**YESHIVAT HAR ETZION**

**ISRAEL KOSCHITZKY VIRTUAL BEIT MIDRASH (VBM)**

**\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\***

**TALMUDIC METHODOLOGY**

**By Rav Moshe Taragin**

**For easy printing, go to**

[www.vbm-torah.org/archive/metho74/15metho.htm](http://www.vbm-torah.org/archive/metho74/15metho.htm)

**Shiur #15: Assembling a *Zeh Borer* Court**

Typically, we assume that courts are institutionalized bodies whose members are appointed by higher socio-juridical organizations. We might have assumed that a halakhic court is appointed by members of the Sanhedrin, as implied by the first *mishna* in *Sanhedrin* (2a). However, the first *mishna* in the third *perek* of *Sanhedrin* (23a) presents a scenario of “*zeh borer*,” in which each litigant nominates a judge and the two selected judges themselves nominate a third. The *mishna* cites a *machloket* between R. Meir and the *Chakhamim* as to the details of this process, but each acknowledge the fundamental method. Is this court – appointed jointly by the litigants – similar in function to a standard, institutionalized court? Or does this court work more as arbitration?

A subsequent *mishna* in the third *perek* (24a) addresses a situation which presumably works through the arbitration model. The two parties may agree to abide by the rulings of a relative or others who are legally disqualified from serving as judges. Presumably, this appointed body does not possess the legal authority to function as a halakhic court, since its members are halakhically invalid as judges. Apparently, the two litigants have selected an “autonomous” group of people to extra-legally arbitrate their dispute. Is this the same dynamic which drives the *zeh borer* scenario as well in the first *mishna* of the third perek? Perhaps only INSTITUTIONALIZED courts function as actual *batei din*, whereas jointly appointed courts are a form of extra-legal arbitration. According to this perspective, while the litigants ask the court to adhere to classic *beit din* guidelines – to process witnesses, analyze the claim, and issue a verdict, with the majority opinion adopted – at its heart, this “selected” court functions very differently from a classic *beit din*.

This question about the essence of a *zeh borer* court may be at the heart of an interesting question regarding the correct *girsa* (version of the text) of the *gemara*. The *girsa* that appears in our texts of the *gemara* prefaces the process of selecting the court with the prologue “*Dinei mamanot* *be-shlosha*” (“a civil court requires three judges”). Thus, the *mishna* that describes the selection process in the case of a *zeh borer* court FIRST repeats the general rule that classic *mamanot* cases require three judges. By repeating this rule (and essentially restating the first line of the opening *mishna* of *Sanhedrin*), the *mishna* may be emphasizing that a SELECTED court is similar to an INSTITUTIONALIZED court and falls under the general category of *dinei mamanot be-shlosha*. In contrast, the Rosh cites a *girsa* that omits this preface from the description of a *zeh borer* court. Does this omission reflect that divergence of a *zeh borer* court from the classic parameters of a *beit* *din*?

The first indication that a *zeh borer* setup works as an extra-legal apparatus can be discerned in two interesting and possibly related comments of the Rema (*Choshen Mishpat* 13:1). If the two selected judges agree to proceed without a third member, they can do so. Typically, the three-person makeup of a court is a fundamental prerequisite. Although the *gemara* often cites Shmuel’s opinion that a two person court can legally preside (see, for example, *Sanhedrin* 3a and *Ketuvot* 21b), most *Rishonim* (with the exception of the Behag) reject this position and require three judges. In fact, the *gemara* in *Sanhedrin* (3b) derives this requirement from the *pesukim* that describe the authority of a *beit din*. If a *zeh borer* court functions by ARBITRATION, it would certainly not be subject to the three person requirement. However, if a *zeh borer* court is identical in its function to a CLASSIC court, we would be forced to reinvestigate the three person requirement to determine why it does not apply to a *zeh borer* court; evidently, the rule is not as PRIMARY as earlier suggested.

A possibly related halakha is stated by the Rema regarding a *zeh borer* court of MORE than three. If the two litigants jointly request a five person court (with two personal nominees each and a jointly appointed fifth judge), they may create that body with the hope of reaching a superior verdict. This may also indicate the autonomous functioning of a *zeh borer* court; there is no precedent for institutionalized courts of more than three judges for common monetary disputes.

Although the allowance of a five-person *zeh borer* court logically invites this view that it works as arbitration, (and that logic is consistent with the Rema allowing a two-person *zeh borer* court), the source of the halakha may indicate that a *zeh borer* court can be augmented even if it functions as a classic court. In his comments on the first *perek* of *Devarim*, the Ramban develops a notion that the litigants have the right (and even the responsibility) to build as CAPABLE a court as possible. The Ramban derives this from the *pasuk* in *Parashat Shoftim* which asserts, “*Tzedek tzedek tirdof*,” implying the value of pursuing an accurate verdict. One example that the Ramban cites is the ability of the parties to force the relocation of the litigation to a “superior” court (known as *Beit Ha-Va’ad*; see *Sanhedrin* 31b). A second manifestation allows the parties to request an augmented *beit din* composed of more than three judges. Since the Ramban derives this right from a *pasuk* and compares it to other legal rights (relocation to a superior *beit din*), it appears that the Ramban views this right as INTEGRAL to CLASSIC *beit din* procedure. At a purely technical level, institutionalized courts do not allow augmentation because their bodies are PRESET. However, when the two parties select the court, they can personally choose the number of judges. Nevertheless, this “chosen” court functions identically to a classic institutionalized court.

An interesting comment of Rashi, though, may indicate that a *zeh borer* court functions differently from classic courts. The *gemara* (23a) describes the advantage of personally selected courts – since the judges are personally (and jointly) selected, the verdict will be more accurate. The simple reading suggests that personal nomination assures a balanced court, which in turn will potentially yield an accurate verdict. Rashi (s.v. *yeitzei*) comments that each nominated judge will pursue the interests of his litigant/nominator. Since each nominee pursues the personal agenda of his nominator, their efforts will be offset/balanced and moderated by the third, “impartial” judge, who was not nominated by either litigant. Taken literally, Rashi implies that a judge in a *zeh* *borer* court is allowed – and even obligated – to work on behalf of his nominator’s victory.

The Rosh is aghast at this reading, claiming that “empty” minds took this Rashi literally and actually implemented this policy, choosing judges who would do their own personal bidding even through deceitful and unfair tactics. The Rosh rejects this notion, instead reinterpreting Rashi’s comments. However, many indeed take Rashi’s comment quite literally. The *zeh* *borer* judges – at least according to Rashi – resemble lawyers, NOT judges. Perhaps Rashi indeed maintained that *zeh borer* is not a classic *beit din* process, but is instead an incorporated form of arbitration. If this is true, then without question the panelists are not judges as much as legal representatives of the respective parties.

A third indicator that a *zeh borer* court may function differently from a classic *beit din* is yielded by an interesting comment of the Rif (cited by the Ramban in his comments to *Bava Metzia* 20a). At which point are the litigants no longer able to reverse their nominations? Presumably, if they are nominating actual judges, their selections should be binding. In fact, the prevalent opinion maintains that once they legalize their selection in a contract (known as a *shetar* *beirurin*), they can no longer rescind their choice. Some claim that they can reverse their decision up until the “court” begins it proceedings by processing the claims. Either way, their selection of judges is binding. The Rif, in contrast, claims that the litigants can reverse their claims UNTIL the verdict is rendered. The Ramban is surprised by this comment and therefore reinterprets it. If a *zeh borer* court functions as a classic *beit din* whose judges have been personally selected, their roles should be binding. Taken at face value, the Rif implies that a *zeh* borer court IS NOT a classic court, but rather operates as an autonomous arbitration body. In fact, a nominated body of invalid judges (alluded to above and described by the *mishna*, 24a), which clearly functions in a extra-legal capacity, may not be binding until the verdict is issued (depending on different interpretations of the *mishna*). If a *zeh borer* court of “legal” jurors is also non-binding until *gemar din*, it would be highly suggestive of the fact that this body does not function in the classic *beit din* model.

Highlighting the fact that *zeh borer* may represent an entirely different track is an interesting comment of the Tur in explaining a difficult Rambam (see Tur, *Choshen Mishpat* 13). Can a *zeh borer* nominated judge “switch course” and impose himself as an institutionalized judge? A *yachid mumcheh* (a single individual who is renowned for his halakhic knowledge and has received formal ordination) may IMPOSE himself as a court and enforce his rulings; he can serve as one model of an institutionalized court (see *Sanhedrin* 5a). However, if he has been SELECTED by one party as part of the *zeh borer* assembly, he may not serve in this capacity, but must cooperate with the other selected judge (who is of lesser caliber than himself), jointly select a third judge and process the verdict. As the Tur explains (at least in defense of the Rambam), once the *zeh borer* process has begun, the selected judges cannot switch to an institutionalized track of adjudication. If SELECTING jurors through *zeh borer* were just a different method of achieving a court similar to institutionalized courts, why can’t a selected judge decide to act as an institutionalized one? If, however, *zeh borer* constitutes extra-legal arbitration, we can easily understand why a panelist selected for this arbitration cannot act as a *beit din*!

This question as to the functioning as a *zeh borer* panel may impact the scope of *zeh borer*. When is *zeh borer* “allowed,” as opposed to institutionalized courts? Two very different models emerge from the *Rishonim* – a minimalist one and a maximalist one. The Ramban takes a maximalist approach. *Zeh borer* is clearly the preferred model! Institutionalized courts are only NECESSARY for recalcitrant litigants who refuse to cooperate in a *zeh borer* process. By contrast, the Rambam and Meiri (in their respective comments to the first *mishna* of the third *perek*) take a minimalist approach. Any court of ordained judges (*mumchin*) which has been appointed in *Eretz Yisrael* can IMPOSE their authority and subpoena the litigants to appear involuntarily. In the absence of this option, *zeh* *borer* is necessary as an alternate backup.

Clearly, it would have been easier for the Ramban and Meiri to view *zeh borer* as extra-legal arbitration. The PREFERRED and typical route is institutionalized courts; in situation in which these courts are not operative, a backup plan of arbitration – *zeh borer* – is necessary to prevent chaos. However, the Ramban could not view *zeh borer* in this light because most cases are in fact processed through *zeh borer* courts. Only “sticky” situations involving non-cooperative litigants must be resolved through the imposed authority of institutionalized courts. If *zeh borer* comprises most adjudicated cases, it is more likely that it entails a mainstream form of *beit din* and not arbitration.