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Survey of Recent Halakhic Periodical Literature

LITIGATION AND ARBITRATION BEFORE NON-JEWS

I. THE PROHIBITION

1. The Prohibition and the Vitality of Jewish Jurisprudence

A colleague, who on occasion teaches a course in Roman law, claims that the following incident actually occurred. On the last day of the semester, following the usual perfunctory remarks concerning the final examination, a student raised his hand. Upon being recognized, the student asked, "Are we responsible only for the material in the textbook or are we responsible for recent cases as well?" The classroom erupted in laughter. The question, which might have been appropriate in any other law school class, was discordant in a class on Roman law. The Roman empire has long since ceased to exist and abrogation of Roman law followed closely in the wake of its dissolution. It is, or course, ludicrous to speak of "recent cases" in conjunction with a system of law that, despite its continued and profound influence over other systems of law, has for many centuries not been sovereign in any jurisdiction.

Such a question, if asked of a professor teaching Jewish law, would not be greeted with derision despite the fact that Jewish law has not been the law of any sovereign jurisdiction for two millennia. Even with the establishment of the State of Israel, Jewish law is the law of that jurisdiction only with regard to matters of marriage and divorce. Yet Jewish law is not only alive and well but is constantly applied in novel situations. That is true not only of ritual law but also of the jurisprudence of Jewish law. Case material regarding such matters is as recent as the morning mail which, virtually on a daily basis, brings Torah journals containing learned articles devoted to myriad aspects of Jewish law. Despite the fact that nowhere is Jewish jurisprudence the law of the land, despite the fact that rabbinical tribunals do not enjoy police power

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and cannot compel appearance, Jewish law has not only survived but remains healthy and robust.

There are a variety of socio-religious factors that serve to explain the disparate fate of Jewish and Roman law. Not the least significant of those factors is the fact that Jews feel themselves duty-bound to abide by the provisions of Jewish law not only with regard to matters of ritual and religious observance but with regard to their commercial and interpersonal affairs as well. Judaism is more than a religion concerned with the worship and adoration of the Deity; it is a religion of law governing every aspect of human life including the most mundane.

Jewish law is transnational and hence dependent upon neither political sovereignty nor judicial autonomy. It is binding as a matter of conscience. Judaism expects its adherents voluntarily to govern themselves by Jewish law in all aspect of their lives. In interpersonal, financial and commercial matters it requires them to be bound by the provisions of *Hoshen Mishpat* rather than by the provisions of the legal code of the country in which they may reside. The host country is usually quite content to allow its citizens to deal with one another according to any principles they choose and to settle their own disputes among themselves. Generally speaking, the State will not impose itself and its laws unless asked to do so through an appeal to its judicial system. The halakhic principle *dina de-malkhuta dina* (the law of the land is the law) does not embody the notion that Torah law is superseded by civil law[1] and hence the principle is entirely irrelevant when the State itself does not insist upon adherence to the provisions of its civil code. Indeed, it is the overwhelming consensus of rabbinic opinion that Jewish law would not recognize the applicability of *dina de-malkhuta dina* with regard to such matters even if the State were to insist that its nationals conduct their affairs solely in accordance with civil law and resolve their disputes only in a secular judicial forum. Judaism does not recognize the State's authority to compel violation of biblical law regardless of whether such law treats of religious or jurisprudential matters.[2]

These demands made by Jewish law upon adherents to Judaism reflect the fundamental belief that Jewish law is divine in origin and that man does not enjoy the right to supplant divine law with a legal system that is human in origin. The principles recorded in both the Written and the Oral Law are perforce different from those that are the product of human intellect. *Vis-a-vis* divine law, human law is depicted in rabbinic sources as foreign and alien. Given a choice of legal forums, acceptance of the secular is tantamount to rejection of the divine. To

accept the product of human intellect as superior to the divine is idolatrous; voluntarily to subject one's financial and commercial dealings to the governance of a secular legal system rather than to that of the Torah creates at least the impression that the litigant acknowledges the superiority of man-made law.

The extent to which Jews abided by the provisions of Jewish jurisprudence and were willing to forego recourse to non-Jewish courts even when a litigant would have found it financially advantageous to do so is reflected in a statement of R. Chaim Pelaggi, *Masa Hayyim, ma'arekhet dalet,* no. 23, in which he reports that from his earliest youth and throughout his life in the city of Izmir he never heard of an instance in which a person sought to enforce a claim to a share in the estate of a deceased to which he or she was not entitled according to the laws of the Torah, despite the fact that such a claim would have been routinely recognized by the Turkish courts of the time. This is not to say that instinctive obedience to Halakhah in all its facets was uniform at all times and in all places. In some locales it was necessary to reinforce the statutory prohibition against seeking redress in a secular judicial forum, particularly with regard to matters of inheritance, by issuing formal bans against such conduct.[3] Rabbi Jacob Kuli, *Yalkut me-Am Lo'ez,* Numbers 27:11, found it necessary to warn that, in the long run, not only will a person fail to profit from a recovery in a civil court, but he will be punished by loss of his fortune as well.

To our shame, in many circles withing the contemporary Jewish community, these provisions of Jewish law are honored in the breach. In a relatively recent treatise, a member of an Israeli rabbinic court, R. Ezra Batzri, *Dinei Mamonot,* III, (Jerusalem, 5740), 209, note 1, finds it necessary to repeat the salient aspects of the prohibition against recourse to secular courts in conjunction with his discussion of inheritance despite the fact that he had already discussed them in detail in an earlier volume of the same work. Rabbi Batzri states he has found this aspect of Jewish law to be widely disregarded "either because people find it difficult to forego the benefit granted them [in a secular court] or [because] they err [in assuming] that there is no prohibition whatsoever with regard to this."

2. The Biblical Source

The words "*Eleh ha-mishpatim asher tasim lifneihem*" (Exodus 21:1) are immediately recognized as the opening sentence of the Torah reading of the *Shabbat* known as *Parashat Mishpatim* and identified in that

manner because of the initial noun of the verse. The very division of the biblical text into weekly segments in which that verse introduces one such portion indicates that the verse in question serves as a preamble to the immediately following section. Accordingly, the verse is rendered in translation as "These are the statutes that you shall place before them." As an introduction to the verses that follow, the term "*mishpatim*" must connote the subject matter that ensues, i.e., it serves as a description of the salient provisions of biblical jurisprudence presented in the immediately following section. Accordingly, the word "*mishpatim*" is understood as meaning "laws" or "statutes." Moses is commanded by God to transmit a host of commandments pertaining to torts and bailments as well as to sundry other financial matters and is informed that what is about to be imparted to him is in the nature of *mishpatim*, i.e., rules necessary for the government of society.

Those laws are to be "placed" or "set" before the community of Israel. The persons to be bound by those statutes are not explicitly named; they are referred to solely by employment of the term "*lifneihem*—before them," a term incorporating the pronoun "them." Students of the English language are taught in the primary grades that use of a pronoun that is not governed by an antecedent noun is strictly *verboten*. Not so with regard to biblical Hebrew. Not infrequently, Scripture relies upon the reader's acumen in correctly identifying the person, place or thing to which reference is made by the employment of a simple pronoun.

Talmudic exegesis, while it certainly neither denies nor contradicts the plain meaning of the text, assigns an entirely different meaning to this verse. The talmudic understanding of the passage is based upon two linguistic ambiguities: (1) The term "*mishpat*," of which *mishpatim* is the plural, is a homonym. It may refer to a "law" or it may connote a judgment or sentence; it may also connote a lawsuit or a judicial proceeding. (2) The term "*lifneihem*" may refer to the otherwise unnamed people of Israel or it may refer to the individuals named in the immediately preceding biblical section,[4] *viz.*, the judges appointed by Moses. Seizing upon both ambiguities, talmudic exegesis renders the verse as "And these are the lawsuits which you shall place before them [the judges]."

Understood in this vein, the passage, although couched as a positive exhortation, serves to establish a ban against having recourse to other judicial bodies. Lawsuits must be pursued before the designated judges and before no others. This interpretation of the verse is formulated by the Gemara, *Gittin* 88b, in the form of two separate injunc-

tions: "'Before them'—but not before gentile courts;" and "'Before them'—but not before laymen (*hedyotot*)" i.e., not before individuals lacking ordination as judges.

Both exclusions are readily understandable. The judges designated by Moses were Jews who were charged with rendering judgment in accordance with the laws transmitted by Moses. The Israelites were commanded to eschew gentile courts and to appear before those judges for the purpose of adjudicating their disputes on the basis of the laws of the Torah. The judges designated by Moses derived their authority from their appointment to judicial office. That appointment constituted their ordination as judges and empowered them to designate successors by means of conferring ordination upon others. Thus, in commanding appearance "before them," i.e., before the judges ordained by Moses, the Torah excludes appearance before unordained and hence unqualified judges.

Ordination carrying with it license to serve as a member of a court authorized to render judgment in both criminal and civil cases was passed on from generation to generation until the time of the Roman persecution in the late tana'itic period. As part of a campaign designed to eradicate Judaism as a religion, the Roman conquerors threatened to impose capital punishment upon any person conferring ordination and upon the ordainee as well and also warned that collective punishment would be inflicted upon all inhabitants of any locale in which the ceremony was held.[5] Despite heroic efforts to preserve the transmission of ordination, and with it the judicial system dependent upon ordination, the Romans eventually succeeded in that oppressive endeavor and ordination lapsed in the middle of the fourth century. Accordingly, imposition of statutory capital punishment has been halakhically precluded since that time.[6] Nevertheless, civil matters, at least to the extent that they are common and usual, may be adjudicated. The Gemara, *Gittin* 88b, justifies this practice on the basis of the principle of agency in declaring that present-day rabbinic judges merely serve as the agents of earlier judges in whom the requisite authority was vested.[7] Thus, although the prohibition against having recourse to gentile courts remains fully in effect, the prohibition against adjudication of disputes by unordained laymen is, in practice, not operative.

There is indeed an even more fundamental difference between the respective ambits of these two prohibitions. As recorded by *Shulhan Arukh, Hoshen Mishpat* 26:1, recourse to a non- Jewish court is prohibited even with the consent of both litigants. However, if both parties agree, they are permitted to have their dispute heard by a tribunal com-

posed of laymen.[8] The exclusion of laymen from the judiciary is not absolute; laymen are simply denied the power to compel appearance before them with the result that litigants who willingly submit to their authority commit no transgression. However, litigants do not have the right to accept the authority of a gentile court and, should they do so, they incur a serious transgression.

The disqualification of gentile courts and the disqualification of lay judges both proceed from the single phrase "before them." Nevertheless, there is a disparity between those two disqualifications and that disparity illuminates the need for the formulation of two separate exclusions, *viz.,* "'Before them,' but not before courts of the gentiles" and "'Before them,' but not before laymen." Since, assuredly, gentiles are not ordained and hence are ostensibly subsumed in the broader exclusion of laymen, the need for a separate exclusion is not immediately clear. However, in light of the foregoing distinction, the problem is readily resolved. Exclusion of laymen serves only to deprive unordained judges of coercive power. The additional exclusion of gentiles yields a prohibition against even voluntary acceptance of their judicial authority.

Although, in light of that distinction, the halakhic redundancy of the dual formulation is explainable, an underlying exegetical problem remains. If the phrase "*lifneihem*" serves to establish an inferential negation in the nature of a prohibition, the prohibition should logically include laymen no less so than gentiles. If, however, the phrase serves only to establish a qualification limiting the power of judicial coercion, it would appear that there is no basis for a prohibition attendant upon voluntary acceptance even of gentile courts. It would stand to reason that the two exclusions, derived as they are from a single phrase, should be identical in application.[9]

3. Concerns Reflected in the Prohibition

It is evident that the Sages regarded the verse "*Eleh ha-mishpatim asher tasim lifneihem*" as establishing two distinct and disparate principles of law. Each of those principles is grounded upon a separate concern. In codifying the prohibition against having recourse to gentile courts, *Shulhan Arukh, Hoshen Mishpat* 26:1, adds the comment that submission to the jurisdiction of a non-Jewish court is forbidden even with the acquiescence of both parties and concludes by describing a litigant who transgresses the prohibition as a wicked person who "has blasphemed and has lifted a hand against the Torah of our teacher Moses, may he rest in peace." Recourse to a gentile forum is tantamount to a declara-

tion by the litigant that he is amenable to allowing an alien code of law to supersede the law of the Torah. Such conduct constitutes renunciation of the law of Moses.

Rashi, in his commentary on Exodus 21:1, offers a somewhat different rationale: "'Before them,' but not before gentiles: Even if with regard to a particular suit you know that they rule in a manner consistent with the laws of Israel, do not bring it before their courts, for one who brings Jewish lawsuits before gentiles profanes the Name of God and ascribes honor to the name of the idols thereby enhancing their stature (*le-hahashivam*)[10] as it is said 'For their rock is not our Rock, nor our enemies judges' (Deuteronomy 32:31), i.e., [if we make] our enemies judges [over us] that is testimony to the superiority of that which they reverence."[11] R. Shlomoh Duran, *Hut ha-Meshulash*, III, no. 6, writing in his own name and also citing his father, R. Shimon ben Zemah Duran, makes it clear that both the prohibition and Rashi's explanation thereof apply with equal force to appearance before gentile courts whose judges are not idolators and who administer a system of law entirely divorced from cultic practices. Speaking of Moslems in particular, R. Shlomoh Duran declares that "even though they are not idol-worshipers they deny the laws of our Torah" with the result that a person bringing suit before them *ipso facto* expresses a preference for their religion and their legal system over that of the Torah. Even though the legal system administered by such courts is areligious in nature and theologically neutral, it reflects principles that are at variance from those of the Torah. Hence voluntary choice of such a forum constitutes aggrandizement of those principles to the negation of the norms of the Torah. Halakhic sources discussing the prohibition implicitly follow R. Shlomoh Duran in failing to make any distinction on the basis of the nature and provenance of the legal code administered by the gentile courts.

As might be anticipated, the explanations offered by *Shulhan Arukh* and Rashi are culled from much earlier sources. Rashi's explanation that recourse to gentile courts serves to validate an alien ideology and to enhance the stature of pagan gods reflects a comment found in *Midrash Tanhuma, Mishpatim* 3: "For whosoever abandons [the] judges of Israel and comes before gentiles has first denied the Holy One, blessed be He, and then denied the Torah." The emphasis in *Midrash Tanhuma* is upon denial of God which consequently entails denial of the divine nature of the Torah since if there is no Lawgiver there can be no Law. Rashi equates the atheism to which *Tanhuma* refers with idolatry.[12]

Shulhan Arukh's depiction of acceptance of the jurisdiction of gentile courts as tantamount to renunciation of the law of Moses and hence as blasphemy is clearly taken from Rambam, *Hilkhot Sanhedrin* 26:6, and mirrors a philosophical view formulated by Rambam in his discussion of the nature of divine commandments in the *Guide for the Perplexed*, Book III, chapter 26. In contradistinction to R. Sa'adia Ga'on, *Book of Beliefs and Opinions*, Treatise III, chapter 1, who regards commandments as the product of divine will and hence as essentially arational, Rambam insists that all commandments reflect divine wisdom and hence are entirely rational, albeit in some cases their rational nature is beyond the grasp of human intelligence. Thus, rejection of the system of jurisprudence set forth in the Torah in favor of an alien system of law constitutes not only renunciation of the Law of Moses but, *ipso facto,* represents a renunciation of the Torah as the product of divine wisdom. And denial of the Torah as a manifestation of divine wisdom constitutes a form of blasphemy.

4. Ramifications of the Diverse Concerns

It seems to this writer that the rationales offered by Rashi and Rambam are not coextensive in their explanation of the various facets of the prohibition. Both Rashi and *Shulhan Arukh, Hoshen Mishpat* 26:1, emphasize that the prohibition against having recourse to a gentile court applies even in instances in which the law applied in that forum is identical to the law of the Torah. *Sema*, *Hoshen Mishpat* 26:2, explains that extension of the prohibition to encompass even such situations is derived from the same phrase "*eleh ha-mishpatim.*" For exegetical purposes the term "*mishpatim*" is rendered as "cases" or "lawsuits," but the term is not denuded of its basic meaning, i.e., "laws." Thus, explains *Sema*, the verse must also be understood as an exhortation that "these laws should be placed before them," [*viz.*, before the judges appointed by Moses], i.e., even when the law applied by other courts is identical to that of the Torah and identical to that applied by Jewish judges, the matter must be brought only before the specified judges, *viz.,* those appointed by Moses."

Nevertheless, the reason for a prohibition in such circumstances is not immediately clear. Rambam does indeed prohibit recourse to a non-Jewish judicial forum even if it has adopted the Law of Moses as its legal code. Accordingly, he includes that example in his categorization of appearance before gentile courts as an act of "raising a hand against the Torah of Moses." Nevertheless, recourse to a gentile court to admin-

ister laws recorded in *Hoshen Mishpat* is to be eschewed for a different reason. Appearance before a gentile court even under such circumstances is forbidden because it is *meyaker shem avodat elilim*—it enhances the status of an alien legal system. A litigant appearing before a gentile court does not do so because that court has accepted the Law of Moses in whole or in part. The fact that their judgments are identical to those of rabbinic tribunals is entirely coincidental. The litigant appears before the gentile courts because he accepts their authority and if they administer the Law of Moses he accepts that law, not because he regards it as binding upon him by virtue of having been commanded by God, but because it has been endorsed and adopted by gentiles. In doing so, he gives acceptance and credibility to a foreign ideology. The prohibition, as it extends to such cases, is better understood on the basis of Rashi's explanation rather than on the basis of the explanation offered by Rambam and *Shulhan Arukh*. Indeed, in reading Rashi's comment, it should be noted that Rashi offers his rationale, not to explain the prohibition in general, but to underscore that the prohibition is in full force and effect "even if you know . . . that they will rule in a manner consistent with the laws of Israel."

A close reading of *Shulhan Arukh, Hoshen Mishpat* 26:1, reveals that the rationale presented by *Shulhan Arukh* is also recorded in juxtaposition to a particular aspect of the prohibition. *Shulhan Arukh* declares that recourse to gentile courts "even if both litigants have consented to adjudicate before them is prohibited and whosoever seeks to litigate before them is a wicked person and is as if he has blasphemed and lifted a hand against the Torah of our teacher Moses, may he rest in peace." *Shulhan Arukh* is readily understood as seeking to underscore the principle that mutual acquiescence does not mitigate the prohibition. Rejection of Jewish law is tantamount to blasphemy; mutual acquiescence is nothing other than mutual blasphemy.

There is, however, no hint in halakhic sources that these two rationales are mutually exclusive or in any way incompatible. Indeed, a number of authorities including R. Shlomoh Duran, *Hut ha-Meshulash*, III, no. 6, and his son R. Shimon Duran, *Teshuvot Ya'akhin u-Bo'az*, II, no. 9, first cite Rashi and then Rambam without positing any disagreement between them and elsewhere a second son, R. Zemah Duran, *Teshuvot Ya'akhin u-Bo'az*, I, no. 6, combines the substance of both rationales in a single sentence.[13] R. David ibn Zimra, *Teshuvot Radvaz*, IV, no. 1190, also combines both concerns in stating that appearance before a gentile court is an indication that one who does so believes "that the laws of

our Torah are not true" and continues with the statement "and moreover he causes the *Shekhinah* to remove itself from Israel because he ascribes power to another god."

The prohibition against recourse to *arka'ot shel akum* or secular courts because such action is in the nature of "lifting a hand against the Torah of Moses" is not limited to bringing a suit before a gentile court. That facet of the prohibition includes any judicial proceeding that negates the Law of Moses. A judicial body composed entirely of judges who happen to be members of the Jewish community but who administer an alien system of law, is undoubtedly to be classified as within the halakhic category of *arka'ot shel akum* for the simple reason that the laws such a court administers are not those of the Torah. Thus, voluntary appearance before those judges for purposes of litigation is also tantamount to renunciation of the laws of the Torah in favor of a disparate system of law. A judge who hears a case involving two Jewish litigants and renders judgment in accordance with a secular corpus of law is, at the very least, guilty of aiding and abetting transgressors.[14]

Since, as noted earlier, acquiescence by both litigants does not serve to mitigate the prohibition against "lifting a hand against the Torah of Moses" and since the prohibition applies even when the judges themselves are Jews, it follows that the parties are not entitled to accept the authority of a rabbinic court or *Bet Din* but stipulate that the *Bet Din* shall apply the law of a secular state.[15] Accordingly, if two parties, regardless of where they may be domiciled or where the contract is executed, enter into a contract and stipulate that any dispute with regard to fulfillment of the terms of the contract is to be resolved by a rabbinic court in accordance with, for example, the laws of the State of Delaware, the stipulation is void by virtue of being inconsistent with biblical law (*matneh al mah she-katuv ba-Torah*).[16] The parties are, of course, bound to appear before the *Bet Din,* but the *Bet Din* must adjudicate the dispute in accordance with the provisions of *Hoshen Mishpat.*

5. Secular Courts in the State of Israel

The prohibition involved in "lifting a hand against the Torah of Moses" applies equally whether the authority of the judiciary is derived from the police power of the secular state or the voluntary agreement of the litigants and, *a fortiori*, when it is derived from the authority of a secular Jewish state. Thus, following the establishment of the State of Israel, when it became evident that the *batei mishpat*—the national courts of the State of Israel—could not even attempt to rule in accordance with

the provisions of Jewish law because the *Knesset* refused to enact *Hoshen Mishpat* as the law of the land, *Hazon Ish, Sanhedrin*, no. 15, sec. 4, declared unequivocally that the status of the Israeli *batei mishpat* is no different from that of *arka'ot shel akum*.[17] Despite the fact that the judges are Jews rather than gentiles and despite the fact that they sit under the color of authority of a Jewish state, *Hazon Ish* ruled that their status was that of *arka'ot shel akum* because the system of law they impose is not that of the Law of Moses; substitution of statutes and precedents of Ottoman or British law, or even of the laws of the *Knesset* for the laws of the Torah, constitutes renunciation of the Torah of Moses A view similar to that of *Hazon Ish* is advanced by the late Chief Rabbi of Israel, R. Isaac ha-Levi Herzog, *Ha-Torah ve-ha-Medinah*, VII-VIII, 9-12.[18]

To the objection that neither the judge nor the attorneys who appear before them are proficient in Jewish law and to the objection that Jewish law at times may appear to be unwieldy or not readily applicable to novel circumstances, *Hazon Ish* had a ready reply. He countered that *batei mishpat* need not necessarily be required to render judgment in accordance with *any* system of law. In effect, he counseled that Israeli courts should sit as courts of equity rather than as courts of law. As courts of equity they would render judgment in accordance with what they perceive to be fair and equitable in any given case.

Such a procedure is not a violation of Halakhah because such adjudication is tantamount to arbitration or *pesharah*. Rather than insisting upon a judgment in strict conformity with provisions of Halakhah, Jewish law supports, and indeed encourages, litigants to accept arbitration. Arbitration incorporates elements of compromise and allows judges to take account of extralegal considerations of fairness and equity with the result that, upon conclusion of the proceedings, litigants are less likely to harbor feelings of rancor and ill-will.

Arbitration is not renunciation of the Torah of Moses both because it is specifically authorized by the Torah and because it does not supplant one system of law, with another. It is only rejection of one corpus of law, *viz.*, the Torah, in the form of adoption of a different code to be applied uniformly that constitutes "lifting a hand against the Torah of Moses." Laws are rules to be applied in all cases; *ad hoc* decisions do not constitute a system of law.

Professor Menachem Elon, *Ha-Mishpat ha-Ivri*, (Jerusalem, 5738) I, 22, note 80 and I, 122 note 174, takes issue with *Hazon Ish* on the basis of the words of Me'iri in his commentary on *Sanhedrin* 23a. The Gemara,

Sanhedrin 23a, speaks of "courts of Syria" whose authority could not be legitimately challenged because they had been accepted by the populace. The members of those courts were Jews but are described by Rosh, *ad locum*, as "not having been proficient in the laws of the Torah."

Hazon Ish cites the talmudic reference to the "courts of Syria" as evidence for the thesis that authority is vested in society to establish a judicial system whose judgments may not be consistent with Jewish law. Since the court's jurisdiction must be accepted by the litigants despite the judges' lack of qualification, the court's decisions must be regarded as valid because they constitute a form of arbitration. *Hazon Ish* asserts that the State of Israel has the authority to appoint judges to its courts even though they may be entirely ignorant of Jewish law and empower them to sit as the equivalent of a court of equity in order to render *ad hoc* decisions on the basis of considerations of fairness and common sense. The Gemara's discussion of the authority of the "courts of Syria" is cited as evidence for the conclusion that society has the right to compel that type of adjudication.

Hazon Ish assumes that the "courts of Syria" either, at times, misapplied Jewish law because of lacunae in their knowledge or that they made no attempt to do other than mete out a subjective form of justice. He states unequivocally that they did not rule in accordance with the law of the land or in accordance with their own judge-made law.

Me'iri, however, comments that the "courts of Syria" rendered judgment "in accordance with subjective judgment (*omed ha-da'at*), laws (*hukkim*) and customs (*nimusim*)." R. Shlomoh Goren, *Ha-Tzofeh*, 3 Adar I 5708, reprinted in *Tehukah le-Yisra'el al Pi ha-Torah*, I, 150-151, and Menachem Elon understand Mei'iri's comment quite literally with the result that they ascribe to him the position that, with the approval of the populace that appointed them, Jewish courts may adjudicate lawsuits that come before them in accordance with a non-Jewish system of law.[19] However, Rabbi Goren, citing *Urim ve-Tumim* 22:1, *urim*, sec. 15, asserts that the procedures of the "courts of Syria" are appropriate and legitimate only in communities in which there are no scholars who are proficient in Halakhah but that, where such scholars are available, establishment of judicial bodies in the nature of the "courts of Syria" cannot be countenanced.[20]

It should be noted that, even if this interpretation of Me'iri's comment is accepted as correct, it is impliedly rejected by other early authorities. Ran, *Sanhedrin* 23a, cites the opinion of R. David who explains that the establishment of the "courts of Syria" was appropriate

because, despite the fact that the members of those courts were not scholars of note, "it was impossible that [among a panel of three judges] there not be one who was proficient." Ramban, in his commentary on the same talmudic discussion, apparently endorses R. David's explanation. Implicit in that explanation is rejection of the notion that "courts of Syria" ruled in accordance with a non-Jewish system of law.

Rabbi Herzog, *Tehukah le-Yisra'el*, I, 163, raises the possibility that the "courts of Syria" adopted gentile law as their own and tentatively suggests, only to reject, the notion that if Jewish courts adopt gentile laws because they find them to be equitable and pragmatic such laws no longer have a gentile character since their authority stems from *takkanah* or judicial enactment. Rabbi Herzog concludes with the statement that "it is reasonable (*mistaver*)" to assume that Me'iri's use of the term "*dinim*" does not at all refer to the laws of the general society but to "laws they established for themselves on the basis of their own intellect," i.e., judge-made law in the nature of autonomous *takkanot* formulated by the "courts of Syria" themselves.

It seems to this writer that Me'iri's comments can be understood in a manner somewhat similar to, but significantly different from, the interpretation rejected by Rabbi Herzog. Rabbi Herzog cogently rejects the notion that the halakhic defect inherent in gentile legislation can be cured by formal endorsement and reenactment on the part of Jewish authorities. A careful reading of Me'iri's comment indicates that, in his opinion, the "courts of Syria" adjudicated on the basis of "assessment of the intellect, laws and customs." Those terms should be understood disjunctively, but not in the sense that some issues were decided subjectively, other issues on the basis of custom and yet others on the basis of secular law. Rather, in *any* case brought before them, those judges were free either to render judgment in an entirely subjective and novel manner, to adjudicate on the basis of some custom or practice, or to decide the case in accordance with the legal system of the dominant society. In no suit brought before them did they regard themselves as *bound* by the secular law. It appears to be self-evident that even a properly established *Bet Din*, when applying principles of *pesharah*, need not reject a resolution it finds to be fair and equitable simply because it has been incorporated in a foreign legal system.[21] Quite to the contrary, it would be prudent for them to examine the provisions of such legal systems in order to determine if indeed an appropriate resolution of the controversy before them might not already have been developed in such a system.

Thus, Me'iri may well be understood as stating that when they saw fit to do so, the "courts of Syria" did indeed rule in accordance with prevalent customs or the laws of the general society. The crucial point, however, is that they did not regard themselves as bound to do so nor did they do so in a uniform and inviolable manner. The net result was that even when they ruled in accordance with "*dinim*," i.e., secular law, it was on the basis of *omed ha-da'at*, i.e., on the basis of their own *ad hoc* determination that the provisions of secular law were appropriate in that particular case.

If this analysis is correct, those early authorities who impliedly reject Me'iri's explanation must perforce reject the explanation that the "courts of Syria" acted entirely on the basis of subjective judgment. It may be presumed that those authorities decline to assume that the "courts of Syria" acted on the basis of subjective judgment because they espouse the view that, although individual litigants are perfectly free to accept arbitration and indeed should be encouraged to do so, nevertheless arbitration may not be imposed upon a community by its judicial or administrative officials because such an edict would serve totally to abrogate the jurisprudence of Halakhah in that jurisdiction.[22]

6. Arbitration

Appearance before Jewish judges sitting as a court that administers an alien system of law, even if that system was enacted by Jews, is forbidden despite the fact that there is no hint of endorsement of pagan ideology because it represents renunciation of the Law of Moses. The self-same consideration would render it impermissible to submit a dispute to a non-judicial forum, e.g., to arbitrators, or even to a *Bet Din*, with the stipulation that the arbitrators or the *Bet Din* adjudicate in accordance with the law of the land.[23]

Such a situation allegedly occurred a number of years ago in a European community. The community engaged a *rav* and, seeking to avoid a possible *Din Torah*, stipulated in their contract with him that any dispute between the *rav* and the *kehillah* be adjudicated by a panel of arbitrators who would render a decision in accordance with civil law. The *rav* sought guidance with regard to whether he was bound by Halakhah to abide by that stipulation. Since the stipulation is in the nature of *matneh al mah she-katuv ba-Torah*, i.e., it is at variance with the law of the Torah, it is entirely void and therefore unenforceable. Not only does such an undertaking fail to bind the contracting parties but voluntary adherence to such an agreement would constitute a violation of Jewish law.[24]

Conversely, it seems to this writer that there are situations in which the rationale advanced by Rashi, *viz.*, that appearance before gentile courts "enhances the name of idols" is applicable even though the rationale advanced by *Shulhan Arukh* is not. As noted earlier, the term "idols" employed by Rashi is not to be taken literally. Were that the case, the prohibition against recourse to gentile courts would be operative only if the laws enforced by them were of cultic nature or origin; courts administering a non-religious code of law would not fall within the ambit of the prohibition. However, that conclusion is not reflected in any halakhic source. Perforce, the reason must be that any system of law other than that of the Torah is "idolatrous" in the sense that it reflects legal norms that are at variance with those of the Torah. Agreement to be subject to the jurisdiction of a court receiving its authority from such a legal system enhances and aggrandizes "the name of idols" in the sense that it confers legitimacy upon the ideology from which the court derives its authority. Voluntary appearance before a particular judicial body in and of itself confers status and stature upon that court and the legal system from which it derives its authority even if, in a particular case, it does not impose the provisions of a disparate legal system.

Of course, courts generally do rule in accordance with the law of the jurisdiction in which they sit, but that is not always the case. For example, in small claims courts of many states, including New York, litigants have the option of a trial before a judge or a hearing before an arbitrator. Such appearance would be prohibited even if the arbitrator were authorized to rule solely on principles of equity and fairness. To be sure, as noted earlier, arbitration undertaken in an *ad hoc* manner does not constitute "raising a hand against the Torah of Moses." Nevertheless, that is true only so long as the arbitration proceeding is conducted by a *Bet Din* or by laymen. However, when undertaken under the auspices of a gentile judicial body it is an acknowledgment of voluntary acceptance of the authority of an alien ideological system and hence is not permissible.

That arbitration before gentile courts is prohibited is evident from the ruling of *Shulhan Arukh, Hoshen Mishpat* 68:1. *Shulhan Arukh* speaks of various legal instruments executed by gentile courts that are not enforceable by a *Bet Din*. Among those are *shetarei pesharah* or arbitration awards. Such documents are issued by gentile judges sitting, not as a court of law, but as arbitrators. The reason that such awards are not recognized in Jewish law, despite its encouragement of arbitration and mediation, is that when conducted before a judicial body, the mat-

ter assumes the guise and character of a judicial proceeding, as indeed is the case with regard to *pesharah* conducted by a *Bet Din*. Halakhah regards *pesharah* as a legal procedure. Accordingly, when carried out by a gentile judicial body it falls within the ambit of *meyaker shem avodat elilim* because it enhances the stature of a foreign judicial system.

There is a fundamental difference between arbitration carried out by laymen and arbitration conducted by a court. The former is conducted entirely outside of the judicial arena. Even though the award of the arbitrators can be enforced by a court of competent jurisdiction, the arbitration proceeding itself is entirely extra-judicial. However, whether conducted by a *Bet Din* or by a secular court, arbitration is a judicial procedure conducted with judicial authority. Accordingly, voluntary submission to arbitration under the authority of a gentile court is prohibited because it is an expression of preferment and aggrandizement of a gentile judicial authority. Thus *Arukh ha-Shulhan, Hoshen Mishpat* 22:8, rules that it is permissible to accept a non-Jew "to adjudicate on the basis of his judgment, not on the basis of established [gentile] law just as it is permitted to accept a relative or a person disqualified from serving as a judge to serve in such a capacity."[25] *Arukh ha-Shulhan* clearly permits non-Jews who do not serve in a judicial capacity to act as arbitrators.[26]

This analysis also serves as the basis for resolving the problem presented in the beginning of the present discussion, *viz.*, how is it that the prohibition against having recourse to non-Jewish courts remains in effect even if both parties acquiesce to such proceedings but that the prohibition against lay, i.e., non-ordained, judges does not apply in situations in which both litigants accept their jurisdiction? The Torah does indeed declare "'Before them'—but not before laymen." But neither of the two reasons supporting the prohibition against having recourse to gentile courts applies to *hedyotot* or laymen. Appearance before lay judges for adjudication in accordance with Jewish law cannot be even remotely associated with endorsement of an alien ideology and, in Rashi's terminology, does not turn our "enemies" into our judges. Nor does appearance before non-ordained judges constitute renunciation of the Law of Moses. Despite the absence of formal qualification in the form of ordination, laymen may be entirely proficient in *Hoshen Mishpat* and hence fully competent to apply the law correctly. Assuredly, charging them to do so does not represent "raising a hand against the Torah of Moses." To be sure, since they lack judicial authority, laymen are not empowered to compel appearance before them but lack of coercive authority does not preclude voluntary acceptance of their authority.

Such voluntary acceptance is quite similar to voluntary acceptance of *pesharah* rather than rigid application of law. Accordingly, the exclusion reflected in the exegetical comment "'Before them,' but not before laymen" is understood as limited to a reference to the coercive power vested in the judiciary established by Moses.

II. EXCEPTIONS TO THE PROHIBITION

1. Non-Adversarial Proceedings

The biblical prohibition expressed in the verse "And these are the *mishpatim* which you shall place before them" is limited to empowering gentile courts with the adjudication of *mishpatim*. Matters that are not subsumed within that denotation are not prohibited. In exegetical context, and hence for purposes of defining the prohibition, "*mishpatim*" does not mean "laws" or "statutes" but "lawsuits" or "causes of action." Courts are concerned with many affairs that involve the administration of legal matters but which are entirely divorced from litigation. To cite a rather trivial example, a legal change of name requires a court order. An application to a court for a change of name is not a violation of *lifneihem ve-lo lifnei arka'ot shel akum*. Naturalization proceedings serve as another example. Acquiring citizenship is certainly permitted and there exists no prohibition against initiating the requisite proceeding in a federal court in order to achieve that goal. Such matters are of no import to Jewish law and, for that reason, even if for no other, are not encompassed within the meaning of the term "*mishpatim*." But more significantly, such matters are not adversarial and do not require adjudication between competing claims.

Inheritance is clearly a matter with which Jewish law is concerned. However, probate of a will requires utilization of the offices of a probate court. Banks and other financial institutions are constrained from releasing funds unless the deceased's will is probated. Certainly, if the will is to be contested, Halakhah demands that such a proceeding must be brought before a *Bet Din* rather than before a secular court and that the parties agree to have the court distribute the assets of the estate in accordance with the decision of the *Bet Din*. However, probate of an undisputed will is purely a ministerial function and hence does not violate the prohibition of *lifneihem ve-lo lifnei arka'ot shel akum*.

The common denominator in each of these examples is that they involve matters that are non-adversarial and do not require adjudication

between competing claims. The term *"mishpatim"* as used in this context, refers to matters of litigation, i.e., matters involving different parties each of whom desires something the other is not prepared to grant. Disputes must be presented to a *Bet Din* for judgment in accordance with Halakhah. Matters that are private rather than interpersonal and matters that involve no conflicting interests or claims are not "suits" or "causes of action" within the meaning of the term *"mishpatim."* The prohibition against recourse to gentile courts is limited to adversarial proceedings. Matters that are entirely ministerial are not encompassed within the ambit of the prohibition and turning to secular courts to secure the benefit of such proceedings is not a renunciation of the Law of Moses in favor of a disparate legal system.

2. Siruv

The basis for this distinction is reflected in a provision of Jewish law that does apply to adversarial proceedings. As recorded in *Hoshen Mishpat* 26:2, there are circumstances in which it is permissible to sue a fellow Jew in a secular court. A person with a claim against another must apply to a *Bet Din* for an order directing his adversary to appear before that tribunal. Upon a determination of the *Bet Din* that the defendant's failure to appear is unwarranted, the *Bet Din* issues a *siruv* (lit.: refusal) which is essentially a declaration that the defendant is in contempt of court by virtue of his failure to appear and also grants the plaintiff leave to institute proceedings before a secular court. Even in such cases, the plaintiff is entitled to accept a judgment only for an amount not in excess of the sum he would have recovered in a *Bet Din.* Recourse to a secular court in such instances is categorized by Rambam, *Hilkhot Sanhedrin* 26:7, and later by *Shulhan Arukh, Hoshen Mishpat* 26:2, as "rescue" of funds that otherwise would be lost to the plaintiff.

However, on the surface, categorization of litigation before a gentile court in some circumstances as an act of rescue does not seem to justify such a course of action. The plaintiff, after all, is voluntarily instituting a suit before a gentile court. Is he not thereby accepting a non-Jewish legal system in preference to the Law of Moses and thereby also enhancing the stature of a legal system that supplants the laws of the Torah? The answer lies in the fact that in applying to a *Bet Din* the plaintiff has clearly indicated his preference for adjudication in accordance with Jewish law. The issuance of a *siruv* makes it crystal clear that the offices of a civil court are employed only as a last resort in order to avoid financial loss. Submission to the jurisdiction of such a court on account of

financial duress cannot be construed as renunciation of the Law of Moses. Nor, when undertaken pursuant to leave of a *Bet Din* whose services were clearly preferred by the plaintiff, is the plaintiff contributing to enhancement or aggrandizement of a non-Jewish legal system.

It is for the identical reason that there is no violation of the prohibition against recourse to *arka'ot shel akum* in any situation in which such recourse is involuntary, as is the case with regard to a defendant who is summoned to appear in a secular court, or in which the objective simply cannot be achieved in a *Bet Din*, e.g., change of name, naturalization proceedings, probate of an uncontested will, etc.

It is also for the same reason that there is no barrier to seeking a civil divorce in an appropriate civil court even if the divorce is contested. To be sure, the prohibition against recourse to gentile courts is fully operative with regard to disputes concerning maintenance, alimony, child support and custody of children. Those are matters that should be litigated only before a *Bet Din*. The same is true with regard to an issue of whether either party is obligated to grant or accept a *get*. Indeed, involvement of a secular court in matters pertaining to executing a religious divorce is likely to create a situation in which any *get* that is executed is invalid by reason of duress. Nevertheless, there is no prohibition against applying to a secular court for a decree of civil divorce. Such a decree has no effect whatsoever insofar as Jewish law is concerned. For observant Jews it has the sole purpose of eliminating the threat of a bigamy prosecution by civil authorities upon subsequent remarriage in accordance with the law of Moses and Israel. Both because the divorce decree cannot be obtained from a *Bet Din* and because it is designed exclusively to facilitate a civil purpose it presents no problem with regard to the prohibition against recourse to *arka'ot shel akum*.

3. Confirmation of an Award of the Bet Din

Religious courts enjoy no intrinsic judicial status in the eyes of the American legal system. Such tribunals are, however, recognized as the legal equivalent of arbitration panels with the result that the judgments of a *Bet Din* are enforceable in secular courts as arbitration awards. In order to enforce such awards in a secular court it is necessary for the litigants to sign a submission to arbitration before the proceedings begin and later to have the decision of the arbitrators confirmed by a court of competent jurisdiction within a stipulated period of time.[27] There is no objection in Jewish law to having the award confirmed in that manner despite the fact that it involves an act of a civil court. In the diaspora,

Batei Din do not have the power to enforce their judgments. *Batei Din* may employ the police power of the state, when available, to enforce their decisions. They may harness the power of a secular judiciary for the same purpose in much the same manner that they are empowered to issue a *siruv* permitting recourse to a secular court against a recalcitrant party. Confirming the award of a *Bet Din* in a civil court simply reserves the option of utilizing the power of the court to enforce the judgment of the *Bet Din* should that become necessary.

Indeed, refusal to sign a submission to arbitration, which is a legal requirement necessary to enforce the decision of a *Bet Din* in a civil court, is itself grounds for issuance of a *siruv*. A host of authorities have ruled that, despite appearance before a *Bet Din* in response to a summons, failure on the part of the defendant to execute the necessary instrument designed to render the decision of the *Bet Din* enforceable by civil authorities is tantamount to contempt of the *Bet Din* with the result that the plaintiff may be given leave to apply to a secular court for relief.[28] The justification for this ruling is that the sole rational motive for refusing to sign such a submission is anticipation of an adverse decision by which the litigant does not intend to be bound. It is readily apparent that a person may agree to appear before a *Bet Din* with the hope, and even the anticipation, that he will prevail but with the intention that, should he lose, he will relitigate in a civil court on the chance that the results of a second round of litigation in a different forum will be more favorable to him. Such a stance is clearly both unacceptable and contemptuous. When the parties abide by the decision of the *Bet Din* there is no need for involvement of the secular judiciary. Hence agreement to accord the decision of the *Bet Din* the status of a civilly binding arbitration award poses no additional burden upon a litigant who sincerely intends to be bound by the decision of the *Bet Din*. Accordingly, refusal to grant such status to the decision of the *Bet Din* is tantamount to a declaration that the litigant refuses to be irrevocably bound by such a decision.

III. FURTHER APPLICATIONS AND EXCLUSIONS

1. Rent Control

As noted earlier, although litigants may not voluntarily accept the jurisdiction of non-Jewish courts, nor may they agree that their disputes be adjudicated by a *Bet Din* on the basis of civil law, there are areas in

which the particular provisions of Jewish law may be incorporated either explicitly or impliedly in a contract and made binding upon the parties. For example, Jewish law provides that rent is not due until the conclusion of the rental period. That provision is subject to variance by explicit agreement of the parties. In a locale in which it is common practice to pay rent in advance, the presumption is that the parties intend to be governed by the accepted practice. Unless otherwise stipulated, the *minhag ha-soharim,* or common trade practice, becomes an implied condition of the contract. Any dispute with regard to the existence or nature of an accepted trade practice must, of course, be adjudicated by a *Bet Din.* At times, the practice arises because of provisions of the legal system that are binding upon the society at large. Such laws, in effect, give birth to an accepted practice which, in turn, becomes an implied condition of contracts executed in jurisdictions in which those laws are binding.

Rent control laws are a case in point. Such laws may or may not be independently binding as social welfare legislation by virtue of *dina de-malkhuta dina,* the law of the land is the law. Resolution of that question is contingent upon careful analysis of the various theories propounded by early-day authorities regarding the basis and parameters of the halakhic principle of *dina de-malkhuta.*[29] Such an analysis is beyond the scope of this undertaking. But, even if rent control laws are not halakhically binding *per se* as *dina de-malkhuta,* many contemporary authorities have maintained that, since those laws are generally accepted, they become implied conditions of all rental agreements.[30] Regardless of whether rent control provisions are binding as *dina de-malkhuta*[31] or as *minhag ha-soharim,*[32] any dispute between a landlord and a tenant must be resolved before a *Bet Din.* Despite the fact that in its salient features it is secular law that is administered, the law is binding upon Jews because *dina de-malkhuta* and *minhag ha-soharim* are Jewish law principles. The prohibition against recourse to *arka'ot shel akum* is not waived on account of the non-Jewish provenance of the particular law or regulation to be applied. Accordingly, any disputes between the contracting parties must be resolved by a *Bet Din.* To be sure, the judges sitting on the *Bet Din* may themselves not be familiar with rent control law since it is entirely secular in nature. Nor, for that matter, since they are not tradesmen, are they likely to be familiar with other matters of common trade practice. Matters of common trade practice can be established by a *Bet Din* by inviting expert testimony, i.e., the testimony of tradesmen who are knowledgeable regarding the customs of their trade.

The provisions of rent control law can similarly be made known to the *Bet Din* by means of the testimony of impartial attorneys or academics who are expert in that area of law.

2. Election Law

Less obvious is a situation involving laws governing the electoral process. An incident was widely related a number of years ago involving a primary election in a district having a large Jewish electorate. Both the incumbent and his challenger were observant Jews. The incumbent alleged that the petitions filed on behalf of his opponent were defective by virtue of not being in conformity with one or another of the Byzantine-like provisions of the election law of the State of New York. Accordingly, the incumbent brought suit in New York Supreme Court to have the name of his opponent removed from the ballot. To his surprise, he found himself the recipient of a summons to appear before a *Bet Din*. His opponent alleged that, as observant Jews, they were duty-bound to adjudicate the dispute before a *Bet Din*, rather than before a state court, despite the fact that the issue at stake involved a question of conformity with state law. The issue was indeed adversarial and involved the right to contend for a remunerative position. Whether or not the challenger's halakhic contention has merit is itself a matter to be determined by rabbinic decisors as is the issue of whether the *Bet Din*, assuming it has jurisdiction insofar as Jewish law is concerned, must apply state law in issuing a judgment or whether Halakhah recognizes other principles as governing even in a contest involving a right born of the statutes of a secular state.

3. Custody Disputes

There are indeed matters with regard to which the American legal system does not recognize the authority of a *Bet Din* even when the concerned parties submit to its jurisdiction. The status of a *Bet Din* in the eyes of American law is that of a panel of arbitrators but there are some matters that, in the eyes of the American legal system, cannot be submitted to binding arbitration. Child custody is probably the best example of a matter that cannot be submitted to binding arbitration. The underlying reason is the *parens patriae* doctrine, i.e., the notion that the State is the ultimate guardian of each of its citizens and thus it is the State, and the State alone, that must determine what is in the best interests of the child.

Nevertheless, such matters do fall within the jurisdiction of the *Bet Din*. Jewish law enunciates a principle very similar to the *parens patriae*

doctrine in its principle that the *Bet Din* is "the father of orphans" (*avihem shel yetomim*). The *Bet Din* also makes custody awards on the basis of the best interests of the child, albeit the weight assigned by a *Bet Din* to a particular factor may not be identical to that assigned by a secular court. Custody also involves an adversarial dispute since it involves the privilege and *mizvah* of nurturing and rearing a child. In that sense, the underlying issue is similar to that involved, for example, in a dispute regarding a *hazakah*, or established prerogative, pertaining to sounding the *shofar* in a synagogue on *Rosh ha-Shanah* or of serving as reader of the prayer service. Such matters are certainly within the competence of a *Bet Din* and dare not be brought before gentile courts.

The fact that the secular legal system does not recognize the authority of arbitrators with regard to child custody is of no material significance insofar as the prohibition of having recourse to *arka'ot shel akum* is concerned. The courts intervene in such matters only when a dispute is brought before them. Other than in egregious cases in which a child is taken from a parent because he or she is found to be incompetent to care for the child, the law does not interfere with parental decisions, including decisions pertaining to custody. Thus, as long as both parents continue to respect the decision of the *Bet Din,* the courts will not intrude. A dissatisfied parent has the legal right to attempt to overturn the decision of the *Bet Din* by bringing the matter to court. But he or she does not have the halakhic right to do so. The prohibition "'Before them,' but not before gentile courts" remains in effect.

4. Insurance Indemnification

A serious question involving the prohibition against having recourse to gentile courts arises in situations in which the defendant has insurance coverage but the insurance company refuses to settle the claim. For example, drivers and owners of vehicles involved in automobile accidents are generally covered by insurance for both personal and property damage. In conformity with the terms of its contract, the insurance company is bound to indemnify the insured up to a maximum amount, but only if the insured is found to be legally liable,. The insurance company may agree to a settlement in order to avoid litigation or it may refuse compensation unless and until the plaintiff secures a judgment in a court of law. Jewish litigants who regard themselves to be bound by the dictates of *Shulhan Arukh* would, of course, wish to have a *Bet Din* determine liability. Unfortunately, however, insurance policies do not provide for recourse to a *Bet Din* and do not grant the insured the pre-

rogative of submitting the matter to an arbitration panel. Thus, the insurance company will not be bound by a decision of a *Bet Din* or of an arbitration panel. The defendant who is ordered to pay damages by a *Bet Din* will have no recourse against his insurance carrier.

Despite the fact that it is the tortfeasor rather than the insurance company who is the named defendant and that any mention of insurance coverage in the courtroom may be grounds for a mistrial, the real party in interest is the insurance company. Nevertheless, it is common knowledge that most people carry insurance for claims of such nature. Since it is readily perceived that the cause of action is really against a non-Jewish insurance company that will not appear before a *Bet Din,* it would appear that judicial proceedings in such circumstances do not constitute either a renunciation of the Law of Moses or voluntary aggrandizement of a non-halakhic legal system and hence such suits are not forbidden. To employ Rambam's phraseology and its underlying theory, this, too, is an example of a necessary measure designed to "rescue" funds that would not otherwise be forthcoming. Of course, if the amount awarded by the jury or by the court is in excess of the amount covered by insurance, recovery of the excess from the defendant's personal funds is not permissible other than pursuant to a decision of a *Bet Din* that such an award is consistent with the provisions of Jewish law. [33] A litigant who accepts an award of a civil court to which he is not entitled under Jewish law is guilty of theft and becomes disqualified from serving as a witness.[34]

5. Non-Observant Defendants

The ostensive need for leave from a *Bet Din* in the form of a *siruv* presents a formidable hurdle in instituting legal proceedings against fellow Jews who are both unknowledgeable and uncaring with regard to the halakhic obligation to adjudicate disputes before a *Bet Din.* The prohibition against having recourse to *arka'ot shel akum* applies equally with regard to observant and non-observant defendants. However, in the case of the totally non-observant, it is more than probable that they will spurn any attempt to bring the matter to a rabbinic tribunal.

In theory a Jew who wishes to initiate proceedings even against a gentile is obligated to bring suit before a *Bet Din.* That point is stated explicitly by *Hut ha-Meshulash,* III, no. 6 and by *Divrei Ge'onim* 52:15 in the name of R. Aha'i Ga'on *She'iltot, Parashat Mishpatim* and *Parshat Shofetim.*[35] Yet, in practice, no *Bet Din* issues a summons directing a non-Jew to appear before it for purposes of litigation. *Divrei*

Ge'onim justifies failure to summon gentiles to appear before a *Bet Din* by declaring that gentiles "do not hearken to our law" and hence a Jew is permitted to have recourse to a gentile court in order to rescue his property but adds that when such is not the case and, *a fortiori*, when the gentile himself expresses a desire for the dispute to be resolved by a *Bet Din* "it is elementary that [a Jew] is forbidden to bring him before gentile courts."[36] If so, why in the case of a Jewish defendant is it necessary to obtain prior leave from a *Bet Din* whereas in the case of a non-Jew the established practice confirms that no such leave is necessary?

Netivot ha-Mishpat 26:3 declares that a *Bet Din* may permit a Jewish plaintiff to apply for relief in a gentile court only in situations in which it is clear to the *Bet Din* beyond doubt that the Jew is halakhically entitled to the relief for which he prays. Analyzing that comment, *Orhot ha-Mishpatim* raises a rather obvious concern. What should a Jew do in such a situation? The defendant refuses to appear before the *Bet Din* but the *Bet Din* declines to grant leave to apply to a civil court. In such a situation, must the plaintiff bear his loss with equanimity? *Orhot ha-Mishpatim* advances the thesis that, insofar as biblical law is concerned, there is no prohibition against having immediate recourse to a gentile court against a "powerful" (*ilem*) defendant who is known to flaunt the authority of rabbinic judges. As authority for that position, *Orhot ha-Mishpatim* cites *Yam shel Shlomoh*, *Bava Kamma* 8:65, who states that in such cases "it is an edict dictated by the practice of Jewish courts not to litigate before gentile courts other than upon receipt of permission." *Orhot ha-Mishpatim* adds that the purpose of obtaining leave from a *Bet Din* is to be able to recover legal expenses in accordance with Jewish law, i.e., such expenses are recoverable in Jewish law only if they are incurred with explicit permission of a *Bet Din*. Thus, even according to *Netivot ha-Mishpat*, a Jew may have recourse against a recalcitrant defendant in *arka'ot shel akum* whenever he himself is certain of the validity of his claim in Jewish law but he will not be entitled to collect the expenses of such litigation unless he is able to obtain prior leave of the *Bet Din*. *Kesef ha-Kodoshim, Hoshen Mishpat* 26:2, goes somewhat beyond this position in declaring that, with regard to a person known to have no regard for the authority of a *Bet Din*, there is, in effect, constructive leave to apply to gentile courts. See also R. David Leiter *Teshuvot Bet David*, no. 141.

As stated by *Orhot ha-Mishpatim*, it is certainly to be presumed that a non-Jew will not accept the authority of a *Bet Din*. Hence, according to *Yam shel Shlomoh*, there exists no biblical requirement to summon

the non-Jew to appear before a rabbinic tribunal. Nor is there any evidence that rabbinic enactments requiring prior leave from a *Bet Din* extend to suits against non-Jews. Since the summons of a *Bet Din* would invariably be ignored by a gentile, a *siruv* would be a mere formality and would serve no useful purpose. Accordingly, no *siruv* is needed in order to institute proceedings against a non-Jew in secular courts. If so, it may be argued that, since the non-observant would similarly routinely ignore the summons issued by a *Bet Din*, no purpose would have been served by including cases against totally non-observant individuals in such rabbinic enactments.[37]

Although, application for a formal *siruv* in cases involving a completely unobservant defendant may be unnecessary, nevertheless, in an age in which alternative dispute resolution is encouraged and in which many non-observant Jews are open to the heritage of Judaism, information concerning the function and availability of *Batei Din* should definitely be communicated to the defendant together with an offer to submit to binding arbitration before a *Bet Din*.[38] Many litigants may not be willing to accept adjudication by a *Bet Din* but may be receptive to arbitration before a secular arbitration panel. In the opinion of this writer, in such circumstances, acceptance of secular arbitration by the plaintiff is certainly praiseworthy but is not mandatory if the plaintiff believes that a court is more likely to grant an award in, or closer to, the amount he is entitled to recover according to Jewish law.

NOTES

1. See *Teshuvot ha-Rashba* cited by *Bet Yosef*, *Hoshen Mishpat* 26; Rema, *Hoshen Mishpat* 369:11; *Shakh, Hoshen Mishpat* 73:39; and *Hazon Ish, Sanhedrin, likkutim* 3:26-27. Cf., R. Isaac ha-Levi Herzog, *Tehukah le-Yisra'el al Pi ha-Torah*, II (Jerusalem, 5749), p. 107f, p. 117f and p. 120f.
2. See the list of sources cited by R. Ezra Batzri, *Dinei Mamonot*, I (Jerusalem, 5734), 348, note 13. See also Rabbi Herzog, *Tehukah le-Yisra'el*, II, p. 118.
3. See *Teshuvot Maharashdam, Even ha-Ezer, no. 131.*
4. See Rashi, *Gittin* 88b, s.v. *lifneihem*; cf., the somewhat variant explanation of *Tosafot, ad locum*, s.v. *lifneihem.*
5. See *Sanhedrin* 14a.
6. Capital punishment is presently precluded for other reasons as well. Statutory capital punishment may be imposed only when the sacrificial ritual

is regularly performed and only when the Great Sanhedrin sits in its chambers within the Temple precincts. See Rambam, *Hilkhot Sanhedrin* 14:11.

7. For a response to the objection that agency cannot survive the death of the principal see *Teshuvot Hatam Sofer, Orah Hayyim,* no. 84.
8. This distinction between gentile courts and lay judges is explicitly formulated by Ramban in his commentary on the Bible, Exodus 21:1. For a discussion of the seemingly contradictory view of Ran, *Sanhedrin* 2b, see R. Judah Siegal, *Ha-Torah ve-ha-Medinah*, VII-VIII (5715-5717), p. 87 and the notes appended to that article by R. Saul Israeli, *ibid.*, p. 80, note 7.
9. Cf., R. Naphtali Zevi Judah Berlin, *Ha'amek She'elah, She'iltot de-Rav Aha'i Ga'on, she'ilta* 58, sec. 1, who endeavors to resolve the problem.
10. A variant version reads "*le-hashbiham*" which, in this context, must be understood as having the same connotation.
11. See also supercommentary of R. Eliyah Mizrahi, *ad locum.*
12. In Jewish teaching, idolatry, atheism, and denial of the divine nature of the Torah are theologically and halakhically equivalent. Idolatry is, in effect, but one manifestation of the denial of the Deity. See this writer's *Be-Netivot ha-Halakhah*, I, 154-159 and *Contemporary Halakhic Problems*, IV (New York, 1995), 6-13.
13. R. Chaim Pelaggi, *Hukkot Hayyim*, no. 1, questions why the prohibition against having recourse to gentle courts, which constitutes a biblical transgression is not enumerated among the complement of the 613 commandments. The problem is readily resolved if it is understood that recourse to such courts, since it is tantamount to renunciation of the Law of Moses, is tantamount to idolatry. Thus, the prohibition against supplanting the law of the Torah by another legal code is subsumed under the prohibition against idolatry and does not constitute an independent transgression. See *Contemporary Halakhic Problems*, IV, 12f.
14. Cf., R. Menasheh Klein, *Mishneh Halakhot*, VI, no. 313, s.v. *od amarti* and VII, no. 255, s.v. *u-mah she-katav,* as well as *idem*, *Sha'arei ha-Mishnah*, *sha'ar* 10.
15. There are, however, circumstances in which a *Bet Din* must take notice of secular law. In instances in which people generally comport themselves in accordance with the provisions of such laws, those laws may acquire the status of "common trade practice." Since people contract in reliance upon such practices, provisions of law that are generally followed may become implied conditions of a contract. Such laws are binding to the extent that they would be binding if explicitly incorporated in the contract and hence are binding by virtue of the agreement of the parties rather than by virtue of the legal authority of the State. See *infra*, note 30 and accompanying text.
16. Cf., *Teshuvot Rivash*, no. 52 and *Tashbaz*, I, no. 61, who reject Rivash's conclusion. See also Ramban, *Commentary on the Torah*, Exodus 21:1; *Teshuvot ha-Rashba*, cited by *Bet Yosef, Hoshen Mishpat* 26; Rema, *Hoshen Mishpat* 248:1 and 369:8; *Sema, Hoshen Mishpat* 369:20; *Taz, Hoshen Mishpat* 248:1; *Teshuvot Maharit,* II, *Hoshen Mishpat*, no. 6; *Teshuvot Hatam Sofer*, *Hoshen Mishpat*, no. 142; and *Teshuvot Ba'i Hayyei, Hoshen Mishpat*, no. 158. Cf. also, *Sema*, *Hoshen Mishpat* 26:10; *Taz*, *Hoshen Mishpat* 26:3; and *Birkei Yosef, Hoshen Mishpat* 26:3 as well as R. Judah Siegal, *Ha-Torah ve-ha-Medinah*, pp. 84-91.

17. That view is also propounded by Rabbi Batzri, *Dinei Mamonot,* I, 346f; R. Benjamin Silber, *Az Nidberu*, III, no. 74; and R. Judah Siegal, *Ha-Torah ve-ha-Medinah*, VII-VIII, pp. 74-77.
18. See also *idem, Tehukah le-Yisra'el,* I, 164.
19. For a survey of rabbinic opinion with regard to the role of recently discovered manuscripts, such as those of Me'iri, in halakhic decision-making see R. Moshe A. Bleich, "The Role of Manuscripts in Halakhic Decision-Making: *Hazon Ish*, His Precursors and Contemporaries," *Tradition*, vol. 27, no. 2 (Winter, 1993), pp. 22-55.
20. This is also the position of *Netivot ha-Mishpat, hiddushim* 22:13. Cf., however, *infra*, note 22.
21. The notion that a *Bet Din* is free to assess the merits of provisions of other legal systems in formulating its own resolution of a dispute is advanced by R. Saul Israeli, *Ha-Torah ve-ha-Medinah*, VII-VIII, 77, note 3.
22. See *Urim ve-Tumim* 22:1, *urim*, sec. 15 and *Netivot ha-Mishpat, hiddushim* 22:13. However, Rema, *Hoshen Mishpat* 8:1, appears to rule that such a communal edict is entirely appropriate. Cf., however, Rabbi Herzog, *Tehukah le-Yisra'el*, I, 165, who endeavors to interpret Rema in a manner compatible with the position of *Urim ve-Tumim* and *Netivot.*
23. Cf., however, *Netivot ha-Mishpat, hiddushim* 22:14, who understands *Shakh, Hoshen Mishpat* 22:15, as expressing doubt with regard to the permissibility of submitting to the authority of an individual gentile for the purpose of extra-judicial adjudication but in accordance with a non-Jewish legal system. If so, *Shakh*'s doubt is whether the prohibition of *arka'ot shel akum* is limited to appearance before a formal judicial body because only recourse to a formal court is *meyaker shem avodat elilim* or whether the prohibition is all-encompassing. However, both *Netivot ha-Mishpat, loc. cit.*, and *Arukh ha-Shulhan, Hoshen Mishpat* 22:18, rule unequivocally that adjudication on the basis of non-Jewish law is forbidden even outside of a formal judicial framework. See also *infra*, note 25.
24. A collection of responsa dealing with that situation, including one by this writer, was assembled by R. Raphael Evers of Amsterdam and published in his *Teshuvot ve-Shav ve-Rapeh*, I (Jerusalem, 5754), no. 77. See also *Be-Netivot ha-Halakhah*, II (New York, 5759), 169-172.
25. Cf., however, *Halakhah Pesukah* (Jerusalem, 5746), *Hoshen Mishpat* 22:13, note 113, who maintains *Shakh* disagrees and maintains that even arbitration before a gentile is forbidden and that, although *Netivot ha -Mishpat* disputes *Shakh*'s ruling, *Arukh ha-Shulhan* rules in accordance with the position of *Shakh.* It seems to this writer that *Shakh* is understood by *Netivot ha-Mishpat* as expressing doubt only with regard to adjudication in a non-judicial forum on the basis of a codified system of law and that *Arukh ha-Shulhan* asserts that the forbidden nature of such an act was never questioned by *Shakh.* See this writer's *Be-Netivot ha-Halakhah*, II (New York, 5759), p. 171. Cf. also, *Yetav Lev, Parashat Mishpatim.*
26. See also *Az Nidberu*, III, no. 74.
27. For precisely the same reason, the litigants and the *Bet Din* must conform to the applicable provisions of the arbitration law of the jurisdiction in which the *Bet Din* proceedings are held.
28. See *Teshuvot Ne'ot Desha,* no. 51; *Teshuvot Divrei Hayyim,* II, *Hoshen*

Mishpat, nos. 7 and 9; *Teshuvot Sho'el u-Meshiv, Mahadura Telita'a*, III, no. 125; *Teshuvot Ramaz, Hoshen Mishpat*, no. 6; and *Divrei Ge'onim*, I, no. 52, sec. 8.

29. See, for example, R. Meir Arak, *Teshuvot Imrei Yosher*, II, no. 153, sec. 2, and R. David Menachem Babad, *Teshuvot Havazelet ha-Sharon, Hoshen Mishpat*, no. 8.
30. See, for example, *Erekh Shai, Hoshen Mishpat* 312:5 and Rabbi Yosef Eliyahu Henkin, *Teshuvot Ivra*, no. 96, sec. (1) 8 and sec. (2) 4, published in *Kitvei ha-Gra'i Henkin*, II (5749), 175 and 176. Cf., R. Joshua Pinchas Bombach, *Teshuvot Ohel Yehoshu'a*, nos. 10-11. Rabbi Henkin apparently maintains that such laws are also valid on the basis of the intrinsic application of *dina de-malkhuta*. See *Teshuvot Ivra*, no. 96, sec. 1(4). The decision of *Erekh Shai* may be seen as reflecting a similar view.
31. See R. Eliezer Waldenberg, *Ziz Eli'ezer*, IV, no. 28, secs. 11-12, and V, no. 30, sec. 4; *Piskei Din shel Batei ha-Din ha-Rabbaniyim be-Yisrael*, XVII, 195; and *supra*, note 30.
32. An interesting aspect of that position is discussed by R. Chanoch Cohen in a short contribution to the Tishrei 5711 issue of *Ha-Ma'or*. A landlord demanded that his tenant either accept a sizable increase in rent or vacate the premises. Pleading the provision of the applicable rent control law, the tenant refused to do either. Thereupon the landlord declared his property to be *konam vis-a-vis* the tenant, i.e., he involved a principle of Jewish law that empowers an individual to render any benefit from the property impermissible to another person or persons upon pain of religious transgression. If the landlord had the halakhic power to declare a *konam*, the tenant would have had no choice but to vacate the premises. Rabbi Cohen asserts that, in this situation, the landlord was powerless to do so.

    Without analyzing the grounds for the applicability of the principle, Rabbi Cohen asserts that *dina de-malkhuta* serves to vest a leasehold interest in the tenant. Since a *konam* is not valid if it would serve to extinguish a property interest of another individual, he argues that a *konam* cannot be employed to interfere with a legitimate right of tenancy. However, Rabbi Cohen's argument is subject to dispute. *Shulhan Arukh, Yoreh De'ah* 221:1, records a controversy among earlier authorities with regard to whether a tenancy constitutes a property interest of sufficient strength to prevent a *konam* from becoming effective. Citing *Tosafot, Arakhin* 21a, Rabbi Cohen infers that all authorities would concede that a *konam* cannot be imposed in the presence of a tenancy in perpetuity. Assuming that is correct, it is nevertheless highly doubtful that rent control regulations have the effect of establishing a tenancy in perpetuity.
33. Recovery of an award from an insurance company, even if all of its principals and shareholders are Jewish, is permissible even in a situation in which Jewish law does not recognize tort liability. Such recovery is permissible because of the contractual undertaking of the insurer to indemnify against any civil judgment. However, when forced to pay a claim, the insurance company may subsequently increase the premium for further coverage. For a discussion of whether the insured has a claim against the plaintiff for reimbursement for such additional charges in instances in which Halakhah

does not recognize a claim in tort see R. Moshe Sternbuch, *Teshuvot ve-Hanhagot*, III, no. 444.

34. See R. Shimon ben Zemah Duran, *Tashbaz*, II, no. 290 and R. Akiva Eger, *Hoshen Mishpat* 26:1. See also *Hut ha-Meshulash*, I, no. 19; *Teshuvot Yakhin u-Bo'az*, I, no. 6 and II, no. 9; and *Teshuvot Radvaz*, IV, no. 1190. An earlier source, *Teshuvot ha-Rashba*, cited by *Bet Yosef*, *Hoshen Mishpat* 26, similarly categorizes a person who accepts a recovery under such circumstances as a thief. Rabbi Batzri, *Dinei Mamonot*, I, 346, explicitly incudes recovery in Israeli *Batei Mishpat* in this categorization.
35. This statement does not appear in the published versions of *She'ilotot*. See *Dinei Mamonot*, I, 347, note 9.
36. See also *Dinei Mamonot*, I, 347.
37. See also the discussion of Rabbi Sternbuch in his *Teshuvot ve-Hanhagot*, III, no. 445.
38. Cf., *Teshuvot ve-Hanhagot*, III, no. 445.