, each faction having not only its own institutions for the administration of justice, but also its own philosophy of normative regulation. Jewish courts in English history also exemplify this separation.

Indeed, although today the personal law of domiciled English Jews is English law and not Jewish law, this does not appear always to have been the case. For quite a number of years, Jewish courts had exclusive jurisdiction over, among other things, marriage and divorce. Transfer of jurisdiction from the ecclesiastical courts to the secular courts did not occur until about 1857; but this position has been reached, not apparently as the result of any deliberate policy, but merely as the result of a series of accidents.

We can speak generally of ecclesiastical law (Jewish or otherwise) even though it might contradict official State law. Such a system does not necessarily depend on State-supported coercion. Weber asserts that:

... we categorically deny that law exists only where coercion is guaranteed by the political authority. There is no practical reason for such a terminology. A 'legal order' shall rather be said to exist wherever coercive means, of a physical or psychological kind, are available; i.e., wherever they are at the disposal of one or more persons who hold themselves ready to use them ...

There are several observations to be made in this connection. First, one of the bases of typifying legal systems or sub-systems might be by describing their legitimacy as perceived by the society. Several possibilities come to mind:

(a) manifest authorization or legitimation: the larger system specifically authorizes the sub-system to engage in certain judicial or quasi-judicial functions (e.g., rabbinical courts, labour arbitration tribunals):

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18 In Lindo v. Belsario (1795) 1 Hag. Con. 216 at 216, Lord Stowell said:
This is a question of marriage of a very different kind — between persons governed by a peculiar law of their own, and administered, to a certain degree, by a jurisdiction established among themselves — a jurisdiction competent to decide upon questions of this nature with peculiar advantage, and with sufficient authority ... I cannot but be sensible, that in applying the general principles of the law of marriage to this case, I may be adopting rules that are not duly founded, and which may prove highly inexpedient. On the other hand, if I am to apply the peculiar principles of the Jewish law, which I conceive is the obligation imposed upon me, I may run the hazard of committing those principles, having a very moderate knowledge of that law.

In no uncertain terms, Lord Stowell took the view that the marriages of English Jews were governed by the Jewish law and not by the law which, at that date, governed English gentile marriages.


(b) *latent legitimation*: while the sub-system is manifestly authorized to carry out a singular function (perhaps the regulation of the economy), the larger system authorizes the operation of a latent legal system;

c(c) *non-legitimation*: these legal systems, while perfectly legitimate in the eyes of the participants, are resisted by, and in turn resist, the larger system (e.g., Black Panthers, Hell's Angels, Weathermen).

Secondly, each of these legal systems, as contradistinct from a social system, possesses an authoritative structure for both the promulgation of rules and the application of sanctions.

Legal institutions exist not in a vacuum, but in a milieu of values, ideas, and habits, which Friedman has called the “legal culture”. Each legal sub-system, of which there are many in our society, exists in an analogous culture of its own. This second (analogous) culture shall be termed a “minority culture”, in spite of the realization of the fact that in some cases, the terminology of the ethnologist would require the use of the word “anti-culture”. By examining one of these sub-systems, the rabbinical court, and its relation to the whole system, an analysis of the larger legal culture can perhaps be extrapolated.

III. THE RABBINICAL COURTS

The history of rabbinical courts can probably be traced back to pre-Biblical days. The first judge was Moses, who sat from morning to evening in judgment over the Children of Israel as they wandered in the desert after their flight from Egypt. Eventually, the administration of justice was changed, when Moses was advised by his father-in-law to choose judges for the people, instead of sitting in judgment himself.

It is the intention of this section to very briefly delineate the development of that structure of judges from early times to special consideration of its role in present-day America. The complexities of geography and epochal time being as they are, the outline is necessarily skeletal; for rabbinical courts went where Jews went, and their penetration into the Jewish culture is as extensive as Jewish history itself.

The contemporary rabbinic tribunal in the United States can be viewed, on the one hand, as an anomaly; but on the other, as an expression of a continuing, and ethnically-enclosed culture, which promulgates its own ethos,

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22 Cf. Friedman, supra note 11, at 37:

When a community moves from a tribal system to nationhood and a money economy, the law will have to be changed; the law will have to implement and support the new political, social, and economic realities. If the legal tradition does not by itself support these programs, new law — sometimes in massive doses — must be manufactured or brought in from outside.
despite the existence of a potent, State-controlled legal structure. The implications of its continued existence, it is hoped, will be made evident in the course of the following discussion.

(a) Historical Perspective

In the Middle Ages of Central Europe, the vast majority of Jews could be found subsisting within the physical and psychological confines of compulsory ghetto life. Deprived of political independence, curbed in their social contacts with the outside world, and subject to discriminatory laws and prejudices, the only institution left to the exiled Jews was the synagogue. Laws were promulgated in some regions which dictated that no Jew was allowed to give testimony in a civil court; and in other regions, the Jews were placed in the same category as minors, fools, the insane, and women, regarding the admission of their testimony in court. This disability dates back to the Byzantine Emperor Justinian, who declared that neither Jews nor heretics should be admitted as witnesses against Christians.

Although the Jews were deprived of judicial standing in the civil courts, they nonetheless enjoyed the privilege of having their rights protected and justice administered by their own tribunals.

Life in the ghetto grew up around the synagogue. Its dominant position in Jewish life is to be accounted for on the basis of the function of religion in that life, and the synagogue as an expression of that function. Aside from being a house of prayer, study, and assembly, the synagogue was the administrative centre of the ghetto. Most of the public announcements that concerned the entire community were made there, and through the synagogue, the secular authorities were able to communicate with the Jews. For example, taxes were assessed, and such functions as were left to the Jewish community itself by civil or ecclesiastical overlords, such as local regulations, were passed and proclaimed. Provided that the Jews paid taxes and tributes, the State did not interfere with the life and affairs of the community. Nor did the State lend its secular arm to enforce the ordinances of the rabbis.

The constitution of a court in conformity with Rabbinic requirements was the sign of a properly organized community. In its turn the community recognized the court and abided by its decisions. Thus there was established a reciprocity between the community organized as a legal body and the court having judicial and administrative functions.

The Jewish court, called the “Beth Din” (House of Judgment), was thereby granted autonomy by the civil governments, and was instrumental in helping to maintain Jewish individuality, identifying them as a distinct group.

25 Jews had seen a history of official, State-endorsed persecution in, and expulsion from, such countries as England (1290) and France (1394); and in Spain (1391), decades of ill-feeling caused a frenzied mob, exacerbated by the fiery anti-Jewish sermons of the Archdeacon Ferrand Martinez, to storm the Jewish quarter leaving an orgy of carnage (70,000 murdered) in their wake. See C. Roth, A History of the Jews (New York: Schocken Books, 1961), at 206-32 [hereinafter Roth].

26 See generally, D. M. Shohet, The Jewish Court of the Middle Ages (1939).

27 For a tracing of Jewish courts and law (12th-17th Centuries) throughout most of the countries of continental Europe, see L. Landman, Jewish Law in the Diaspora: Confrontation and Accommodation (1968) 86-103 [hereinafter Landman].

This status of jurisdiction prevailed throughout most of the Middle Ages; and the rabbinic tribunal was by far the most distinctive representation of that status as an institution of Jewish self-government.\textsuperscript{29}

Perhaps as a reaction to the aforementioned prejudices which permeated that era in Europe, and in keeping with Judaic law, there was a prohibition against litigation in Christian secular courts. The Code of Jewish Law ("Shulhan Aruh")\textsuperscript{30} states that when a controversy arises between two persons, they should make every effort to compromise, in order to avoid the humiliation of a lawsuit.\textsuperscript{31} If it is impossible for them to reach a compromise, and they are forced to go to court, they should have recourse to a Jewish tribunal. It is forbidden to bring suit before secular judges in their courts, even if their decision would be in accord with the law of Israel.

It was the purpose of the medieval rabbis to keep litigation between Jewish parties before Jewish tribunals in order to strengthen Jewish judicial power and maintain their autonomy. Their fear of unjust treatment by the non-Jewish courts, which so often was well-founded, served as an additional deterrent.\textsuperscript{32} In almost every century we find at least some rabbinic affirmation of this aversion to allowing disputes between Jewish litigants to be heard in a Gentile court.

Moses ben Maimon (or to use the more usual Greek form, Moses Maimonides), theologian and philosopher of the 12th Century, echoed the thesis of the Mesopotamian sages, the Geonim,\textsuperscript{33} when he commented that litigation by Jews in a secular court amounts to blasphemy and treason against the law of Moses and the God of Israel.\textsuperscript{34}

But theory and dogma did not coincide in every community. While medieval German Jews recognized only Judaic law and rabbinical courts, such unanimity did not exist in medieval Spain:

The Jewish courts (in Spain) did not receive the same support for exclusive jurisdiction as did their counterparts in Germany. Jews often had recourse to the secular tribunals. Jewish litigants in Spain did not practise the same uncompromising fidelity nor feel the strong necessity to bring their disputes before Jewish tribunals as did their German brethren.\textsuperscript{35}

Italy presented a different picture. While under the influence of the German Rabbis prior to the end of the 15th Century, there was a strong attitude of refraining from using secular gentile courts; but toward the end.

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\textsuperscript{29} See generally, L. Finkelstein, \textit{Jewish Self-Government in the Middle Ages} (1924).

\textsuperscript{30} R. S. Ganzfried, \textit{Code of Jewish Law} (H. E. Goldin, transl.)

\textsuperscript{31} \textit{Id.} at vol. IV, c. 181 (Litigation and Testimony).

\textsuperscript{32} Landman, \textit{supra} note 27, at 87. But see \textit{id.}:

\begin{quote}
... R. Tam reiterated the prohibition against taking Jewish disputes to non-Jewish courts. There is, however, one additional and very pertinent ruling mentioned in (his) takkanah\textsuperscript{**}; namely, if both parties agree to submit their litigation to a non-Jewish court, then permission is granted them. \textit{No such exception was ever made by talmudic law.} (Emphasis added).
\end{quote}

\textsuperscript{**Author's note:} "takkanoth" (pl.) were a series of regulations authored by rabbis, intended to adapt Jewish life to the altered conditions which it had come to face in Europe: see Finkelstein, \textit{supra} note 29, at 153.

\textsuperscript{33} The "Geonim" (sing. "Gaon") were the heads of the two great Mesopotamian seats of learning, the Academies of Sura and Pumbeditha (circa 800 B.C.E.). The "Excellencies" (as translated) continued to foster and develop the traditions of the exponents of the Oral Law who had immediately preceded them.

\textsuperscript{34} See Shohet, \textit{supra} note 26 at 97.

\textsuperscript{35} Landman, \textit{supra} note 27, at 97.
of the century, as the status of the Jews of Italy gradually began to decline, and with the influx of Spanish Jews, a different attitude developed.38

Spain and Italy, though, were anomalies to the European Jewish tradition of litigation in rabbinical courts. Generally, the Jews of that era were most influenced by the German rabbis, who, out of a zeal for observance of traditional law, and a desire for continued cultivation of Jewish learning, gave preference to the “Beth Din”.

The Jewish tribunal was an integrated, powerful institution, even though Jewish communal life was controlled from without. The ghetto was regulated by ordinances which covered every phase of life. As Louis Wirth wrote, “If a distinction between the religious and secular applies to most modern ghettos and other communities, no such distinction existed in the medieval ghetto.387 The punishment for violations ranged from fines, imprisonment, corporal punishment,388 banishments, to excommunications,389 and even the death penalty (only in Spain). These ordinances were usually passed by the Community Council with the consent of the rabbi. Additionally, the religion itself contains a body of law, not only ecclesiastical, but also civil and criminal.

Two texts, The Jewish Court in the Middle Ages,40 and The Criminal Code of the Jews,41 both serve to demonstrate the complexity of the court system and the law which was dispensed. There are lengthy and detailed chapters dealing with court organization, rules of evidence, the taking of oaths, civil procedure, methods of executing judgments, and specific references to perjury, accidental homicide, adultery, idolatry, and so on.42 Indeed, it is quite evident that this was a comprehensive and complex system of applied law and formalization of religious adherence.

(b) Foundations in Traditional Law

There is no central religious authority in Judaism, no single ecclesiastical dignitary who exercises world-wide jurisdiction. For the most part, each local

38 In this context, it is important to remember that the rabbinic tribunal is a conflict-resolving mechanism in the legal culture. In connection with these various samples of Europe, Professor Friedman would have us ask a number of pertinent questions: “What are the attitudes of different populations toward (Jewish) law and the legal system? Who goes to (a rabbinical) court and why?”: Friedman, supra note 11, at 40 (bracketed inserts added); and “What do people think of (Jewish) law? Do groups or individuals willingly go to (the rabbinical) court?”: Friedman, supra note 11, at 34 (bracketed insert added).
37 L. Wirth, The Ghetto (1928), at 54.
38 See generally, Rev. D. DeSola Pool, Capital Punishment Among the Jews (A paper read before the New York Board of Jewish Ministers, 1916).
39 The Spanish philosopher, Baruch Spinoza (1632-77), was excommunicated in 1656. Malcolm X, in his autobiography, wrote: Spinoza impressed me for a while when I found out that he was black. A black Spanish Jew. The Jews excommunicated him because he advocated a pantheistic doctrine, something like the ‘illness of God’, or ‘God in everything’ ... The Jews read their burial services for Spinoza, meaning that he was dead as far as they were concerned. ... See The Autobiography of Malcolm X, (1964), at 181.
40 Shohet, supra note 26.
42 See also “Nezikin”, in The Talmud (Vol. III, Chap. IV) (Rabbi Dr. I. Epstein ed. 1933), which delineates procedures, especially as between civil and capital cases.
congregation is independent of the others. But what binds the great majority of congregations together and provides an element of uniformity is the accepted authority of traditional law.

The three main sources of Jewish law are the Torah, the Mishnah, and the Gemara. The Talmud is essentially a compilation of laws and traditions which have evolved from the Torah. The laws of the Torah were enunciatory in nature and required a great deal of interpretation by the Rabbis. Jews, who were no longer in touch with the centres of Jewish population in Mesopotamia (circa 800 B.C.E.), still required guidance on matters connected with Judaic law and religion. They directed their inquiries to the sages of the Mesopotamian Academies by one form of correspondence or another. These sages (Geonim) were thus occupied with responding to these demands, and their answers to problems were called “Responsa”. Out of this, a large body of oral interpretive teachings developed. Hitherto, the teachings of the Rabbis had centred upon no written text other than the Bible. But there had already grown up about this a vast amount of oral lore. No written code could ever cover all the possible exigencies. From the earliest beginnings, there had been questions and difficulties concerning one point or another on which there was no direct guidance in the Torah.

The first attempt to organize and compile these teachings was begun by a Hebrew scholar, Hillel, in the first century before Christ. This effort culminated 400 years later with the Mishnah, a compilation similar to a restatement of the law. The comprehensive commentary on the Mishnah that forms the second, and far larger, portion of the Talmud is called the Gemara. The Gemara (which came to denote “teaching”) explains the terms and subject-matter of the Mishnah, and seeks to elucidate difficulties and harmonize discrepant and/or ambiguous statements.

On the basis of accumulated material and precedents, rabbis must decide individual cases and religious questions brought to them. It is in conformity with these codes of laws and traditions, and the glosses relating thereto, that most of the rabbis conduct their administration.

The rabbi performs his ecclesiastical functions through the medium of a court, the aforementioned “Beth Din”, in which he is usually assisted by several other rabbis. This court, a form derived from the ancient Egyptian

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43 The Torah consists of the first five books of the Old Testament: Genesis, Exodus, Leviticus, Numbers, and Deuteronomy.
44 A recent article, J. W. Jurkowitz, Talmudic and American Tort Liability — A Comparative Analysis (1968) 10 Ariz. L. Rev. 473, outlines the remarkable resemblance between Talmudic and modern law, especially when one considers the fact that “its (the Talmud's) twenty volumes represent an almost unbelievable literary undertaking at a time in history when illiteracy was virtually universal.” See esp. 483.
45 For a developmental history of the “Responsa”, see Roth, supra note 25, at 152 ff.
46 The Mishnah consists of six Orders: Zeraim, dealing with agricultural laws; Moed, laws concerning festivals and fast days; Nashim, concerning women and family life; Nezikin, civil and criminal jurisprudence; Kodashim, dealing with the sanctuary and food laws; and Toharoth, laws of clean and unclean.
Sanhedrin Courts,\textsuperscript{47} decides all questions pertaining to religious domain. Its actual duties vary, depending on the country in which it is situated and the division of duties between institutions of the particular community. But it has been known to issue marriage certificates and bills of divorcement (which are usually supplementary to those required by the civil law of the country); it may examine and license ritual slaughterers and butchers to ensure the ritual fitness of all food offered for Jewish consumption; it solves problems relating to religious observances and ceremonies; and it arbitrates and/or mediates in disputes between two individuals, and between individual and community.\textsuperscript{48} “The jurisdiction of the Beth Din usually comprises only questions of religious law, but civil disputes are also often voluntarily submitted to its decision, and cases in which both parties are Jews are also occasionally referred to it by civil judges.”\textsuperscript{49} Its authority is seldom disputed, and in unreported English cases of Kashruth\textsuperscript{50} violation, its pronouncements have been upheld by the civil court.\textsuperscript{51}

(c) The Dispersal

Because of the various socio-political phenomena over the last 200 years (civil wars, persecutions, expulsions, “pogroms”, etc.), there has been a rapid dispersion of Jews to various parts of Europe, Africa, Asia, and North and South America.\textsuperscript{52} To be sure, even after this “dispersal”, they continued to regulate themselves by their own code. As the American judge, L. R. Yankwich, wrote:

After the dispersion, the Jews became subject to the laws of the land in which they lived. They retained, to a limited extent, here and there, certain autonomy in civil disputes among themselves. As to these, the Talmud remained the law. And the traditions of Jewish jurisprudence were kept alive, as a cultural influence, among the learned Jews ... \textsuperscript{53}

\textsuperscript{47} It has generally been conceded that juridical authority was derived from the undisputed authority of the Sanhedrin of old, which was the institution which guided Jewish communal life in Palestine in the last century of the Second Commonwealth, i.e., from about 140 B.C.E. to almost 70 C.E., when Jerusalem was destroyed by the Romans: see Rosenthal, supra note 28, at 185.


Much has been written about the Sanhedrin, some of it conflicting with other accounts. In The Great Sanhedrin, (1962), Dr. Sidney B. Hoenig advances the thesis that there were, in point of fact, three courts: (1) The Great Court of Rabbis, which dealt with the Law, its development, and decisions; (2) The Court of Priests, which dealt with temple rituals; and (3) The Governing Council, which dealt with general administrative and civil matters. His suggestion was that the rabbinical court, which is presently being discussed, was only one facet of a rather complex Sanhedrin court structure; cf. Epstein, supra note 42, who suggested the existence of only two courts.

\textsuperscript{48} In his autobiographical memoirs, Isaac Bashevis Singer wrote of the variety of disputes which were brought to his father, a rabbi in Warsaw, for settlement: see generally I. B. Singer, In My Father’s Court (1962), and Singer, Major Din Torah: Dispute Brought to Rabbi for Arbitration, (1965), 40 Commentary 77.

\textsuperscript{49} I. Cohen, Contemporary Jewry (1950), at 31.

\textsuperscript{50} The term “kashruth” refers to the ritual fitness of meat offered for sale. Laws of Kashruth are dealt with to some extent in one of the Orders of the Mishnah, “Kadashim”, infra note 46.

\textsuperscript{51} See Cohen, supra note 49, at 30-1.

\textsuperscript{52} See Roth, supra note 25, at 354 ff.

\textsuperscript{53} Supra note 23, at 18.
Their former structure of compulsory ghettoization, notwithstanding newly found freedom, had surprisingly been retained. Voluntary ghettos (replacing compulsory ones, and often aligned on the basis of European origin) continually arose, based on strong primary group relationships, on exclusion (as complete as possible) of external influence, and on strong ties with traditional law and synagogue life. And so, a particular type of ethnic group was born. Within the group, such things as family life, religion, education (in the form of a parochial school system), and often even economic and occupational activities\(^5\) were either completely, or partially, ethnically enclosed:

The East Side of New York, like the East End of London, became the seat of a curious alien cultural world. There were whole streets, or even areas, in which nothing but Yiddish was heard. Newspapers in the same language, modelled as closely as possible on the standards of American journalism, were published in a steady profusion to satisfy their intellectual needs. The Yiddish theatre attained a momentary importance in New York that it never had in Warsaw. The children received a rudimentary Hebrew education in hundreds of Heder, and a smaller number of Talmud Torahs, the methods and general atmosphere of which were transplanted bodily from the Pale of Settlement. Old acquaintances from any one province, or city, or township, would band themselves together to establish their own synagogues, or prayerhall, or friendly society, with the result that within the New York Ghetto there was a host of minor divisions, according to place of origin.\(^5\)

This served psychologically as a source of group identification, and also provided a patterned network of groups and institutions, which allowed the individual to confine his primary group relationships to his own group throughout all the stages of the life-cycle.

This unique ethnic heritage which existed might have consisted of cultural norms brought from the country of recent emigration, and it might have rested on different religious values, or on the cumulative domestic experiences of enforced segregation within, say, American borders over a number of generations. One sociologist, M. Gordon, suggested that this type of group could be properly labelled an ethnic “sub-society”, having its own cultural patterns consisting of “the national cultural patterns blended with or refracted through the particular cultural heritage of the ethnic group; this blend is the subculture of the ethnic society”.\(^5\) While this might be true for other ethnic groups, and perhaps even of Jews in a most general sense, it is doubtful whether this label could be appropriately applied to Orthodox Jews, especially with reference to traditional law and its maintenance. The very nature of the tenets of Judaism was such, that it could not accept Gordon’s notion of “national cultural patterns” in blend with, or refracted through, their own cultural heritage. Rather, the object of the exercise was to resist the influence of external cultural patterns; and it is suggested that the very existence of rabbinical courts in the contemporary North American context affirms this fact.

\(^5\) See, e.g., Roth, supra note 25, at 361:

… (T)he newcomers (i.e., the Jews), in an inordinately high proportion, entered the tailoring and allied industries ….

\(^5\) Roth, supra note 25, at 362.

\(^5\) M. M. Gordon, Assimilation in American Life (1964), at 137.
Rabbinical Courts in America Today

The contemporary Beth Din bears resemblance, albeit slight, with its historical counterpart. Indeed, the philosophical basis dichotomizing “Jewish vs. secular” courts still permeates the religion and justifies the present existence of the tribunal. But many differences, though, in subject-matter jurisdiction, the dispensation of damages, court organization, and so on, are clearly distinguishable between the courts of past and present.

In the Middle Ages there was a body of law, made up of ecclesiastical, civil and criminal; but today, it is essentially ecclesiastical and only partly civil. The contemporary court has no criminal jurisdiction whatever and, as such, may no longer mete out penalties such as fines, corporal punishment, imprisonment or death.

The prominent functions of the present-day Beth Din can best be viewed in the context of its institutional setting. It should be remembered that the availability of a rabbinical court in any community is a direct function of the demand made for its existence by that community. In light of this fact, it is obvious that certain North American cities seem to have a proliferation of such courts, while other cities have none. The North-East part of the United States seems to stand out, not only for the Beth Dinim (pl.) which exist to regulate affairs in that particular community of Jews, but also as a centre for tribunals throughout the continent.

In the United States today, there exist a variety of different types of rabbinical courts. Some are ad hoc arbitration boards and conciliation tribunals, and still others are permanently established institutions. Their procedures and powers differ to a certain extent, as does their jurisdiction, but the basic fact is that they all exist to interpret Jewish law and to provide remedial relief, of sorts, in the event of a dispute, usually between two (Orthodox) Jews.

The largest and best known of the established rabbinical courts is the Beth Din of the Rabbinical Council of America (R.C.A.). This court, associated with the Orthodox movement of Judaism, deals mainly with problems of marriage and divorce, and is intensively involved in interpreting Jewish laws and customs, which are published under the title of “Responsa”. Additionally, religious matters such as conversion to the Jewish faith, and

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57 The “Shulhan Aruh” (Code of Jewish Law) continues to promulgate the separation of Church and State in matters that are covered by Jewish law.
58 For an analysis of the various Jewish courts, and their particular powers, procedures, and jurisdictions, see generally “Modern Solomons”, supra note 21.
59 Id. at 56. General information on the R.C.A. Beth Din was obtained from an interview with Rabbi Gedaliah Felder, a member of the tribunal, in Toronto, Canada, March 16, 1970.
60 For several thorough discussions of Jewish marriage and divorce law, see: M. J. Schecter, Civil Enforcement of the Jewish Marriage Contract (1969-70), 9 J. of Fam. L. 425; Rabbi Dr. I. Jakobovitz, Marriage and Divorce, in An Introduction to Jewish Law, supra note 47; and I. Groob, ‘Get’: Divorce Jewish Style, 40 Conn. B. J. 594.
61 Supra, note 45.
Halizah, a Biblical ceremony, are within the court’s competence and jurisdiction. Finally, the R.C.A. Beth Din also serves as a registration agency, for the recording and maintenance of documents pertaining to conversions, adoptions, Halizah, marriages, and divorces.

There are other established rabbinical courts which handle routine disputes (i.e., community courts), and they are generally superintended by the local rabbi. Many of the voluntary ghettos, which North American Jews have maintained, have this type of Beth Din, which deals mainly with litigants who are members of the local community (e.g., the Hasidic Jews of Williamsburg, N.Y.; the Orthodox German community in Washington Heights, N.Y.). In the context of these local courts, the prominent function of the rabbi is that of arbitrator. The litigants are required to sign a submission agreement before the court will consider the case.

Another type of rabbinical court is not permanently established, but rather convenes in an ad hoc manner. These are partly characterized by informal proceedings, a break from the formality of the ancient Sanhedrin court procedure. The disputants are not necessarily represented by counsel, but rather, each litigant has the right to select one member to the tribunal, and the third member is the product of mutual consensus. In many cases, if both parties agree to submit the dispute to a single rabbi sitting alone, his decision would be upheld in a civil court so long as there was a signed submission agreement.

The last type of courts to be mentioned are the arbitration and conciliation tribunals. These are generally operated by Jewish organizations, and decide matters concerning Jewish groups or individuals. The Jewish Conciliation Board of America, established in New York in the early 1920’s, is an interdenominational Jewish court of arbitration. It functions as a voluntary social service agency, handling from 400 (in 1966) to 1000 (in 1969) cases per year. Each case is heard by three judges consisting of a lawyer, a

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63 See Modern Solomons, supra note 21, at 59:
Under Biblical Law, if a woman became a widow without bearing children, she had to either marry her late husband's brother ... or else go through a ceremony called halizah, after which she could remarry freely ....

64 Id. at 60. This particular notion of community court is reminiscent of the idea of a neighbourhood court system, proposed by Edgar and Jean Cahn: see E. S. Cahn and J. C. Cahn, What Price Justice: The Civilian Perspective Revisited in Symposium: Justice and the Poor, (1966) 41 Notre Dame Law 843 at 950.


66 6 C. J. S. Arbitration and Award, ss. 45, 46 deals with the right of two parties to make an agreement and appoint a substitute for a special arbitrator or umpire: s. 46a: In the absence of statutory prohibition, practically any person (i.e., ... infants, women, outlaws, deaf persons, ministers, unincorporated associations, committees of boards of trade, attorneys at law, members of ecclesiastical courts, and sheriffs) is competent to act as an arbitrator, regardless of natural or legal disabilities. (Emphasis added).

67 Id. at 62.

68 Id. at 62. This is comparable to a labour arbitration board where labour selects one member, management another, and the third is chosen by both.

69 Modern Solomons, supra note 21, at 63-8.


71 Id.

rabbis, and a businessman. When the litigants sign a submission agreement, it is enforceable under the arbitration laws of the state.

(e) An Exemplary Case: S.E.T.C. v. Mindick

In May, 1968, the Rabbinical Court of Justice of the Associated Synagogues of Massachusetts postponed its customary business in order to inquire into a dispute between a Jewish landlord (the Mindick family real estate interests) and his 700-800 Black and Puerto Rican tenants (represented by the South End Tenants' Council). The tenants complained that the forty buildings owned by the Jewish family in the South End Urban Renewal Area of Boston were unsanitary, rat and roach infested, and unsafe, and accused the landlord of rent-gouging and punitive reprisals for their complaints. No recourse was possible through the city authorities, apparently, because of "red tape": appeals led to court procedures, delays, and costs the tenant group could not assume.

Responding, the owners claimed that many of the aforementioned conditions were the result of tenant misbehaviour, particularly property damage and non-payment of rent.

Immediately, after listening to a host of complaints and counter-complaints, the Beth Din set up a five-man Board of Arbitration (two selected by the landlord, two by the tenants, and one by the court) to investigate the charges. Meanwhile, the court received assurances from the landlord that the most hazardous conditions in their buildings would be remedied immediately.

In the hearings and negotiations that followed, complexities beyond the simple landlord-tenant dispute were brought into clearer focus. The time element was an important factor. If the case was taken to the regular courts, it might languish in docket for as long as a year awaiting appeal to a higher court. In addition, the role of Boston's Housing Inspection Division was illuminated, revealing understaffing in the face of voluminous complaints. Most striking, though, were the reactions of the tenants to the Beth Din, one of whom allegedly commented: "I've gone before whitey's court many times, but this is the first time I feel people are listening to me."


Harvard Crimson, supra note 73.

Lindeman, supra note 73, at 11:

The Board of Arbitration has now become a permanent body, meeting at least twice monthly. It consists of five members ... Its function is not only that of fact-finding but also to render judgment and impose sanctions. Moreover, its rulings are legally binding on both parties ... However, there is a Board of Review, to which either party may appeal any decision of the Board of Arbitration ....

Id.
After the Board of Arbitration sent its findings to the court, the court then found both sides at fault and decided that both parties must sign an agreement, acknowledging the rights and responsibilities of each.\textsuperscript{77} The landlord agreed to no longer evict a tenant summarily. In case of non-payment of rent, the tenant must be given 14 days’ notice in writing before any action can be taken. The landlord also agreed to provide janitorial service, to assure safety in the buildings by installing locks, and to provide heat, hot water, and periodic paint jobs.\textsuperscript{78}

The agreement required the tenants to assume responsibility for keeping their own apartments clean, and enjoined them from wilful damage to property.

Additionally, through the agreement, the Board of Arbitration can hold rents in escrow. Thus, the rent may be put toward emergency repairs when a health or safety hazard exists, which the landlord has failed to correct.

To have dealt with such a matter, which does not fall under the rubric of religious law, was quite a significant departure in the development of the rabbinical court in America. The Boston Herald-Traveller reported:

> It is the first time in U.S. history that a Rabbinical Court, normally concerned with interpretation of Jewish law, divorce cases and disputes between synagogues, has entered a social problem of such magnitude.\textsuperscript{79}

and another magazine article stated:

> This departure by the Bet(h) Din, which is accustomed to deal with divorce cases, family disputes and other differences which come under religious law, is unprecedented in recent Jewish history.\textsuperscript{80}

Bishop Anson Phelps Stocks, Jr., head of the Protestant Episcopal Diocese of Massachusetts, was asked by one journalist to comment on why the Protestant Church has not followed the example of the Beth Din.\textsuperscript{81}

The trouble with adapting their type of procedure to ours is that we have no such tradition. The Jewish religion is largely a religion of laws, religious, hereditary and social, and the idea of discipline is part of their genius.\textsuperscript{82}

Indeed, this is an important perspective. The court, by responding to the challenge, expanded the relevance of Jewish law to the urban crisis, and has shown its concern for an issue “that cries for solution”.\textsuperscript{83}

(f) Why Go to a Rabbinical Court?

Although there are a number of advantages in resorting to a rabbinical tribunal, only a small minority of persons do so.\textsuperscript{84} In problems of a religious

\textsuperscript{77} The agreement is on file with the author.

\textsuperscript{78} Wall Street Journal, supra note 73, at 1, col. 4.

\textsuperscript{79} The Boston Herald Traveler, supra note 73, at 40.

\textsuperscript{80} Lindeman, supra note 73, at 10.

\textsuperscript{81} Id. at 29.

\textsuperscript{82} Id. at 29.

\textsuperscript{83} Id. at 29.

\textsuperscript{84} The extreme position on this point has been articulated by Landman, supra note 27, at 103:

> Today, very few Jews would institute suit in a Jewish tribunal if, indeed, they are aware that such tribunals exist. A once powerful and significant institution in Jewish life has all but disappeared except in areas dealing solely with religious law.
nature, such as conversion, a Beth Din is the only avenue available; but for other types of problems where civil courts are available, there are still important reasons for going to a rabbinical court. Considerations of speed, finances, procedure, expertise, privacy, and social stigma are particularly relevant.

As was discussed in the Mindick case, the time element was an important factor contributing to the tenants’ decision to take the case to the Jewish tribunal in the first place. In the civil courts, there would have been a considerable waiting period before the case would have come to trial; and this was compounded by the potential delay of appeals. In light of the crowded dockets of the civil court system, this problem is magnified to considerable proportions. With respect to the tenant who must live in such squalor, any wait at all would seem inhumane and alienating. Expeditiousness, therefore, is an important factor.

Additionally, there is no charge for bringing a dispute to a rabbinical court, and the litigants present their own case to a panel, thus eliminating lawyer’s fees. Each disputant is allowed to choose one member to the tribunal, and, most often, he chooses the rabbi of his own congregation to represent him, for which no fee is asked. Sometimes, though, when a dispute involving large sums of money is settled, the advantaged litigant will contribute a small percentage of the spoils to some charitable organization. Many of the persons who would potentially use these courts are poor, so the minimal level of expenditure assures that access to justice is available to all, regardless of wealth.

In terms of another aspect, procedure, seeking a solution from the tribunal is again advantageous. While complicated and comprehensive procedures, characterizing civil courts, do have certain policy objectives in terms of the rationality of the adjudicative function, it can be argued that in many instances it is circuitous and counter-productive to the advancement of an expeditious and fair hearing. In contrast, the attention directed by the rabbinical tribunal to procedural issues (e.g., documentation, evidentiary problems, subject-matter/monetary jurisdiction, etc.) is minimal, merely requiring a simplistic process of filing and serving one’s intention to have the dispute heard. Also, an action can be brought before any tribunal, subject to agreement between the parties.

Often, the rabbi-judges are expert in the field specifically before the court, by virtue of their education (both secular and religious) and their intimate knowledge of the relations and affairs of the community. Also, because they are spiritual leaders, the litigants and the wider interested public will have that much more respect for the authority and legitimacy of the decision or outcome.

Consider, as well, that, in addition to the self-evident advantage of privacy in the regulation of personal affairs (which is so obviously lacking in the public-consciousness of the civil courts), there is the fact that one is being judged by one’s peers. The rabbi who solves your dispute one day, might be the person in whom you would confide your personal problems the next, and invite to your house for dinner the next.

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65 Interview, supra note 59.
Finally, an analysis of certain mechanics of conflict resolution illustrates yet another feature of the rabbinical court. After the litigants sign a submission agreement, the court will then ask whether they want “din” (strict law) or “pesharah” (compromise). This indicates a two-pronged approach to a dispute, dichotomizing the adjudicative, and the mediative-arbitrative, elements. The latter approach is almost exclusively used in disputes other than those which involve the interpretation of religious dogma. The proceedings begin with a hearing, wherein the litigants participate by presenting their preliminary proofs and arguments. As the hearings continue, and more evidence is presented, negotiations commence, with the rabbi acting as mediator. In this way, instead of issuing a decision, the court undertakes to persuade the parties to reach a voluntary settlement. As Professor Fuller wrote:

The morality of mediation lies in optimum settlement, a settlement in which each party gives up what he values less, in return for what he values more.86

In addition, the use of mediation in certain types of disputes may tend to “create or reinforce the norm that willingness to compromise is the proper behaviour in conflict situations”.87

One can anticipate the argument that, by undertaking mediation after the hearing but before the award, the arbitrator can use the gentle threat of a decision to encourage settlement; but it is suggested that this would be too narrow a view of the inputs going into the process. It is at this exact and crucial juncture that the “legal culture” criss-crosses with the conflict resolution mechanism, adding a new dimension to the arbitration proceedings. These proceedings take on this different perspective when viewed against the backdrop of the deeply ingrained religious norms and values which brought the litigants to the Jewish tribunal in the first place. Not only does the cultural element subsume those factors inducing dispute-settlement, but it also reinforces the legitimacy of that particular mode of resolution by lending to it the aura of religiosity.

Out of this combination of ingredients, a litigant never comes away from a decision bearing the stigma that he was “the loser”, and his opponent, “the victor”. When this is considered in the context of the fact that these persons may have a disagreement today, but will interact socially or commercially in the community tomorrow, it is reminiscent of the delicacy of the labour-management dispute, after whose settlement both sides must return to continue to work side by side. This points out the particularly relevant fact concerning the fundamental difference between the philosophies of the State legal system and the Jewish tribunal: the former is wont to look to the past, in an attempt to assess wrongs and develop some schemata for retributive redress, punishment, and/or deterrence; whereas the latter (i.e., the rabbinical court) tends to look to the future, in an attempt to re-align and reorder established relationships which have undergone a temporary dislocation. It is submitted that an agreed, mediated settlement, in this instance, is often better than one imposed on the parties.

86 L. Fuller, Collective Bargaining and the Arbitrator (1963), Wisc. L. Rev. 3 at 23.
Notwithstanding its religious orientation, the rabbinical court has been seen to be an institution to which a variety of disputes may be referred and settled. The role of the decision-maker/arbitrator is particularly important in this regard, because certain kinds of reactions seem to flow from particular types of resolution. For example, if the judge makes a decision, or adjudicates, there is always the liability that he will incur the displeasure, anxiety, or disrespect of the litigant against whose argument he has ruled. On the other hand, in a mediative-arbitrative situation, both parties can come away from the table with a certain amount of satisfaction that they did not lose, but rather submitted to a compromise.

The question which must inevitably arise in proceedings based on this type of model concerns the development and uniformity of (Judaic) law, and the prediction it affords (i.e., the “guidepost” function).

Particularly in the adjudication of strict law (“din”), but also in the arbitration of disputes (“pesharah”), the rabbi must set to paper his answers (“Responsa”) to the dispute. Some writers have presumed to analogize these writings to those of the common law tradition; but how does this process compare to the logically formal reasoning, or “legalism”, of the common law?

Lawrence Friedman has suggested that we can expect “legalism” to occur in any legal system “where there are decision-makers who (a) cannot avoid making decisions, (b) are expected to give reasons for their decisions, and (c) are confined to a more or less closed system of rules or concepts for the source of their ‘reasons’”. In the light of these boundaries, he would suggest that the role of decision-maker in some sacred law systems, such as the rabbinical tribunal, is such that the same strains toward legalism appear. In institutionalized religions, the decision-makers have great authority, but hardly ever is the charismatic authority of a leader so great, that his naked response would be sufficient, without justification in reasoning. Answers to disputes must be supported by reasons, and these reasons must be religious in nature, derived from the sacred and holy source-texts of traditional law:

... (T)he decision maker in the mature stages of a sacred law system is under pressure to give reasons for his decisions; otherwise he cannot show how his result derives from a sacred source. Yet sacredness is mediately or immediately necessary for the legitimacy of the result. Inevitably, the reasoning tends toward legalism.

Decisions of this sort can and do develop and alter the application of Judaic law. On the one hand, certain Rabbis came to be so highly respected that their opinion came to be revered as having the force of law. Out of this came the irresistible development of a doctrine similar to that of stare decisis.

89 Id. at 158 (emphasis added).
90 E.g., Rashi (Rabbi Shlomo Itzhaki); Rambam (Rabbi Moses ben Maimon, or Moses Maimonides); etc.
As was distinguished by Weber, highly traditional "empirical justice"\textsuperscript{91} is represented in the responses of the rabbis to the Talmud:

The more the religious character of the khadi or of a similarly situated judge is emphasized, the freer he is in his treatment of individual cases within the sphere which is not bound by sacred tradition.\textsuperscript{92}

This example, of legalistic reasoning, is but one level on which the legal sub-system can be examined as a microcosmic form of a legal system. Obviously, though, such a methodology has its limitations and disadvantages. One becomes especially conscious of the fact that one's conclusions are inevitably coloured by the variables compared, and indeed, by the very example (i.e., the rabbinical court) chosen. Nevertheless, a few statements will be ventured.

First, the law plays a significant role in the maintenance of the cultural value system. It does this in a number of ways. The very notion of "Jewish law" articulates a sense of cultural separateness. Each time one performs an activity in accord with (or in breach of) the law, one is reminded of his ethnicity. To the degree that these rules permeate the activities of members of the minority culture, they permit one to conduct all his activities in accordance with the legal rules of the culture, and, in this way, prevent or minimize leaks which would otherwise occur if a participant were constantly compelled to seek outside rule-guidance. In this way, the self-sufficiency of the system is enhanced.

It is interesting to observe in this connection the role played by laws whose tangible functions are no longer obvious. Why, for example, are Jewish divorce laws retained when a religious divorce no longer suffices to put in order a man's marital affairs? Why are kashruth laws (whose historical origin, it has been conjectured, was found in a desire to have people avoid eating food, like pork, which was at one time difficult to preserve) maintained at a time when food ordinarily marketed is safe for consumption? Three intangible functions are suggested:

(1) It is possible that the self-maintenance of a system prohibit it from forthrightly conceding that a law is no longer manifestly functional;

(2) It may be that certain laws have never had any function other than that of habituating obedience to law, and that they are promulgated only for the purpose of the reinforcement of legitimacy which is the result of obedience to a body of law;

(3) It is possible that a "functional-prerequisite" of a legal system is a completeness with respect to the life cycle, i.e., that the law have "something to say" (almost anything might suffice) about each of the important activities and events in the life of men.

\textsuperscript{91} Weber wrote that rational adjudication on the basis of rigorously formal legal concepts is to be contrasted with a type of adjudication which is guided primarily by sacred sanctions. One example is "empirical justice", which is formalistic, not by subsumption of the case under rational concepts, but by use of "analogies" and the reference to and interpretation of "precedents". See generally, Weber, Rational and Irrational Administration of Justice, Sociology of Law (Vilhelm Aubert ed., Baltimore: Penguin Books, 1969) 153.

\textsuperscript{92} Id. at 158-59.
The second important observation is that, in the main, rules are made in the contemplation that they will be kept, not that they will be broken:

The general issue was not what a man must do and what a man must not. It was, rather, what a man should do, and should not, if he desired to carry out the Torah in its every detail; it was a code of life, rather than one of law. These rules are intended to operate as "guideposts", by which men might formulate their expectations in such a way so as to avoid intra-system conflict. In this sense, the law is integrative. This, it is suggested, is perfectly consistent with the notion that laws might be formulated or applied in such a way as to enhance its integrative potential vis-à-vis the majority by operating to create a group or class of social outcasts within the confines of the minority culture. Such a group might indeed be highly functional.

Thirdly, there appears to be a need to soften, or "cushion", the impact of the law on its objects, while at the same time coercing acceptance. The rabbinate performs this function in a manner analogous to lawyers in the larger society. In the first place, they are often consulted in advance to determine what course should be adopted. In this way, they aid in forestalling deviance. As well, they assist in explaining to a potential offender the nature of the offence and its likely result. In this way, they "cool-out" an offender. Lastly, an offender, or a person seeking redress, is likely to have a voice both in the choosing of the court and in representing his case to that court. In this way, the decision-making process is legitimized through the inference that each interested party has had a say in determining the outcome.

It is obviously important in this connection to note that the prevalence of arbitration proceedings in commercial matters (there is also a provision for the application of "din", or strict law, if the parties desire) emphasizes the importance of the sub-system of its being able to resolve conflicts in such a way so as to preserve, rather than destroy, the cultural attachment. The rabbi-judges are frequently experts in the technical matters at hand, as well as, of course, in the laws to be applied. Of further importance in facilitating resort to this legal system is the fact that it is faster, cheaper, and procedurally less complex than the State courts.

The effect of all of this is to show a two-edged process. On the one side, the legal system hedges against the erosion of cultural values by providing a guidance system sufficiently complete to minimize contacts with outside value structures. On the other hand, the judicial process is integrative in nature, thus permitting (in theory) the internal resolution of internal conflicts, and thus minimizing the alienation from the minority culture its members would likely feel were they unable to gain satisfaction within its four walls during times of trouble.

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93 Roth, supra note 25, at 126.
94 Boaz Cohen has described the Jewish tribunal as an instrument of self-help; B. Cohen, Self-help in Jewish and Roman Law, Extract of the International Review of Ancient Laws, 3rd Series, Article II (1955):
For in the very nature of things, there were emergencies and exigencies that brooked no delay and for which recourse to the normal process of law would be too late to prevent a wrong, or would prove inadequate.
95 See generally, Why Go to a Rabbinical Court?, supra p. 351.
One conclusion that might be advanced is this: the law is something intimately concerned with the culture in which lay its seeds and where the unbuilding of society has decimated any widespread sense of shared value. The role remaining for State-law is to encourage the development of legal sub-systems which are solidly grounded in value structures sufficiently recommended to sub-system participants, to permit the legal sub-system to function in its integrating-reinforcing role. State law ought to maintain the cautious apprehension that intrusion, beyond the degree which is necessary to minimize inter-sub-system conflict, may dilute that self-supporting function.