Jewish Law: The Quiet Revolution

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We use the word "revolution" to describe political upheavals and major transformations in society and culture: the French Revolution, the Industrial Revolution, the Digital Revolution, the Sexual Revolution – the list goes on. And lawyers speak of "legal revolutions," fundamental changes in the established legal order that are not justified or warranted by the preexisting law.[1] We think that the word "revolution" is a proper descriptor for the shift in rabbinic and halakhic thinking that made it possible for Jewish law to function *baz'man hazeh*, "nowadays," in a world devoid of the Temple and (more significantly for this subject) the Sanhedrin. We call it a "quiet revolution" because, although it took place solely in the realm of theory and involved no violence or massive displacement, it was an act of audacity (even *chutzpah*) that on its face seems totally unauthorized by any precedents of provisions of the existing law. A community of rabbis and their successors simply assumed power that according to theory did not belong to them, on the basis of what they thought to be sheer necessity. And unlike most matters of *halakhah*, there's almost no *maḥloket* (dispute) over this one.

The revolution of which we speak is contained in a two-word Aramaic formula: שליחותייהו עבדינן (*sh'liḥutaiho avdinan*), "we act as their agents."

The Preexisting Law. Let's begin with the state of Jewish law prior to the revolution, rooted in take a look at a foundational Torah verse.

Deuteronomy 16:18

שֹׁפְטִים וְשֹׁטְרִים תִּתֶּן־לְךָ בְּכָל־שְׁעָרֶיךָ...

> You shall appoint judges and officers in all your gates…

The verse conveys the Torah's conception of "justice" as not only a matter of substance (you must reach the right and just results) but as a matter of procedure: it's a basic requirement of the Torah that justice is a matter of *law,* of legal process, accomplished by means of *courts.*[2] If we want justice, it matters greatly that we appoint judges who are truly qualified to "say what the law is."[3]

A judge is determined to be qualified through the process called סמיכה (*s'mikhah*), "ordination," whereby an ordained judge confers the title "rabbi" upon a student, along with the full range of judicial powers. As Rambam puts it (*Hil. Sanhedrin* 4:1-2):

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[1] On the subject, see M. S. Green, "Legal Revolutions," *North Carolina Law Review* 83 (2005), pp. 331-409.
[2] Ramban to Deut. 16:18 derives this point from Ex. 22:8 and 21:22.
[3] Rashi to Deut. 16:18 defines שופטים as "judges who determine and apply the law" (דיינים הפוסקים את הדין).

אחד בית דין הגדול ואחד סנהדרין קטנה או בית דין של שלשה צריך שיהיה אחד מהן סמוך מפי הסמוך, ומשה רבינו סמך יהושע ביד שנאמר ויסמוך את ידיו עליו ויצוהו, וכן השבעים זקנים משה רבינו סמכם ושרתה עליהן שכינה, ואותן הזקנים סמכו לאחרים ואחרים לאחרים ונמצאו הסמוכין איש מפי איש עד בית דינו של יהושע ועד בית דינו של משה רבינו...

> Any court – whether the *beit din hagadol*, the smaller "Sanhedrin" of 23 judges, or a three-judge *beit din* – must include one member who is ordained by another ordained judge. Moses our rabbi ordained Joshua through the laying on of hands, as it is said (Numbers 23:23), "(Moses) laid his hands upon (Joshua) and instructed him." In the same way, Moses ordained the seventy elders, and the *Sh'khinah* rested upon them. And those elders ordained others, and those others ordained others, so that the chain of judges ordained by ordained judges reaches back to the *beit din* of Joshua and to the *beit din* of Moses our rabbi.

וכיצד היא הסמיכה לדורות לא שיסמכו ידיהן על ראש הזקן אלא שקורין לו רבי ואומרים לו הרי את סמוך ויש לך רשות לדון אפילו דיני קנסות.

> How is *s'mikhah* performed in all subsequent generations? The ordaining judges do not lay their hands upon the head of the elder [i.e., the candidate for ordination] but rather call him by the title "Rabbi" and say to him: "You are now ordained, and you have the authority to judge all matters, including the law of fines."

In classical halakhic thought, *all* legal matters are to be adjudicated by *s'mukhim*, ordained judges, rather than by lay judges (הדיוטות, *hedyotot*).

<u>Exodus 21:1</u>

וְאֵלֶּה הַמִּשְׁפָּטִים אֲשֶׁר תָּשִׂים לִפְנֵיהֶם׃

> These[4] are the laws you shall set before them.

<u>*B. Gitin* 88b</u>

תניא, היה ר״ט אומר׃ כל מקום שאתה מוצא אגוריאות של עובדי כוכבים, אף על פי שדיניהם כדיני ישראל, אי אתה רשאי להיזקק להם, שנאמר׃ ״ואלה המשפטים אשר תשים לפניהם״. ״לפניהם״ - ולא לפני גויים. דבר אחר׃ ״לפניהם״ - ולא לפני הדיוטות.

> A *baraita* - Rabbi Tarfon used to say: wherever you find non-Jewish[5] law courts,[6] even when their laws are the same as Jewish law, you are not permitted to resort to them, as it is said (Exodus 21:1): "These are the laws you shall set before them." "Before them," that is, not before Gentile courts.
> Another interpretation: "before them," and not before lay judges.

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[4] That is, the ones mentioned in *parashat Mishpatim* (Ex. 21:1-24:18), which cover torts, obligations, criminal law, ritual matters, in short, the entire spectrum of the *halakhah*.
[5] The translation follows the manuscripts, all of which read ״גויים״ rather than ״עובדי כוכבים״.
[6] The Greek ἀγορά, "marketplace," where law courts would meet.

Ordination, therefore, is synonymous with the judicial function; as far as the Torah is concerned, there are no real "judges" who are not *ordained* judges, whose knowledge of the law is attested by their participation in the ritual of *s'mikhah.*

The requirement that judges be *s'mukhim* (סמוכים, ordained) also makes at least two essential theological points. First, it links those who dispense justice in the community to the chain that stretches back to Moses and Joshua, so that the ordained judge embodies the status and the legal authority of the Biblical *shoftim.* Second, it underscores the centrality of Eretz Yisrael in the administration of Jewish law:

Rambam, *Hil. Sanhedrin* 4:4

אין קרוי אלהים אלא בית דין שנסמך בארץ ישראל בלבד והם האנשים החכמים הראויין לדון שבדקו אותן בית דין של ארץ ישראל ומינו אותם וסמכו אותן.

> Only a *beit din* ordained (*nismakh*) in Eretz Yisrael qualifies for the title "*elohim*."[7] They are the scholars who are fit to act as judges; they have been examined by the *beit din* of Eretz Yisrael, who appoint them and ordain (*samkhu*) them.

B. Sanhedrin 14a

אמר רבי יהושע בן לוי: אין סמיכה בחוצה לארץ.
מאי אין סמיכה? אילימא דלא דייני דיני קנסות כלל בחוצה לארץ - והא תנן: סנהדרין נוהגת בין בארץ ובין בחוצה לארץ!
אלא: דלא סמכינן בחוצה לארץ.

> R. Y'hoshua b. Levi said: there is no *s'mikhah* outside the land of Israel.
> What does he mean by "there is no *s'mikhah*"? If you mean to say that the judges outside the land of Israel have no authority to adjudicate cases of fines,[8] that's contradicted by the Mishnah (*M. Sanhedrin* 1:20): "the Sanhedrin functions within the land of Israel *and* outside if it."
> Rather, he means that we do not *confer* ordination outside the land of Israel.[9]

While *s'mukhim* can sit as judges in Diaspora communities, they can receive their commission to do so *only* from the *beit din* of Eretz Yisrael and only *in* Eretz Yisrael. The authority of Jewish law is thus rooted in the soil of the Jewish land. Perhaps that is what is meant by the verse (Isaiah 2:3 and Micah 4:2) כִּי מִצִּיּוֹן תֵּצֵא תוֹרָה וּדְבַר־ה' מִירוּשָׁלָם, "for the Torah shall go forth from Zion, God's word from Jerusalem."

While this system is certainly coherent as a matter of theory, it obviously doesn't square with historical fact. Ever since the Babylonian Exile the majority of Jews have lived *b'ḥutz la'aretz*,

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[7] The word *elohim* appears several times in *parashat Mishpatim* (Exodus 21:6; 22:7; 22:8; 22:27) in a judicial context and is understood by Jewish tradition as "judges" or a *beit din.* See Rashi to each of those verses. And see *Tur, Ḥoshen Mishpat* 1: *elohim* are required for judging all the legal matters discussed in that *parashah.*
[8] As we'll see, adjudication of fines (קנסות) is restricted to ordained judges; lay judges have no authority over this area of the law.
[9] See Rambam, *Hil. Sanhedrin* 4:6.

outside of Eretz Yisrael. These communities in the *golah* developed courts to manage their varied and complex legal affairs, but the preponderant majority of those who served as judges in Babylonia and elsewhere did not possess *s'mikhah*.[10] If *all* legal matters must be adjudicated by *s'mukhim*, how did these lay judges derive their judicial authority? Moreover, we know that the ritual of *s'mikhah* eventually disappeared and has been inoperative for many centuries.[11] Again, if *s'mikhah* is a fundamental requirement for judicial authority, how can any Jewish court operate *baz'man hazeh,* "today," in a post-*s'mikhah* world? One answer, of course, would be for the Jews simply to recognize the authority of lay judges as a practical necessity. But even if unavoidable, that approach would be unacceptable on religious and halakhic grounds. If the Jews are a people of Torah, and if "medieval Judaism saw itself as the direct and legitimate continuation of the Judaism of antiquity,"[12] today's Jewish legal system must also be *legitimate*, that is, valid according to the Torah even in the absence of the institution of *s'mikhah.*

Clearly, non-ordained judges needed a theory to justify their claim to that legitimacy. They constructed that theory upon the law of agency (שליחות, *sh'liḥut*), which empowers individuals to grant power of attorney to others to act as their legal representatives. Thus the phrase שליחותייהו עבדינן, "we act as their agents."

<u>*B. Gitin* 88b</u>

אביי אשכחיה לרב יוסף דיתיב וקא מעשה אגיטי, א״ל: והא אנן הדיוטות אנן!...
א״ל: אנן שליחותייהו קא עבדינן, מידי דהוה אהודאות והלואות.
אי הכי, גזילות וחבלות נמי!
כי עבדינן שליחותייהו - במילתא דשכיחא, במילתא דלא שכיחא - לא עבדינן שליחותייהו.

> Abaye found Rav Yosef presiding in court and coercing (certain husbands) to issue divorces to their wives. He said to him: "On what authority do you do this? We are only lay judges!"[13] …
> Rav Yosef replied: "we act (in this matter) as the agents of the ordained judges, just as we do on matters of admissions and loans."[14]
> In that case, we should also (act as their agents and) adjudicate cases of robbery and bodily injury!
> We act as their agents only on matters that occur frequently, but we do not act as their agents on matters that occur infrequently.

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[10] Notice that most of the Babylonia Amoraim do not possess the title "Rabbi." See below in the discussion of *B. Gitin* 88b.

[11] It's unclear exactly when the ritual of *s'mikhah* ceased. Rambam, at any rate, speaks of it in the past tense already in the 12th century. While today's rabbis are "ordained" upon the completion of their studies, their *s'mikhah* is acknowledged to be a symbolic representation of the ancient practice of *s'mikhah* which has disappeared. Today's "*s'mukhim*" do not possess the full judicial powers of the ordinees of old.

[12] Yaakov Katz, "סמיכה ודמכות רבנית בימי הביניים", in **הלכה וקבלה** (Jerusalem: Magnes, 1984), p. 201. This assertion of theological and legal continuity, Katz notes, was essential to rebut Christian claims that the disappearance of such institutions as the Temple and the Sanhedrin prove that the Church has replaced the Jews as God's covenant community.

[13] What follows (and is omitted here) is the *baraita* of Rabbi Tarfon, p. 2, above.

[14] *B. Sanhedrin* 2b, and Rashi *ad loc., hoda'ot v'halva'ot*. Both of these categories have to do with loans. "Admissions" refers to the borrower's admission that a debt in fact exists; "loans" refers to testimony concerning the validity of a debt when the putative borrower denies its existence.

Rav Yosef is a Babylonian Amora of the third generation. He does not possess *s'mikhah*, which is why his title is the honorific "Rav" rather than "Rabbi." This means, as his student Abaye suggests, he lacks the authority to adjudicate cases such as this. Rav Yosef responds that while that is true according to the original *halakhah*, we now enjoy that authority: the ordained judges of Eretz Yisrael have commissioned us to act as their agents, deputizing us to adjudicate this area of the law, just as we are empowered to adjudicate "matters of admissions and loans." The implication is that here, as well, the *s'mukhim* of Eretz Yisrael wanted to ensure that the Babylonian courts, though composed of *hedyotot,* were empowered to compel husbands to obey decrees for divorce.[15]

This grant of agency is not unlimited. The passage notes that cases involving robbery and bodily injury lie outside the competence of non-ordained judges. The difference, we are told, is that *hedyotot* have adjudicatory power only over matters deemed "frequent." (It's nice to think that such matters were considered "infrequent" in those days!) In *B. Bava Kama* 84b, the Talmud expands upon this limitation: the ordained judges also did not grant us agency to adjudicate fines (קנסות). Moreover:

כי עבדינן שליחותייהו - במילתא דשכיחא ואית ביה חסרון כיס, אבל מילתא דשכיחא ולית ביה חסרון כיס, אי נמי מילתא דלא שכיחא ואית ביה חסרון כיס - לא עבדינן שליחותייהו

> We act as their agents on matters that are frequent and that involve monetary loss.
> But on matters that are frequent but do not involve monetary loss, or on matters that are not frequent but do involve monetary loss – we do not act as their agents.

What does this mean specifically? The *Shulḥan Arukh* (*Ḥoshen Mishpat* 1:1) summarizes the details.

בזמן הזה, דנים הדיינים דיני הודאות והלוואות (וכתובות אשה וירושות ומתנות ומזיק ממון חבירו, שהם הדברים המצויים תמיד ויש בהם חסרון כיס;
אבל דברים שאינם מצויים, אף על פי שיש בהם חסרון כיס, כגון בהמה שחבלה בחברתה, או דברים שאין בהם חסרון כיס אף על פי שהם מצויים, כגון תשלומי כפל, וכן כל הקנסות שקנסו חכמים, כתוקע לחבירו (פי' שתוקע בקול באזנו ומבעיתו), וכסוטר את חבירו (פי' מכה בידו על הלחי), וכן כל המשלם יותר ממה שהזיק, או שמשלם חצי נזק, אין דנין אותו אלא מומחים הסמוכים בארץ ישראל.

> In the present era [*i.e.,* following the disappearance of *s'mikhah*], judges may adjudicate matters of admissions and loans, *k'tubot*, inheritance, gifts, and monetary damages, all of which are frequent occurrences and involve monetary loss;
> However, matters that are not frequent though they involve monetary loss, such as an animal that injures another animal, or matters that do not involve monetary loss even though they are frequent, such as double payment,[16] as well as fines levied by the Sages, like the fine for shouting into the ear of another or slapping the face of another, and any matter for which one is required to pay more than the amount of the damage one has

[15] See Deut. 24:1: Biblical law empowers the husband to issue a divorce, while the wife enjoys no such power. She may, however, ask a *beit din* to require her husband to divorce her. Should he refuse, the court is granted a range of enforcement powers, including physical coercion. That's what Rav Yosef is doing in *B. Gittin* 88b.
[16] See Ex. 22:3.

caused or to pay half-damages – all such matters must be adjudicated by experts (*mumḥim*) ordained in Eretz Yisrael.

Yes, there are limitations. There is still a big difference between ordained and non-ordained judges. Rav Yosef and his colleagues are *hedyotot,* not "*Elohim*"; they can't assume judicial powers equal to those wielded by judges who possess *s'mikhah*. Still, it seems they have been granted authority by those *s'mukhim* to adjudicate a wide range of legal matters. The purpose behind this is a practical one, it's indicated in Rav Yosef's statement that the Babylonian rabbis already act as agents of the ordained judges of Eretz Yisrael "on matters of admissions and loans." They do so, as we learn in *B. Sanhedrin* 3a, שלא תנעול דלת בפני לווין, "so as not to bar the door to borrowers," i.e., should we insist upon adjudication before *s'mukhim* in these cases, potential lenders may refrain from lending out of concern that, should disputes arise, they won't be able to find ordained judges to hear their claims.[17] In other words, *hedyotot* are granted certain judicial powers that the Torah reserves to *s'mukhim* because the community in Babylonia must have a functioning legal system. Without judges who can adjudicate "matters that are frequent and that involve monetary loss," commercial and societal relations will break down. And unless non-ordained judges like Rav Yosef are able to enforce decrees of divorce – a power restricted in theory to *s'mukhim* – great injustice will be done to Babylonian Jewish women whose husbands refuse the demand of the *beit din*.

Now it's fine for Rav Yosef to claim שליחותייהו עבדינן, "we act as their agents," for in his time there *were* ordained judges in Eretz Yisrael who could make that appointment. But notice that the 16th-century author of the *Shulḥan Arukh* declares that this authority is wielded by judges "in the present era," during *his* time and our own, when *s'mikhah* has not been practiced for many centuries. Simply put, there's no longer a "they" who can grant "their" authority to non-ordained judges; how then can non-ordained judges *today* legitimately claim to function as the agents of the *s'mukhim*? Not to worry. The *Shulḥan Arukh* is relying here upon a second theory (or, better, a corollary to the original theory) of *sh'liḥut*:[18]

<u>*Tosafot, Gitin* 88b, *s.v. b'milta*</u>

וא"ת היכי עבדינן שליחותייהו? והא עכשיו אין מומחין בא"י, ומי יתן לנו רשות?
וי"ל דשליחות דקמאי עבדינן.

Kashya: how can we act as their agents? After all, today[19] there are no ordained judges in Eretz Yisrael, so who can grant us the authority?
Teirutz: we act as the agents of the original ordained judges.

That is to say, the *s'mukhim* who originally granted power of attorney to the Diaspora sages meant for that commission to last in perpetuity. The agency (*sh'liḥut*) that they granted exists through all time, so that today's judges (as well as those in the days of the Babylonian

[17] See Rashi, *Sanhedrin* 3a, *s.v. shelo tin`ol delet*.
[18] See also *Tur, Ḥoshen Mishpat* 1.
[19] The authors of the Tosafot flourished in northern and central Europe during the 12th-14th centuries.

Amora'im) can claim legitimacy to act as their agents, administering law and dispensing justice on matters that are essential to a functioning, well-ordered community.[20]

A Legal Revolution. "Revolution," we should point out, is not identical to "change." Halakhic *change* is a common occurrence in the Rabbinic period. The Rabbis made numerous significant alterations to the existing state of the law by way of *takkanah*, legislative enactment. And since *takkanah* is a legitimate power of the Rabbis, those changes themselves are halakhicly legitimate; they are *not* "revolutionary." We call *this* change a revolution because we find no evidence in the Mishnah or any other tannaitic text that the ordained Rabbis of Eretz Yisrael ever adopted a *takkanah* deputizing Diaspora scholars to act in their stead.[21] The only textual evidence we find is the Aramaic statement of Rav Yosef in *B. Gitin* 88b: שליחותייהו עבדינן, "we are their agents,"[22] and there is no equivalent statement in Hebrew *or* Aramaic in any text produced by the Palestinain Jewish community. It's possible, of course, that Rav Yosef is referring here to an actual *takkanah*, the record of which is now lost to us. It's also possible, though, that he and his Babylonian colleagues created this doctrine as an *ex post facto* theoretical justification (notice it comes that in response to Abaye's objection) for a practice in which they have been engaged for a long time.

We think this second possibility is the more plausible explanation: the Babylonian sages – *hedyotot* all - appropriated a wide range of legal powers for themselves in the absence of any formal appointment of agency (שטר הרשאה) from their ordained colleagues in Eretz Yisrael. They did so simply because they had no choice. The Talmud (*B. Sanhedrin* 3a) tells us why: the lack of a functioning legal system will "bar the door to borrowers" and destroy the economic and commercial life of the community. *No* community can function without judges; no *justice* can be done without judges. Therefore, though classical *halakhah* restricts judicial power to *s'mukhim,* the non-ordained Babylonian sages arrogated that power to themselves. This was an act of legal revolution because there is no legal precedent for such arrogation; the system established in the Torah and classic halakhic theory presumes that "these laws" (Exodus 21:1) will be brought before ordained judges.

But law resists revolution; arrogation of power is by its nature illegal, an act that transgresses the law. Along with the power they knew was necessary, the Babylonians also wanted *legitimacy*. They wanted to claim that their revolution was no revolution at all, that it was fully authorized by the existing law. So they created a narrative of *sh'liḥut*, the claim that the ordained judges of Eretz Yisrael appointed them to act in their stead. Subsequent rabbinical generations simply pushed that narrative to its next logical stage: שליחותייהו דקמאי עבדינן, "we act as the agents of the ordained judges of old." And by placing *limits* upon their arrogation ("we act as their agents

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[20] It's interesting that these matters include *giyur*: today's judges have the power to accept non-Jews for conversion – again, a power originally reserved to ordained judges – "so as not to bar the door to proselytes"; *Tosafot, Y'vamot* 46b, *s.v. mishpat k'tiv beh*.

[21] At least one recent authority does claim that the Rabbis (i.e., the ordained judges of Eretz Yisrael) made such an enactment in our case מפני תיקון עולם, "for the repair of the world." See *Arukh Hashulḥan, Ḥoshen Mishpat* 1:1. Unfortunately, he offers no evidence for that claim. His explanation is more an *ex post facto* justification for the fact that the Babylonian rabbis seized legal authority for themselves; see below in the text.

[22] The statement also appears, of course, in *B. Bava Kama* 84b, but there it's brought up by the *s'tam Talmud*, the product of editors who come later than the Amoraim named in its discussion.

only in matters that are frequent occurrences and that involve monetary loss"[23]), these *hedyotot* further disguised the revolutionary nature of their act behind a pledge of continuing allegiance to the legal system established in the Torah, in which supreme judicial power rests solely in the hands of the *s'mukhim,* the judges who stand in the line that extends all the way back to Moses and Joshua.

The fact that we can see through that disguise should not lessen our admiration for their accomplishment. When the presumptions underlying the Torah's system of law gave way before the tides of history, they created a new set of presumptions, a theory to assert that their revolutionary action, clearly justified by necessity, was in fact *legitimate,* a "revolution" fully consistent and continuous with the existing system. In doing so they allowed the *halakhah* to survive and to flourish under conditions radically different from those that prevailed in Eretz Yisrael in ancient times.

Might this be an early example of progressive *halakhah*? Discuss!

[23] Along with (as we've seen) such essential matters as conversion (note 19, above) and the coercion of divorce (*B. Gittin* 88b).