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THE ROLE OF THE ELDERS IN THE LAWS OF DEUTERONOMY

JEFFREY H. TIGAY
UNIVERSITY OF PENNSYLVANIA

It is a great pleasure for me to take part in this volume honoring Barry Eichler. For more than forty years, most of them when we were colleagues at Penn, I have found in him a dear friend, a wise counselor and teacher, and a model of rigorous and penetrating scholarship. Among the many subjects of his interest, at the core lies the study of biblical law in its ancient Near Eastern context, and I offer the following study as a token of my affection and admiration.

In addition to cases that the laws of Deuteronomy assign to professional, appointed judges for adjudication,¹ several others are assigned for some purpose to the elders. These are the cases of accidental homicide (Deut 19:12), the insubordinate son (21:19–20), the accused bride (22:13–21), and refusal to perform levirate marriage (25:5–10). It is commonly assumed that in these cases the elders serve as judges,² and this division of labor between the elders and professional judges has prompted many attempts at explanation revolving around the question of whether the two groups functioned simultaneously in the same judicial system, handling different categories of cases, or whether these cases reflect different strata in the development of biblical law, with the elders judging in the traditional tribal society whereas professional judges are a later development from the period of the monarchy.³

¹ Deut 17:9, 12; 19:17–18; and 25:1–2. By “professional” judges I mean simply those called *šōpēṭîm*, whose appointment is commanded in Deut 16:18, without implying that they were paid or were full-time judges.

² See already m. Yebamot 12:1; Sanhedrin 8:4; Makkot 2:6; b. Ketubbot 46a; Maimonides, *Hilkhot Roṣeah* 5:7; Mamrim 7:7; Naarah Betulah 3:6; Yibbum 4:1. For moderns see, e.g., Driver, *A Critical and Exegetical Commentary on Deuteronomy*, 233; Hoffmann, *Sefer Devarim*, 374; Weinfeld, *Deuteronomy and the Deuteronomistic School*, 234; Phillips, *Deuteronomy*, 115; Mayes, *Deuteronomy*, 304 and 310; Craigie, *The Book of Deuteronomy*, 268. For more recent scholarship see the sources cited in the works listed in the next note.

³ The bibliography on this subject is extensive. See Rofé, “The Organization of the Judiciary in Deuteronomy,” 92–112; Levinson, *Deuteronomy and the*

It seems to me that the premise of this debate—that the elders serve as judges in Deuteronomic law—is dubious. In no case are they explicitly said to judge, and in 21:2 elders and judges are referred to as separate groups (as they are Josh 8:33; 23:2; 24:1; Ezra 10:14). The elders are never said to engage in the activities typical of judges, such as investigate, inquire, or interrogate (19:18; cf. 13:15; 17:4), convict, acquit, or announce a verdict (17:19–21; 25:1), nor are they ever mentioned in contexts that refer to such activities. Looking beyond Deuteronomy, it is notable that when Moses and Joshua go up to Mount Sinai, Moses says to the elders: “Wait here for us until we return to you. You have Aaron and Hur with you; let anyone who has a legal matter approach them” (Exod 24:14).⁴ Aaron and Hur, not the elders, serve as judges.

What, then, is the role of Deuteronomy’s elders in the legal passages that mention them?

The common denominator in the cases of the insubordinate son, the accused bride, and refusal to perform levirate marriage, is that the outcome in each case is entirely determined not by the elders but by a declaration or action made or performed before them. Their role is to serve as a public forum for procedures that require publicity. The case regarding levirate marriage requires publicity in order to bring public pressure to bear on the reluctant brother-in-law and, if he continues to refuse, to make it publicly known that his brother’s widow is free to remarry.⁵ In the case of the slandered bride, presenting the evidence of virginity requires publicity in order to restore her reputation and that of her parents, which was publicly defamed by her husband who “put out [*hōšî*] a bad name for her” and so as to show the public the justice of her husband’s punishment, and perhaps also to deter other husbands from making such charges public. In these cases, the ceremony of removing the brother-in-law’s sandal and the bride’s parents’ presentation of the signs of virginity suffice to determine the outcome. The judges’ role in

Hermeneutics of Legal Innovation, 98–143, esp. 124–27, and briefly in Berlin and Brettler, eds., *The Jewish Study Bible*, 403; Wells, “Competing or Complementary? Judges and Elders in Biblical and Neo-Babylonian Law” (my thanks to Prof. Wells for kindly allowing me to read and cite his paper in advance of its publication).

⁴ Translation from *Tanakh: The Holy Scriptures*.

⁵ In b. *Yebamot* 101b certain rabbis required a quorum of five elders (instead of the standard three) for the sandal-removal ceremony, “in order that the matter be given due publicity” (*lēparsûmê millēta*) “so no priest would marry her; while prospective husbands, on hearing that she had been freed by halizah from her levirate bond, might begin to woo her” (n. 61 *ad loc.* in *The Babylonian Talmud, Seder Nashim, Translated into English*).

such cases is similar to their role as “witnesses” (as a “notarial forum”) to the agreement that Boaz and the redeemer make at the city gate in Ruth 4:1–11⁶ and to the role of “all who entered the gate” of Hebron in whose sight Ephron the Hethite sold the field and cave of Machpelah to Abraham (Genesis 23). As Sarna put it: “the negotiations...are carried out at the city gate....The transaction is given the widest possible publicity in order to avoid the likelihood of future litigation.”⁷ Since the gate was the most public place in the city, conducting such procedures in the presence of those gathered there served in the same way as the required publication of information important to the public, such as real estate transactions, in newspapers today.

The elders’ role as a public notarial forum is comparable to the role of the assembly (*‘ēdā*) in the Elephantine documents, as described by R. Yaron: The *‘ēdā* served as

the forum before which declarations of divorce might be made. We have no ground for attributing a judicial nature to the function of the *‘edah* [at Elephantine, unlike the *‘ēdā* in Numbers 35:12 and 24–25]; it merely provides for the necessary publicity. This would prevent subsequent uncertainty and possible allegations of adultery against the divorced wife.”⁸

Such a role is known from Mesopotamia as well. A letter from the Old Babylonian period refers to a man who assembled twenty of the city’s elders in order to tell them about his adoptive brother who had run away and to remove him from his status as brother.⁹ This is reminiscent of publishing in newspapers that one is no longer responsible for somebody’s debts. A number of Neo-Babylonian documents mention declarations to the Assembly (the *puḫrum*). In one, a widow appears before the assembly in a time of famine and dedicates her two sons as slaves to the temple of Ishtar of Uruk so that the temple would feed them and officials of the temple accept them.¹⁰ In another, a woman declares that the true father of her son is not the man her son had named but another man, and the son agrees to change the name of his father in all his documents.¹¹ (Since the assembly also functioned regularly as a court, it is clear from such cases that the notarial forum did

⁶ Reviv, *The Elders in Ancient Israel: a Study of a Biblical Institution*, 66. The term “notarial forum” is Reviv’s.

⁷ Sarna, *The JPS Torah Commentary: Genesis*, 159.

⁸ Yaron, *Introduction to the Law of the Aramaic Papyri*, 28.

⁹ Stol, *Letters from Yale*, 36–37.

¹⁰ Dougherty, *Shirkûtu*, 33–34.

¹¹ TCL 13 138, in Pohl, *Neubabylonische Rechtsurkunden*, no. 47.

not necessarily have to be a non-judicial body; the two functions could be performed by the same body. In other words, notwithstanding what seems to be the case in Deuteronomy and at Elephantine, a court could also play this role.)

The elders play a non-judicial role also in the case of the insubordinate son (Deut 21:19). The parents' declaration that their son is insubordinate requires a public forum so as to place his execution under communal supervision and prevent a hasty or arbitrary decision by the frustrated, insulted parents, and so that the public will know that his execution is justified. In the light of 25:8, where the elders summon the resistant brother-in-law and talk to him, it is conceivable that bringing the case of the insubordinate son to the elders would give them the opportunity to mediate between parents and son. But in this case the law does not say that the elders should speak to the parents and the context indicates that the parents' declaration is all that is required to seal the fate of their son.

The law concerning asylum cities is different from the others in which the elders play a role. Here, too, no judicial process is mentioned, but in addition, the law does not describe a procedure of any kind that takes place in their presence. Their role is simply to extradite the intentional killer from the city of asylum and hand him over to the blood avenger. The parallel passages in Num 35:12, 24–25 and Josh 20:6, 9 do describe a trial, conducted by the assembly ('*ēdā*'), but these passages are from P¹² and are not decisive as far as Deuteronomic law is concerned. Of course, from a legal point of view it would be reasonable to assume that in a case such as this there would be a trial. It is generally assumed that Deut 19:12 presupposes that a trial has already taken place in which the killer was convicted of intentional homicide.¹³ If so, we would have to assume that the text is extremely elliptical. If we do assume that, we might further assume that it was the elders, "the only officials explicitly mentioned in the text,"¹⁴ who conduct the trial. But this would be the

¹² Rofé, "The History of the Cities of Refuge in Biblical Law," 228–30.

¹³ See the halakhic exegesis summed up in Maimonides, *Hilkhot Roṣeah* 5:7; Luzzatto, *Il Pentateuco*, at Deut 19:12 (he assumes a two-part trial: a preliminary hearing preceding v. 12 and a final trial between vv. 12a and 12b); Wells, "Competing or Complementary? Judges and Elders in Biblical and Neo-Babylonian Law," p. 7 of draft, following n. 23: "testimonial and other types of evidence are already available and further investigation of the matters at hand is unnecessary." Cf. Rofé, "History of the Cities of Refuge," 228 (repr., 138–39).

¹⁴ Wells, "Competing or Complementary? Judges and Elders in Biblical and Neo-Babylonian Law," p. 20 of draft, just after n. 77.

only case, not only in Deuteronomy but in the entire Torah, in which the elders serve as judges, and it seems just as likely, if not more so, that if the law does presuppose a trial, it would be conducted by professional judges and that following the conviction the elders would merely be exercising the administrative function of extraditing the killer under their executive authority as leaders of the city (cf. Josh 20:4 in which they admit the killer to the city merely on the basis of his own statement).

On the other hand, since the text does not mention a trial, perhaps there is none. It may be that the role of the elders is to act on the basis of their knowledge, as the family heads in the city, about the past relations between the killer and the victim. Apparently this is the only basis for a decision in Deuteronomy, since the killing took place in the woods where there would have been no witnesses.¹⁵ In the absence of witnesses, that the killer “lay in wait” may simply be an inference from the past enmity (cf. 22:23–27, in which an execution is likewise carried out based on circumstantial evidence). Another possibility is that their role is to ensure that the killer is not executed on the basis of a private agreement between his family and that of his victim: “Where the families of the victim and the perpetrator both agree on the details and the circumstances of the tragedy, there is no need to turn to the judgment of the elders, that is, to the judgment of the heads of the city’s families. The elders are needed only if there is an accusation of premeditated murder; then, even if all are agreed on the details of the deed, some sort of higher authority is needed to make the decision and take the initiative in carrying out the sentence of death.”¹⁶

We do not have enough cases to be sure that in Israel it was generally the elders who served as the public/notarial forum or if it played this role only in certain types of cases. Most of the cases we have reviewed deal with matters concerning families: the insubordinate son, accusations of premarital unchastity, and refusal to perform levirate marriage. In the case of murder, blood vengeance is also a family matter, between the killer and the victim’s family.

¹⁵ The proximity to this law of Deut 19:15–21, about witnesses at trials, might suggest that our law does involve witnesses, and hence a trial, as does the parallel law in Numbers 35, where v. 30 requires two witnesses for execution. However, unlike the case in Numbers 35, Deuteronomy separates the law of witnesses from the law about accidental homicide with v. 14, which deals with an unrelated topic (landmarks), indicating that to Deuteronomy these are separate laws.

¹⁶ Rofé, “History of the Cities of Refuge,” 229 (repr., 139).

In the rest of the Bible, too, there is hardly a case in which the elders function as judges. As noted above, Exod 24:14 indicates clearly that the elders do not judge, and elders and judges are mentioned as different groups in several other passages. The one exceptional case in which elders serve among the judges in a criminal case is in the trial of Naboth in 1 Kings 21. They are involved (along with the “nobles” [*hōrīm*]) apparently because Naboth’s conviction for *lèse majesté* would lead to the confiscation of his ancestral land by the king (cf. the document from Alalakh that refers to the confiscation of the estate of a man convicted of *lèse majesté*¹⁷).¹⁸

None of this excludes the possibility that individual elders, on the strength of their prestige and experience, were among the appointed professional judges. Indeed, from an anthropological perspective it is certainly plausible that the authority of the elders as a group once included adjudication. But as far as the biblical evidence reflects actual practice in Israel during the biblical period, that must have been in the distant past.

To sum up: Deuteronomy assigns several legal cases to the elders. It is generally assumed that in these cases the elders, rather than appointed professional judges, serve as the judges, and this has prompted attempts to clarify whether the elders and professional judges functioned simultaneously in the same judicial system, handling different categories of cases, or whether these cases reflect different strata in the development of biblical law. But the premise of the discussion—that the elders serve as judges—is dubious since Deuteronomy never actually says that they are to engage in judicial activities. Nor is this picture contradicted in the rest of the Torah. In Exod 24:14, Moses tells the elders that in his absence Aaron and Hur, not they, will serve as judges (Exod 24:14). It seems, then, that the elders’ role is different. In the cases of the insubordinate son, the accused bride, and a brother’s refusal to perform levirate marriage, they serve as a public forum for procedures that require publicity, like the elders in the book of Ruth (chapter 4) and “all who entered the gate” of Hebron who witness Ephron’s sale of his field and cave to Abraham (Genesis 23), and like the assemblies at Elephantine and in certain Mesopotamian documents. In the case of accidental murder, the elders’ role is less clear, but there, too, they are not explicitly assigned a judicial role and it is not likely that they play one.

¹⁷ Pritchard, *ANET*, 546, no. 15.

¹⁸ Cf. Loewenstamm, “Notes on the Alalakh Tablets,” 225 (repr., 25–26).

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