

# The Prohibition Against Going to Secular Courts

By Rabbi Yaakov Feit

The Torah states (Exodus 21:1), “*V’eileh ba-mishpatim asher tasim lifneihem*,” “And these are the statutes which you shall place before them.” The Talmud (*Gittin* 88b), sensitive to the word “*lifneihem*,” deduces “*lifneihem- velo lifnei akum*,” “Before them- but not before gentiles.” As such, the Talmud understands that there is a prohibition against bringing disputes to be adjudicated before gentile courts.<sup>1</sup> The rationale for such a prohibition is explained by Rashi who writes that one who goes to secular courts “profanes the name of God and gives honor to the name of idols.”<sup>2</sup> Rambam writes that one who does so is considered as if he has “blasphemed and raised a hand against the Torah of Moses.”<sup>3</sup> The unanimous conclusion among *halachic* authorities is that the prohibition extends to even those gentiles who are not technically idol worshippers.<sup>4</sup> Acceptance of a foreign court system, even if secular in nature, is considered a rejection of Torah law.

The *Shulchan Aruch* emphasizes the seriousness of this prohibition by describing one who violates it in unusually harsh terms. One who goes to secular court is consid-

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<sup>1</sup> See R. Shimon ben Tzemach Duran (1361-1444), *Shu”t Tashbetz* II, no. 290 who understands this prohibition to be biblical in nature. This is also the implication of R. David ibn Zimra (1479-1573), *Teshuvot Radvaz*, I, no. 172; *Chiddushei ba-Ran*, *Sanhedrin* 2b; *Chiddushei ba-Ramban*, *Sanhedrin* 23a; R. Chaim Benbenishti (1603-1673), *Teshuvot Ba’i Chayei*, *Choshen Mishpat* no. 158; R. Chaim Yosef David Azoulay (1724-1806), *Birkei Yosef*, *Choshen Mishpat* 26:3 and *Kli Chemdab*, beginning of *Parshat Mishpatim*. However, see R. Baruch Klai, *Sefer Mekor Baruch*, no. 32 who concludes, based on the omission of this prohibition by Rambam and Rasag from their list of mitzvot, that this prohibition is in fact rabbinic in nature. See R. Yerucham Fischel Perlow (1846-1934), Commentary on *Sefer Hamitzvot* of R. Saadia Gaon, II: 319, who attempts to explain the omission.

<sup>2</sup> See commentary of Rashi to Exodus 21:1.

<sup>3</sup> Rambam, *Mishneh Torah*, *Hilchot Sanhedrin* 26:7.

<sup>4</sup> See *Shu”t Tashbetz* II, no. 290 and R. Shimon Duran (1361-1444), *Yachin U’Boaz* II, no. 9, who states this explicitly, as well as the Rif, quoted in *Beit Yosef*, *Choshen Mishpat* 26:3, who refers specifically to adjudicating before Muslims. This is accepted by all halachic authorities. See *Knesset Ha-Gedolah*, *Choshen Mishpat*, 26:1; R. Shmuel Vozner (1913-), *Teshuvot Shevet Halevi* X, no. 263 sec.1; R. Yitzchak Yaakov Weiss (1902-1989), *Teshuvot Minchat Yitzchak* IV, no. 52 sec.1; R. Ezra Batzri, *Dinei Mamot* V (Jerusalem 1990), no. 5; R. Shmuel Leib Landesman, “*Teshuva bi-Inyan Arkaot*,” *Yeshurun* XI (2002), 708.

See, however, R. Meir Dan Plotzki (1867-1928), *Kli Chemdab*, beginning of *Mishpatim*, who at the end of his comments on the prohibition writes in brackets that his discussion is only theoretical since it is only relevant in areas that practice real idol worship. In light of the overwhelming majority who disagree, as well as the use of brackets, a persuasive argument can be made that *Kli Chemdab*’s comments were inserted for governmental censors who were prevalent at the time, and do not reflect his viewpoint.

ered “an evildoer, as if he has blasphemed, and as if he has raised a hand against the Torah of Moses.” The *Shulchan Aruch* also states that the prohibition applies even in a situation where the secular court would rule according to Jewish law and in a case where both litigants agree to go to secular courts.<sup>5</sup>

As a result of this unequivocal prohibition, one who wishes to adjudicate a private legal dispute with a Jewish adversary generally must do so in the confines of a *beit din*. What follows is an examination of some of the exceptions to and ramifications of this rule.

## A. EXCEPTIONS TO THE RULE

### I. A DEFENDANT WHO REFUSES TO APPEAR BEFORE A *BEIT DIN*

In a situation where one’s adversary refuses to appear before a legitimate *beit din*, *Shulchan Aruch* permits one to resort to the secular courts after receiving permission from a *beit din*.<sup>6</sup> Typically, a plaintiff opens a file in a *beit din*, which then issues a *hazmanah* (summons) to the defendant. If a proper response is not received,<sup>7</sup> that *beit din hamazmin* (summoning *beit din*) would send additional *hazmanot* and, if the defendant has failed to properly respond to the *beit din*, a *heter arkaot* (permission to litigate in secular court). If appropriate, the *beit din* may also issue a *seruv* (document of contempt) against a recalcitrant defendant.

*Sma* writes that the custom of *batei din* is to only give permission after the adversary has refused to respond to three summonses by *beit din*.<sup>8</sup> Nevertheless, some *batei din* may give permission earlier if it is clear that the adversary will not appear in a *beit din*.<sup>9</sup>

<sup>5</sup> *Shulchan Aruch, Choshen Mishpat*, 26:1.

<sup>6</sup> See *Shulchan Aruch, Choshen Mishpat* 26:2. The theory underlying this exception to the prohibition of litigating in secular courts appears to be a recognition among authorities that where compliance with the prohibition would necessarily result in the forfeiture of funds to which the litigant has a legitimate claim, the prohibition should be set aside. *Kli Chemdah, Mishpatim*, questions why one should be permitted to violate a biblical prohibition in order to “save his money”. R. Moses Sofer (1762-1839), *Teshuvot Chatam Sofer, Choshen Mishpat*, no. 3 and *Biur ha-Gra, Choshen Mishpat* 26:2, as explained by *Be’er Eliyahu*, imply that one is permitted to do so since the secular court merely acts as an agent of *beit din*. *Kli Chemdah* rejects this approach and suggests that the prohibition only applies in a case where one has the option of appearing before *beit din*. In a case where one has attempted to go to *beit din* but the adversary refuses, appearing before secular court does not imply a rejection of Torah law and as such there is no prohibition.

<sup>7</sup> See section 2 of the Rules and Procedures of the Beth Din of America for an example of acceptable responses to a *beit din*. (“Rules and Procedures of the Beth Din of America,” Beth Din of America, Accessed January 27, 2012, [http://bethdin.org/docs/PDF2-Rules\\_and\\_Procedures.pdf](http://bethdin.org/docs/PDF2-Rules_and_Procedures.pdf))

<sup>8</sup> *Sma, Choshen Mishpat* 26:8. Also see *Pitchei Teshuvah, Choshen Mishpat* 11:1 and *Netivot ha-Mishpat, Chiddushim*, 11:4 who refer to the custom of issuing three summonses.

<sup>9</sup> See R. Yitzchak Yaakov Weiss (1901-1989), *Shu”t Minchat Yitzchak* IX, no. 155.

The Beth Din of America generally sends three summonses before granting permission to litigate before the secular courts. However, the Rules and Procedures of the Beth Din of America provide that it is within the discretion of the *Av Beit din* to grant permission to go to secular court if no response is forthcoming after proper notification and the passage of thirty days.<sup>10</sup>

## 2. ONE WHO IS SUMMONED TO SECULAR COURT

Defendants inappropriately summoned to secular court by a fellow Jew may defend themselves in secular court without violating any prohibition. There is some disagreement as to whether defendants are required to receive express permission from *beit din* to defend themselves in the action, and whether they are required to take steps to indicate their willingness to move the case to a *beit din*.<sup>11</sup>

## 3. NON-JEWS

Tashbetz<sup>12</sup> assumes that, technically speaking, the prohibition against litigating in secular court would apply even in the context of a non-Jewish adversary. However, one may assume that a non-Jew will not willingly appear before a *beit din*, and accordingly one may bring the non-Jew before a secular court without permission from *beit din*.<sup>13</sup>

<sup>10</sup> Rules and Procedures of the Beth Din of America, Section 2(i), (accessed January 27, 2012, [http://bethdin.org/docs/PDF2-Rules\\_and\\_Procedures.pdf](http://bethdin.org/docs/PDF2-Rules_and_Procedures.pdf))

<sup>11</sup> Although *Tumim, Chosben Mishpat*, 26:1 writes that even in such a situation the prohibition remains, this does not seem to be the accepted opinion. R. Meir Auerbach (1815–1878), *Imrei Binah, Chosben Mishpat*, no. 27 refers to those who require that the defendant protest that the case should be brought to *beit din* but argues that not even that is required. Similarly, R. Yechezkel Katzenelenbogen (1667–1749), *Knesset Yechezkel*, no. 97, also quoted in Imrei Binah and R. Shalom Mordechai Schwadron (1835–1911), *Shu"t Mabarsbam* I, no. 89, write that no protest is necessary and no permission from *beit din* is required. This appears to be the opinion of R. Ovadya Yosef (1920–), *Yechaveh Daat* IV, no. 65 who permits a defense attorney to defend a Jew who is wrongfully brought to secular court but makes no mention of a requirement to protest or receive permission from *beit din*. However, *Kesef ha-Kodshim, Chosben Mishpat*, 26:1 writes that although one who went to secular court to defend against an injunction does not “bear much guilt” it is appropriate to first receive permission from *beit din* to do so. R. Moshe Shternbuch (1926–), *Teshuvot ve-Hanbagot* III, no. 453 writes that it is appropriate for defendants to voice their preference to appear before *beit din*. He implies that one who is brought to secular court by a religious Jew is certainly required to demand that the case be moved to *beit din*. Note that even if there is no prohibition for a defendant to participate in secular court proceedings without protest, such participation may prevent the defendant from later insisting on *beit din* adjudication. See Section C.1 for a discussion of this matter.

<sup>12</sup> *Shu"t Tashbetz* II, no. 290 and *Shu"t Tashbetz* IV (*Chut Hameshulasb*), no. 3:6, also quoted in R. Chaim Aryeh Kahane (unknown – 1917), *Divrei Geonim*, no. 52:15. *Medrash Tanchuma, Parasbat Shoftim* I also explicitly writes that it is forbidden to take a non-Jew to secular court.

#### 4. NON-OBSERVANT JEWS

*Kesef ha-Kodshim* rules that when it is extremely likely that an adversary will refuse to appear before *beit din*, one may go directly to secular court without prior permission from *beit din*.<sup>14</sup> The argument can be made that a non-observant Jew may be immediately summoned to secular court without permission from *beit din*, since it can be assumed that he or she would not attend a *din torah* (*beit din* proceeding). Nevertheless, some *batei din* have the practice of issuing one summons (as opposed to three) before granting permission to go to secular court in such a situation.<sup>15</sup> The Beth Din of America does not differentiate between observant and non-observant Jews and will issue three summonses in all cases unless the party summoned makes it clear that they will not appear before the Beth Din.

#### 5. INSURANCE COMPANIES

Generally, where a defendant maintains insurance coverage for the particular claim being pursued by a plaintiff, it is the position of the Beth Din of America that the insurance company is viewed as a necessary party in interest. Accordingly, if the insurance company is not prepared to submit to arbitration before a *beit din*, the plaintiff may pursue his or her claim in secular court.<sup>16</sup> This is because the insurance company

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<sup>13</sup> *Orach Mishpat, Choshen Mishpat* 26:1: 178 writes that it is a *mitzvah* to try to bring the non-Jew to *beit din* but upon refusal he may bring him to secular court. Based on ruling of Tashbetz, in the unusual case where a non-Jew would be willing to appear before *beit din*, one would theoretically be required to litigate the case in *beit din*. See *Kovetz Haposkim, Choshen Mishpat* 26: 178 who cites *Teshuvot Emet Me'erefs* who writes that, nevertheless, one who takes a non-Jew to secular court, rather than *beit din*, would not be treated as a *mesarev* or one who refuses to recognize the authority of *beit din*. R. Michael Broyde has stated that Jews may avail themselves of the secular courts even in cases of gentile adversaries prepared to appear before a *beit din*, since the use of secular courts in such an instance would not constitute a form of rebellion or denial of the authority of the Torah.

<sup>14</sup> *Kesef ha-Kodshim, Choshen Mishpat*, 26:2.

<sup>15</sup> *Minchat Yitzchak* IX, no. 155, 2 writes that his practice is to send one summons. However, if the *beit din* determines, based on the totality of the circumstances, that the individual is noncompliant, permission may be granted to go to secular court immediately. See *Teshuvot ve-Hanbagot* III, no. 441 who reaches a similar conclusion. However, *Teshuvot ve-Hanbagot* III, no. 445, concludes that it is not necessary to burden a claimant with the requirement to send even one summons, although it would be appropriate to note in the secular court pleadings that that *beit din* is the preferred forum. R. Chaim Jachter, *Gray Matter Vol. II* (Teaneck, NJ: 2006), 166 quotes R. Mordechai Willig as requiring permission from *beit din* before bringing a non-observant Jew to secular court. R. J.D. Bleich, *Contemporary Halakhic Problems V* (Southfield, MI: Targum/Feldheim, 2005), 37 writes that in a day and age where "alternative dispute resolution is encouraged and in which many non-observant Jews are open to the heritage of Judaism," an offer to appear before a *beit din* is appropriate.

<sup>16</sup> In most cases, insurance companies are not owned by Jews. See section A: 3 of this article which established that one may initiate an action against a gentile defendant in court even without obtaining prior permission from *beit din* to do so.

acts as a surety (i.e. a guarantor with primary liability). Just as a creditor may pursue either the debtor or surety, a plaintiff may pursue the insurance company in whatever forum necessary.<sup>17</sup>

Where insurance coverage is common and expected, such as in cases of professional malpractice, personal injury and automobile and property casualty, a defendant has the right to insist that a plaintiff bring his or her claim directly against the insurance company, even if the plaintiff wishes to seek damages from the defendant, personally, in *beit din*. This is based on the assumption that both parties entered into their course of dealing with an implicit assumption that any liability would be covered by insurance, and that any recovery could be obtained only from the insurer.<sup>18</sup>

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<sup>17</sup> R. Bleich, *Contemporary Halakic Problems V*, 34 adds that, “since it is readily perceived that the cause of action is really against a non-Jewish insurance company that will not appear before a *beit 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 *halachik* legal system and hence such suits are not forbidden.” Also see R. Michael Broyde, *The Pursuit of Justice and Jewish Law* (New York: Ktav Publication House, 1996), 47. See R. Yitzchak Zilberstein, “*Teviah bi-Arkaot al Mechdal Shel Rofeh*,” *Yeshurun* XI (2002), 695-697 who also permits going to secular court in such a situation. See, however, R. Avraham Chaim Sherman, “*Teviat Nezikin Kineged Mevutach Tzad Gimel*,” *Sbaarei Tzedek* VII (2007): 45-57 who views the insured as the primary litigant and as such requires appearance before *beit din*, which then may permit the litigants to proceed in secular court. See *Teshuvot ve-Hanbagot* III, no. 444 who discusses the case of a Jewish insurance company and requires permission from *beit din* before bringing them to secular court. Also see R. Yaakov Yishaya Blau, *Pitchei Choshen – Hülchot Yerusha* (Jerusalem: *Beit Horaah Tevunot Aryeh*, 1996), 1:65.

<sup>18</sup> Where insurance is not commonly held, other factors may be relevant in determining whether a plaintiff may insist on pursuing the defendant, personally, in *beit din*, even in the face of a claim by the defendant that he or she is insured and will not be indemnified for any losses in *beit din*.

<sup>19</sup> This is the implication of R. Moshe Feinstein (1895-1986), *Iggerot Moshe, Choshen Mishpat* II, no. 11, who writes that one may not refuse to appear before *beit din* on the grounds that their adversary already filed for an injunction in secular court. This is the opinion of Ramah Mi'Panu 51 quoted by *Knesset Hagedolah* 73 (*Beit Yosef* 47) and R. Batzri, *Dinei Mamonot* I, no. 5:11. He writes that in a case of imminent monetary loss one is permitted to file for a preliminary injunction to freeze assets so that the case may be taken to *beit din*. R. Shternbuch, in *Teshuvot ve-Hanbagot* III, no. 440, adds that no permission is required to do so but that contemporaneously with emergency court filings litigants must make it clear that they intend to bring the case before *beit din*. In *Teshuvot ve-Hanbagot* III, no. 445, he writes that it is the prevailing custom to be lenient in not requiring permission. In *Teshuvot ve-Hanbagot* V, no. 362:2 he adds that if it is possible to get permission from a *beit din* one should do so and that if that is not possible it is appropriate to ask permission from the rabbi of the area. See, however, *Teshuvot Shevet HaLevi* X, no. 263:4 who assumes that an injunction is an action of a *beit din*. As such he does not permit one to file for an injunction in secular court before a *beit din* proceeding since no presumption of guilt has been established. This analysis would seem to be limited to Israel, where a *beit din* has the authority to issue an injunction.

## 6. CASES INVOLVING THE THREAT OF IMMINENT LOSS

Most *halachic* authorities maintain that in a case of imminent loss when there is no time to go to *beit din* first, one is permitted to file for a preliminary injunction or temporary restraining order in secular court, even without permission from a *beit din* to do so.<sup>19</sup> The rationale for such a position seems to be that the prohibition of going to secular courts entails going to such a court for “judgment.” Since an injunction to prevent imminent loss is not dispositive of the underlying claims, obtaining such an injunction does not violate the prohibition.<sup>20</sup> The position of the Beth Din of America is that it is *halachically* permissible for parties to resort to civil courts, when necessary, for injunctions restraining the other party from taking action in a matter until a *beit din* can properly adjudicate the underlying dispute.

Similarly, where a party faces an approaching deadline, pursuant to a statute of limitations, to initiate an action in court, the party may file a petition or seek to toll the statute of limitations in secular court in order to preserve his or her right to seek remedies. Also, a landlord wishing to evict a tenant for non-payment of rent who stands to lose rent from re-letting the premises if he or she is unable to first begin eviction proceedings until after a *hazmana* process has played out, may initiate an action in landlord-tenant court simultaneously with initiating the *hazmana* process in *beit din*. Since the plaintiff is merely reserving the right to seek remedies in court if he or she is unable to do so in *beit din* and he or she will not begin substantial judicial involvement prior to completion of the *hazmana* process, such an action does not represent a violation of the prohibition against litigating in secular court. In both these cases, the plaintiff should simultaneously begin the *hazmana* process or make his or her preference to litigate in *beit din* clear to the defendant in the court pleadings or otherwise, and be prepared to adjudicate the substantive dispute in *beit din* in the event the defendant indicates a willingness to do so.<sup>21</sup>

<sup>20</sup> See *Teshuvot Chatam Sofer, Choshen Mishpat*, no. 3 who permits registering the statement of a witness in secular court for use in *beit din* at a later date. Since the secular court is not asked to judge, no prohibition is violated. *Kesef ha-Kodshim, Choshen Mishpat*, 26:2 writes that the Torah only forbade “*mishpatim*” or judgments but not actions in secular court that do not require judgment.

<sup>21</sup> There is an additional reason for permitting such actions. Certain judicial actions cannot be performed by a *beit din*. For example, obtaining a name change or adopting a child are governmental functions that can only be accomplished by a secular court judge, and one does not violate the prohibition against litigating in secular court by bringing such an action to secular court (see R. Bleich, *Contemporary Halachic Problems* V, 26). Other actions require action by a secular court judge, but also involve the adjudication of substantive disputes among litigants. Where the dispute can be separated from the court action in a manner that allows for *beit din* adjudication, Jewish law



## 7. DISCOVERY

A party who files a complaint in secular court solely to initiate discovery may technically not be in violation of the prohibition of adjudicating before a secular court, to the extent the filing is followed by discovery that proceeds among the parties without judicial involvement.<sup>22</sup> Litigation in secular court to enforce discovery rights may constitute a violation of the prohibition.<sup>23</sup> In any event, a plaintiff who files an action in secular court, even if only for the purpose of beginning the discovery process, may lose his or her right to later insist on *beit din* adjudication of that claim.<sup>24</sup>

## 8. UNDISPUTED CLAIMS

A plaintiff with an undisputed claim, such as where the defendant has signed a confession of judgment for the full amount being claimed by the plaintiff, may resort to secular court without attempting to litigate the matter in a *beit din*. Since the courts are not being asked to adjudicate competing claims, such an action could be charac-

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would require such separation. For example, a civil divorce can only be obtained in court, but the parties may also be disputing issues such as the allocation of their assets, spousal and child support, and custody and visitation. It is permissible to file a court action for civil divorce, so long as the plaintiff makes his or her preference to litigate in *beit din* clear to the defendant, either in the court pleadings or by simultaneously initiating the *hazmana* process. Similarly, a landlord may file a complaint in secular court for possession of leased premises in landlord-tenant court, so long as it is clear that such action is merely a predicate for the enforcement of a *beit din* decision on the merits of the case.

<sup>22</sup> See Roger S. Haydock and David F. Herr, *Discovery Practice* (Austin: Aspen Publishers, 2009), §31.01 (“Discovery is designed to take place primarily with satisfaction and without court involvement. Interrogatories, depositions, document production, and requests for admissions are all normally used without a judge ordering or barring them.”)

<sup>23</sup> See R. Bentzion Yaakov Vozner, “*Halicha li-Arkaot*,” *Divrei Mishpat* III (1997): 195-197, who discusses the case of an individual who plans on adjudicating before *beit din* but goes to secular court for the purpose of putting pressure on his adversary. R. Vozner points out that *Shulchan Aruch, Choshen Mishpat*, 26:1 begins by writing, “It is forbidden to adjudicate” in secular court but ends by writing that anyone who “comes to adjudicate before them” has violated the prohibition. He argues that the additional words here as well as in other primary sources indicate that appearance before secular court alone, when a request to adjudicate has been made, is a violation of the prohibition since it honors another system of law and represents a rejection of Torah law. Similarly, see R. Asher Weiss, *Minchat Asher Devarim* (Jerusalem, 2007), 3:1 who prohibits appearing in secular court even when one’s intention is merely to convince an adversary to agree to a compromise. Also see R. Yehoshua Yehuda Leib Diskin (1817-1898), *Shu”t Mabaril Diskin*, in the collection of rulings based on his manuscripts in the back of his responsa, no. 20 which says that one who issues a “*pazavu*” (seemingly a summons) is not deemed to have gone to secular court since only words were spoken and no court action was taken. One may infer from here that any action taken in court beyond a summons, such as actual appearance, would be tantamount to violation of the prohibition. It follows that appearance in secular court solely for enforcement of discovery would be prohibited as well.

<sup>24</sup> See Section C.1.

terized merely as a collection action with no resulting violation of the prohibition of litigating in secular court.<sup>25</sup>

Even absent a confession of judgment, in the case of a claim upon which no defense or counterclaim can reasonably be anticipated, the prohibition of litigating in secular court may not technically bar a plaintiff from initiating an action in secular court, although it may still be appropriate to first attempt to adjudicate the claim in a *beit din*.<sup>26</sup> Examples of such claims are nonpayment of tuition obligations, or of an unconditional promissory note, mortgage or guaranty,<sup>27</sup> if the parties have no other business dealings with each other that could result in the assertion of a counterclaim that may offset the obligation.

## 9. CONFIRMATION AND ENFORCEMENT OF AN AWARD OF *BEIT DIN*

Based on the same logic, one who wishes to have a judgment from *beit din* confirmed or enforced in secular court is permitted to do so. Here too, the claimant is petition-

<sup>25</sup> *Shu"t Mabarsbam* I, no. 89 quotes the position of the *Av Beit din* of Butchatch who permits going to secular court in the case of a defendant who admits his debt. He argues that with the admission of liability, the case is viewed as if a decision was already rendered, and enforcement in secular court is akin to enforcing a decision of *beit din*, which does not violate the prohibition of appearing before secular courts (see note 28). Requesting permission prior to going to court to enforce such an obligation is merely a "*middat chassidut*." See *Shu"t Mabarsbam* II, no. 252 and *Shu"t Mabarsbam* III, no. 195 where he reiterates this position. Similarly, *Teshuvot Shevet Halevi* II, no. 263:3 permits use of secular courts to collect a "*chov barur*" or clear debt provided basic *halachic* laws of debt collection (such as certain debtor protection laws enumerated in *Shulchan Aruch, Choshen Mishpat*, 97:23) are not violated. See R. Yaakov Kamenetsky (1891-1986), *Emmet le-Yaakov, Choshen Mishpat*, 26 who suggests that secular courts may be utilized when one is merely coming to take what is clearly his and requires no decision from *beit din*. R. Bleich, *Contemporary Halachic Problems* V, 26 permits probate of an uncontested will in secular court on the same grounds. R. Mordechai Eliyahu, "*Mabat Torani Al Chukei ha-Medina vi-Hatkanat Takanot bi-Yameinu*," *Techumin* III (1982), 244 similarly permits appearance before a secular court to collect a clear debt. See R. Weiss, *Minchat Asher Devarim*, 3:4 who writes that a bounced check would not qualify as a *chov barur* since the debtor may have any of several possible defenses (i.e. he could claim that the debt was already paid, the sale was voided, etc.) As such, the creditor would be required to go to *beit din*. Presumably this would be the case regarding similar unambiguous documents.

<sup>26</sup> Practically speaking, what might be viewed by a claimant as a *chov barur* may be met by defenses and counterclaims asserted by the defendant. Once such defenses and counterclaims are asserted the claimant would be required to continue the action in *beit din*. Even if no actual defenses or counterclaims are asserted, in a case where the debtor claims that he cannot afford to pay and/or requests an extension, it would be appropriate to go to *beit din* first, even if not absolutely required. In any event, a plaintiff who files an action in civil court, even if he or she does so on the basis of an expectation that the claim would not be substantively contested, may lose the right to later insist on *beit din* adjudication of that claim (see Section C.1.).

<sup>27</sup> This assumes that no interest is being charged, or that there is a valid *heter iska* in place. Where the claim involves interest charges, *beit din* involvement may be necessary.



ing the secular court to enforce a decision of *beit din* that was already rendered, rather than adjudicate a dispute between parties.<sup>28</sup>

## 10. CRIMINAL LAW

As a technical matter, criminal litigation does not violate the prohibition of litigating in secular court since it involves criminal charges brought by the government against an individual rather than a civil dispute resolution between two individuals. One should consult a competent *halachic* authority to determine whether reports of criminal activity to the secular authorities involve a separate prohibition of *mesirah*. In any event, it is important to note that in any instance of imminent danger to human health or safety, criminal activity must be reported to the police.

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<sup>28</sup> *Urim vi-Tumin, Choshen Mishpat*, 26:5 quotes *Kenesset ha-Gedolah* in the name of Maharshach who permits enforcing a decision of *beit din* in secular court without express permission of *beit din*. *Urim* questions why this is permitted, since he equates seeking redress in the secular courts with “taking the law into one’s own hands,” which is only permitted against an adversary who is an “*alam*”, a strong and non-compliant individual. Even if *Urim*’s question makes it clear that he prohibits enforcing a *beit din* award absent non-compliance, the implication is that he would permit it where there is actual non-compliance. *Kesef ha-Kodshim* 26:2 implies that a defendant’s status as non-compliant can certainly be presumed based on an *umdenab* (i.e. a likelihood of non-compliance based on prior actions). *Imrei Binah, Choshen Mishpat*, no. 27, answers the *Urim*’s question by pointing out that no prohibition is violated where the secular authorities are not rendering a decision but are merely carrying out the decision of *beit din*. He quotes Maharikash who nevertheless requires receiving permission from *beit din* to do so, but writes that such an argument is not compelling. R. Vozner, “*Halicha li-Arkaot*,” 197-200, answers *Urim*’s question by pointing out that in the case of someone who refuses to carry out the decision of *beit din*, “there is no greater *alam* than this.” *Teshuvot Maharsham* IV, no. 105 quotes and concurs with the opinion of Maharshach that one may enforce a *beit din* decision without permission from *beit din*. R. Shlomo Kluger (1785-1869), *Teshuvot ha-Elef Lecha Shlomo, Choshen Mishpat*, no. 3 comes to a similar conclusion as Maharshach. *Teshuvot Shevet Halevi* X, no. 263:2 writes that one is permitted to enforce a decision of *beit din* when the other party refuses to comply but notes that in a case where his non-compliance is sanctioned by *beit din* because *beit din* has agreed to revisit its decision, one would certainly need permission from the *beit din* before bringing the decision to secular court for enforcement.

However, see *Teshuvot Ve-Hanbagot* III, no. 439 who writes that it is not customary to follow the opinion of Maharshach.

It would seem that confirming a *beit din* decision in secular court should be equated with enforcement of a *beit din* decision. However, see R. Chaim Kohn, “*Akipat Kiyum Psak Pasbranim Al Yedei Arkaot*,” *Divrei Mishpat* III (1997): 188-189 who questions the permissibility of confirming a *beit din* decision since making a motion to confirm an arbitration decision allows the other party to contest the award and thereby retains an element of “judgment.” Accordingly confirmation would require permission from *beit din* as would any other judgment in secular court. R. Kohn concludes, however, that confirming a *beit din* decision in secular court would be permissible since first going to *beit din* and only then seeking recourse in secular court indicates that the party is not attempting to “raise a hand against the Torah of Moshe”. R. Bleich, *Contemporary Halachic Problems* V, 28 writes that confirmation of a *beit din* decision does not require prior permission since the confirmation process results only in the reservation of the option to enforce the decision should it become necessary. He

## II. CASES WHERE *BEIT DIN* JUDGMENTS WOULD BE UNENFORCEABLE UNDER SECULAR LAW

There is no obligation to use a *beit din* to adjudicate public law matters<sup>29</sup> such as allegations of zoning violations, OSHA violations, bankruptcy law<sup>30</sup> or other areas of public law. In a case where two Jewish individuals have a private dispute that may implicate public law issues, a *beit din* should adjudicate the matter if secular law allows for arbitration of the matter.

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notes the opinion of some *halachic* authorities who require permission before enforcing a *beit din* decision. For a further discussion on confirming judgments of *beit din*, see R. Yaacov Feit and Dr. Michael A. Helfand, "Confirming Piskei Din in Secular Court," *Journal of Halacha and Contemporary Society* (Spring 2011): 5- 27.

Section 33 (c) of the Rules and Procedures of the Beth Din of America as well as the standard form of binding arbitration agreement that the parties sign prior to *din torah* proceedings at the Beth Din of America, expressly provide for the enforcement of the decision in secular court. Accordingly, even if permission of a *beit din* to enforce a *beit din* award is required, such permission is presumed upon the issuance of any decision (following the final disposition of any requests for modification under section 31 of the Rules and Procedures) by the Beth Din of America.

<sup>29</sup> This is true for several reasons. In the United States, most public law matters cannot be adjudicated through arbitration. As such any decision rendered by *beit din* would be unenforceable. See *Medrash Tanchuma, Parashat Shoftim*, which states, "When there is no police officer, there is no judge," implying that when *beit din* has no power to enforce its judgments appearance before *beit din* is not mandated. See R. Chaim Ibn Atar (1696-1743), *Ohr Hachayim – Devarim*, 16:18 who writes that there is no requirement to appoint judges when there is no one to enforce their law. See *Teshuvot Maharsham I*, no. 89, who writes regarding enforcement of an admission of guilt that since in our day *beit din* does not have the power to enforce its rulings, receiving permission from *beit din* to go to secular court is merely a "*middat chassidut*" but not required strictly speaking. The implication of his statement is that when *beit din* has no power to enforce its decisions, no prohibition exists since it is clear that appearance in secular court does not imply a rejection of Torah law. Also see *Teshuvot Shevet Halevi X*, no.263:2 who addresses the case of one who wishes to contest a decision of a zoning board. He argues that since the government will not recognize the decision of *beit din* and as such the decision will be unenforceable, it is obvious that no prohibition of going to secular courts applies. These *halachic* authorities assume that a prohibition against going to secular court only applies when the matter can be solved in *beit din*. Bringing a matter unenforceable by *beit din* to secular court does not in any way "raise a hand against the Torah of Moses." However, see R. Landesman, "*Teshuva bi-Inyan Arkaot*," 704-707 who argues that one may not appear before secular court without permission from *beit din* even in a case where *beit din* does not have the ability to enforce their judgment. He argues that *Medrash Tanchuma's* statement cited above is meant to be taken as advice and not as a *halachic* ruling.

In addition, public law matters usually entail determining the rights of parties such as gentiles, public officials, and the community at large. See Section A.3. which discusses *beit din* adjudication of matters involving non-Jews.

Furthermore, *halacha* recognizes the rights of gentiles and society to regulate their own framework and they need not go to *beit din*. As such, one may litigate against a government agency even if its agents are coincidentally Jewish. See R. Broyde, *The Pursuit of Justice and Jewish Law*, Chapter 8, for a further discussion of public law.

<sup>30</sup> See R. Steven Resnicoff, "Bankruptcy- A Viable Halachic Option?," *The Journal of Halacha and Contemporary Society* (Fall 1992): 52-54, who offers several reasons why filing for bankruptcy does not

Generally speaking, the decisions of arbitration panels in the United States regarding child custody and visitation matters are not automatically enforceable in court, although in some jurisdictions *beit din* determinations regarding these matters may be presumptively enforceable.<sup>31</sup> It is the view of the Beth Din of America that custody disputes should be decided in *beit din*.<sup>32</sup>

## B. THE SCOPE OF THE PROHIBITION OF LITIGATING BEFORE NON-JEWISH COURTS

### I. SECULAR LAW BEFORE A JEWISH JUDGE

The prohibition of adjudicating a dispute before a secular court applies even if the

violate the prohibition of going to secular court. First, bankruptcy is an “*in rem*” proceeding. It is not an action directed toward a particular individual and there is no adjudication between parties. Rather, the debtor merely appears before court to seek relief. In a situation where filing for bankruptcy leads to adjudication between individuals in bankruptcy court, appearance in such a court would still be permitted since bankruptcy law would usually prohibit collection actions in *beit din*. R. Resnicoff questions the permissibility of such an appearance in a case where bankruptcy court would make an exception to this rule. Still, he suggests that if most of the creditors are non-Jews the debtor would not violate the prohibition of going to secular court for taking such actions. Since the debtor is entitled to relief against non-Jewish creditors and filing for bankruptcy and following the court’s procedures is the only way to do so, such actions would not be tantamount to “raising a hand against the Torah of Moses.” This paragraph has only addressed the permissibility of bankruptcy vis-à-vis the prohibition of going to secular court. A more complete discussion of whether it is permissible to file for bankruptcy is beyond the scope of this article and is addressed at length in R. Resnicoff’s article.

The Beth Din of America will generally hear a post-bankruptcy claim that addresses a debt that existed pre-bankruptcy upon the consent of both parties. The Beth Din would generally not issue a *servv* in such a case since it would be in contravention of *dina demalchuta dina*, the “law of the land is law.”

<sup>31</sup> For a collection of cases in various states dealing with this issue, see Elizabeth A. Jenkins, “Validity and Construction of Provisions for Arbitration of Disputes as to Alimony or Support Payments or Child Visitation or Custody Matters,” 38 A.L.R.5th 69 (1996). See also Fawzy v. Fawzy, 199 N.J. 456 (2009), in which the court ruled that arbitration decisions regarding child custody and visitation matters are presumptively enforceable pursuant to the applicable arbitration statute. As a practical matter, courts will often defer to the child custody and visitation decision of an arbitration body such as a *beit din* if it is clear to the court that the arbitrators adhered to fundamental notions of due process, considered the relevant factors and acted in the best interests of the child.

<sup>32</sup> See R. Bleich, *Contemporary Halakbic Problems* V, 33 who takes this position as well.

<sup>33</sup> For a discussion regarding adjudication before the secular courts in the State of Israel see R. Avrohom Yeshaya Karelitz (1878-1953), *Chazon Ish, Sanbedrin* 15:4; R. Yitzchak HaLevi Herzog, “*Gedarim bi-Din ha-Malchut, Hatorah Vehamedinah* VII-VIII (1956): 9-12; *Yecheveh Daat* IV, no. 65; R. Eliezer Waldenberg (1915-2006), *Teshuvot Tzitz Eliezer* XII, no. 82; *Teshuvot Shevet HaLevi* X, no. 263; *Teshuvot Ve-Hanbagot* III, no. 441; and R. Binyamin Zilber (1917-2008), *Teshuvot Az Nidberu* III, no. 74. Also see, *Kovetz Haposkim, Choshen Mishpat*, 26: 206. For further explanation see R. Bleich, *Contemporary Halakbic Problems* V, 16-21.

<sup>34</sup> At first glance this ruling appears to contradict the opinion of *Chazon Ish* and others cited above as well as R. Shlomo ben Aderet (1235-1310), *Teshuvot ha-Rashba* VI, no. 254, cited in *Beit Yosef*,

judge is Jewish. The acceptance of a foreign system of law in replacement of Torah Law is considered a repudiation of the Torah and viewed as “raising a hand against the Torah of Moses.”<sup>33</sup>

## 2. CHOICE OF LAW

A choice of law clause, where two parties agreed to be judged in *beit din* but according to the laws of a specific secular set of rules or authority, is permitted by many *halachic* authorities. The Beth Din of America generally respects choice of law clauses and will apply secular law in determining the outcome of a dispute where parties have agreed to be governed by that body of law.<sup>34</sup>

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*Choshen Mishpat*, 26. Rashba discusses a case where a person claimed that the accepted custom in his area was to follow secular law regarding inheritance despite its clash with Jewish inheritance law, and as such argued that it was as if the parties had agreed to be bound by it. Rashba argues that to do so because it is the law of the gentiles is prohibited since he is mimicking the gentiles and this was specifically forbidden by the prohibition against going to secular courts. He writes that even though both parties agree and even though it is a monetary agreement, the Torah does not permit giving value to a gentile system of law. See R. Tzvi Gartner, “*Sheila bi-Inyan Arkaot*,” *Yeshurun* XI (2002): 699-701 who accordingly argues that such clauses are prohibited. See R. Bleich, *Contemporary Halakhic Problems* V, 21-22, and R. J. David Bleich, *Be-Netivot ha-Halachah* II (New York: Michael Sharf Publication Trust of the Yeshiva University Press, 1998): 169-170 who takes a similar position.

However, see R. Zalman Nechemya Goldberg, “*Teshuva vi-Hatzaah bi-Inyan*,” *Yeshurun* XI (2002): 702-703, who takes issue with R. Gartner and argues that the Rashba’s principle applies when the accepted conditions contradict Torah law, as in the case of inheritance, as opposed to when one assumes added obligations that are not in violation of any Torah principle. See R. Tzvi Spitz (20th century), *Sefer Minchat Tzvi - Shechenim*, no. 16:10 who argues that a choice of law clause is permissible when specific laws are mentioned and no reference of a foreign system of law is made. See R. Gartner who takes issue with this opinion. See R. Yonah Reiss, “*Matneh Al Mah Shekatuv ba Torah*,” *Shaarei Tzedek* IV (2003), 288-296 who offers another distinction. The Rashba objected to blind acceptance of another system of law because such acceptance implies that the system is viewed as superior to Torah law. However, acceptance of a certain system of law because it reflects customary business practices of the location does not reject Torah law and is like any other monetary condition which is binding according to halacha. As such, the practice of the Beth Din of America is to allow choice of law clauses which accept a system of law as it is the day of the agreement because it is like any other binding monetary agreement. However, acceptance of a system of law even if the law may change in the future reflects blind adherence to secular law and represents a rejection of the Torah (unless such changes are a reflection of change in customary practice).

R. Bleich, *Contemporary Halakhic Problems* V, 30, does maintain that common trade practices or *minbag ha-socherim* can become implied conditions of a specific contract. It seems that he would differentiate between acceptance of specific practices as opposed to acceptance of an entire system of law. One could argue that a choice of law clause, since limited to a specific situation or contract, is similar to *minbag ha-socherim* and different than acceptance of an entire system of law.

See the Rules and Procedures of the Beth Din of America, subsections 3(d) and (e), which state:

In situations where the parties to a dispute explicitly adopt a “choice of law” clause, either in the initial contract or in the arbitration agreement, the Beth Din will accept such a choice of law clause as providing the rules of decision governing the decision of the panel to the fullest extent

### 3. ARBITRATION

Many poskim assume that one is permitted to present a case for binding arbitration to an arbitrator who is a non-Jew. Since arbitrators are not bound by a specific set of laws,<sup>35</sup> adjudication before them is not considered a rejection of Torah law and as such is not a violation of the prohibition.<sup>36</sup> Still, arbitration conducted under the auspices of a gentile judicial body is prohibited since it acknowledges the authority of a foreign judicial system.<sup>37</sup>

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permitted by Jewish Law. In situations where the parties to a dispute explicitly or implicitly accept the common commercial practices of any particular trade, profession, or community – whether it be by explicit incorporation of such standards into the initial contract or arbitration agreement or through the implicit adoption of such common commercial practices in this transaction – the Beth Din will accept such common commercial practices as providing the rules of decision governing the decision of the panel to the fullest extent permitted by Jewish Law.

<sup>35</sup> See *Silverman v. Benmor Coats, Inc.*, 61 N.Y.2d 299, 308 (1984) (“[A]n arbitrator is not bound by principles of substantive law or by rules of evidence. He may do justice as he sees it, applying his own sense of law and equity to the facts as he finds them to be and making an award reflecting the spirit rather than the letter of the agreement . . . .”) Also see Rule 43 of the commercial rules of the American Arbitration Association (<http://www.adr.org/sp.asp?id=22440>, accessed February 7, 2012) which states, “(a) The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties...” Similarly, Rule 24(c) of the JAMS Comprehensive Arbitration Rules & Procedures (<http://www.jamsadr.com/rules-comprehensive-arbitration>, accessed February 7, 2012) states, “[I]n determining the merits of the dispute the Arbitrator shall be guided by the rules of law agreed upon by the Parties. In the absence of such agreement, the Arbitrator shall be guided by the rules of law and equity that the Arbitrator deems to be most appropriate. The Arbitrator may grant any remedy or relief that is just and equitable and within the scope of the Parties’ agreement, including but not limited to specific performance of a contract or any other equitable or legal remedy.”

<sup>36</sup> *Shulchan Aruch, Choshen Mishpat*, 22:2 states that even if one accepts a non-Jew as a judge, the acceptance is not binding and it is forbidden to appear before that judge. Rama comments, however, that if one was already judged in such a situation the judgment is binding. Shach 22:16 takes issue with Rama and suggests that there is a difference between acceptance of non-Jewish law which is forbidden and acceptance of a specific non-Jewish judge which is permitted. *Netivot ha-Mishpat, Chiddushim* 22:14 rejects Shach’s opinion and writes that even acceptance of a specific gentile judge is prohibited. *Aruch Hashulchan, Choshen Mishpat*, 22:8 explains that Shach permitted acceptance of a specific gentile judge who will judge according to his own logic as opposed to a judge who is bound by a secular body of law. *Aruch Hashulchan* seems to understand that the nature of the prohibition is one of rejecting Torah law by replacing it with a foreign system of law. Acceptance of a gentile judge to rule according to his own judgment is not acceptance of another system of law. *Aruch Hashulchan* rules according to Shach and against *Netivot ha-Mishpat*. In effect, *Aruch Hashulchan* and Shach permit arbitration since an arbitrator is not bound by a body of law. However, *Halacha Pesukab, Choshen Mishpat*, 22:13 views the question of arbitration as a disagreement between Shach and *Netivot ha-Mishpat* and rules according to *Netivot ha-Mishpat* who forbids arbitration before a non-Jew. See, however, R. Bleich, *Contemporary Halakic Problems* V, 21-23 (and R. Bleich, *Be-Netivot ha-Halachab* II, 171), who understands that *Netivot ha-Mishpat* never argued with Shach about a case of arbitration. Rather, *Netivot ha-Mishpat* understood that Shach permitted acceptance of a single non-Jewish judge even if bound by secular law and as such rejected Shach’s view. However, even

## C. RAMIFICATIONS OF VIOLATION OF THE PROHIBITION

### I. APPEARANCE IN *BEIT DIN* AFTER SECULAR COURT

Rama rules that one who brings a case to secular court and does not prevail may not later insist on *beit din* adjudication.<sup>38</sup> Some authorities have expanded Rama's ruling to include instances in which secular court activities have taken place, but no final judicial decision has been rendered.<sup>39</sup> This means that in some cases a *beit din* may

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*Netivot ha-Mishpat* would agree that acceptance of an arbitrator who is not bound by secular law would be permitted.

Many *poskim* seem to take the view of Shach as understood by *Aruch Hasbulchan*. *Teshuvot Tzitz Eliezer* XI, no. 93 permits settlement of cooperative housing disputes by an official appointed by the government since the official is not bound by a set of laws and judges based on the official's view of fairness and equity. R. Waldenberg's ruling carries added significance, since, in effect, he even permits arbitration that is mandated by law.

See *Piskei Din Rabanaim shel Batei Din Ha-Eizorim Be-Yisrael* XIII: 330-334 (Ashdod 1982) who permit adjudication by the Israeli Union of Engineers and Architects. They base their opinion on R. Karelitz, *Chazon Ish – Sanbedrin*, 15:4 who also differentiates between judges bound by a secular set of laws and judges who decide based on logic and fairness. See a similar conclusion in *Piskei Din Rabanaim* VII: 231 reached by the High Rabbinic Court of Jerusalem headed by R. Yitzchak Nissim, R. Yosef Shalom Elyashiv, and R. Eliezer Goldschmidt. See R. Avraham Chaim Sherman, "Maamad *Beit din* Shel Tenuah Al Pi Halacha," *Techumin* XIV (1994): 159-164 who similarly permits arbitration before a political union as well as settlement of a dispute by an expert in a certain area since the expert is judging based on expertise and not based on a specific set of laws. See *Kovetz ha-Poskim, Choshen Mishpat*, 26: 207 who quotes *Teshuvot Pri Elyahu* III, no. 84 and *Teshuvot Kisei Shlomo*, no. 1 who permit "courts of merchants" on the same grounds. See R. Brody, *The Pursuit of Justice and Jewish Law*, 127 who follows the view of *Aruch Hasbulchan*.

R. Sherman adds based on a careful reading of Mei'ri, *Beit ha-Bechirah, Sanbedrin* 23a, that arbitrators are allowed to rule according to secular law if they deem it fair and equitable, as long as they are not bound by secular law. R. Yonah Reiss adds that it may even be permissible for two parties to appear before an arbitrator and stipulate that the arbitrator should judge based on secular law. If one assumes that one may make such a stipulation in front of *beit din* (see note 34), one can similarly argue that it would be permissible to do so before an arbitrator as well.

An interesting case that may arise with regard to arbitration is that of an adversary who refuses to appear before *beit din* but would be willing to go to a non-Jewish arbitrator. Is one required to follow suit since arbitration by a non-Jew is also permitted or may one consider such an individual non-compliant and proceed to secular court? R. Brody, *The Pursuit of Justice and Jewish Law*, 128 argues that one is not required to go to arbitration since even according to Jewish law one is not required to accept a hearing of "*peshara*" or compromise. Rather, the litigant can appear before secular court after receiving permission from *beit din*. R. Bleich, *Contemporary Halakbic Problems V*, 37 writes that accepting arbitration in such a situation would be "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."

<sup>37</sup> See R. Bleich, *Contemporary Halakbic Problems V*, 22-23 and *Teshuvot Az Nidberu* III, no. 74. Perhaps this is explicit in *Shulchan Aruch, Choshen Mishpat*, 26:1 who writes that it is forbidden to adjudicate "in front of non-Jewish judges and in their courts." The addition of the words "and in their courts" may indicate that adjudicating in their courts even when not in front of their "judges" is forbidden as well. Appearance before arbitrators in such a setting would not be considered appearance before their "judges" but would be considered appearance "in their courts."



decline to issue a summons to appear in *beit din* on behalf of a party that has already participated to some degree in secular court litigation. In some cases, the *beit din* may issue a summons, but will not issue a *seruv* if the recipient of the summons fails, ultimately, to appear before *beit din*.

Where a party to ongoing litigation in secular court requests that the Beth Din of America invite the other party to move the case to *beit din*, the Beth Din will generally do so. However, if the other party declines to submit the matter to *beit din*, the Beth

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<sup>38</sup> *Shulchan Aruch, Choshen Mishpat*, 26:1

<sup>39</sup> There are at least two explanations to Rama's ruling. Some explain that appearance before a secular court is tantamount to acceptance of its decision and ipso facto the decision is binding. Others explain that Rama's ruling represents a penalty (*kenas*) imposed by *halacha* against Jews who utilize the secular courts. *Netivot ha-Mishpat, Beurim*, 26:2 quotes both explanations as offered by the *Tumim*. See R. Pinchas Horowitz (1731-1805), *Chiddushei Hafla'ah, Choshen Mishpat*, 26:1 who adopts the first explanation. *Netivot ha-Mishpat* writes that a difference between the two reasons would arise in a case where the judge in secular court was bribed. In such a case the ruling might not be binding under Jewish law but a penalty would still be in order. *Netivot ha-Mishpat* concludes that since no *halachic* authorities raise this distinction, the penalty theory must be the more accurate explanation. See *Biur ha-Gra, Choshen Mishpat*, 26:4 who also adopts this explanation.

If one accepts the penalty theory, a penalty may be appropriate even if a ruling has not yet been issued in secular court. Whereas acceptance of a ruling of a non-Jewish judge is only binding once a decision is made (see Rama, *Choshen Mishpat*, 22:2) penalization for appearing before a secular court may be appropriate once the prohibition of appearing before a secular court has been violated. This suggestion is made by R. Meir Arik (1855-1926), *Teshuvot Imrei Yosher*, no. 36 and R. Aryeh Leib Grosnas (1912-1996), *Teshuvot Lev Aryeh*, no. 51. However, both reject this distinction. *Lev Aryeh* points out that if this distinction is correct, it should have been mentioned by *Netivot ha-Mishpat* who instead quotes the much less likely scenario of bribery. *Imrei Yosher* and R. Shlomo Yehuda Tabak (1832-1907), *Erech Shai, Choshen Mishpat*, 26, argue that penalization of an individual before the conclusion of a civil court proceeding would "lock the doors before those who wish to repent." *Imrei Yosher* as well as *Teshuvot Ve-Hanbagot* III, no. 441 also add that not allowing someone to return to *beit din* if he is already in the middle of a civil court proceeding would cause him to violate the prohibition of appearing before secular courts every second that he is there. R. Shternbuch (*Teshuvot Ve-Hanbagot*) also points out that the phraseology of Rama implies that he refers specifically to an attempt to resort to *beit din* after an unfavorable opinion has already been rendered in secular court. One could respond that Rama was merely referring to the most common case, since most will only take the case to *beit din* after actually losing in court. Those who reject this distinction would argue that penalization of the individual is only appropriate when he violated the prohibition to such a degree that he allowed it to come to a final decision.

See R. Chaim Halberstam (1793-1876), *Divrei Chaim, Choshen Mishpat* II, no. 1, who discusses a case where a plaintiff left a secular court before the final decision and returned to *beit din*. He rules that the defendant must return to *beit din* as long as he is reimbursed for any expenses he was forced to pay in order to defend himself in secular court. See R. Aharon Volkin (1865-1942), *Teshuvot Zekan Abaron, Choshen Mishpat* II, no. 125 who rules that one can compel his adversary to return to *beit din*, even after a decision is rendered in secular court, as long as the reward was not yet collected. Also see R. Batzri, *Dinei Mamot* I, no. 5:4 who rules that *beit din* should accept a case previously brought to secular court as long as no decision is rendered in secular court. He argues that since Rama's ruling is not accepted by everyone, and Rama's reasoning may not be due to the reason of penalization, and Rama's phraseology implies that penalization is appropriate only after a decision is rendered, *beit din*

Din will generally not issue a *seruv* if (i) the plaintiff in civil court is the party requesting *beit din* adjudication and he or she did not obtain prior permission to adjudicate the matter in secular court or (ii) the defendant in civil court is the party requesting *beit din* adjudication and the civil court action has already reached a stage of “substantial judicial involvement,”<sup>40</sup> as determined by the Beth Din based on a review of submissions by the parties.<sup>41</sup> As a practical matter, this means that a party risks losing the ability to compel an adversary to appear before *beit din* as a result of initiation of or participation in secular court proceedings. It is therefore advisable that any action in secular court, other than for emergency injunctive relief, only be taken after first attempting *beit din* adjudication.

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should accept a case that was not completed in secular court. However, Maharil Diskin, in the collection of rulings based on his manuscripts in the back of his responsa, no. 20 writes that one who issues a “*pazavru*” (seemingly a summons) is not deemed to have gone to secular court since only words were spoken and no court action was taken. One may infer from here that any action taken in court beyond a summons, such as actual appearance, would be tantamount to violation of the prohibition and subject to penalization. See R. Avraham Dov Berkowitz, “*Teviah bi-Beit din Liachar Teviah bi-Arkaot*,” *Techumin* XV (1995): 228-244 and R. Mordechai Willig, “*He’arot Bireish Perek Zeh Borer*,” *Beit Yitzchak* 36 (2004), 24-25 who conclude that penalization of one who went to secular court is in order even before a decision was rendered. See *Teshuvot Ve-Hanbagot* III, no. 443 who writes that some *batei din*, including the *beit din* of the Eidah Hacharedis of Jerusalem, have the practice of not hearing any case previously brought to secular court. Even though strictly speaking the ruling of Rama may not apply, such a practice is customary to properly enforce compliance with the prohibition of going to secular court.

The foregoing analysis pertains to the ability of a litigant to insist on *beit din* adjudication following resort to the secular courts, and to the appropriateness of the imposition of a *seruv* against a litigant who declines to submit to *beit din* after secular court proceedings have already begun. In contrast, *Teshuvot Lev Aryeh* 52 writes that in a case where both the plaintiff and the defendant wish to return to *beit din*, everyone would agree that *beit din* would not be required to penalize the plaintiff for bringing the case to secular court and the case should be heard by *beit din*. However, see R. Berkowitz, “*Teviah bi-Beit din Liachar Teviah bi-Arkaot*,” 228-244, who suggests that if the reason for Rama’s ruling is penalization, *beit din* should be required to penalize the plaintiff by not hearing the case even in a situation where the defendant is willing to go to *beit din*. He points out that this would depend on whether the nature of the penalty is for the purpose of protecting the honor of *beit din* or for the purpose of protecting the defendant.

<sup>40</sup> *Shu”t Maharsham* I, no. 89 writes that even though a defendant who is summoned to secular court inappropriately is allowed to defend himself or herself without permission from *beit din*, in a case where the defendant makes certain investments and demands an oath from the plaintiff, the defendant thereby demonstrates an intention to bring the case before secular court and an acceptance of the jurisdiction of the secular court. See R. Shlomo Zalman Braun, *She’arim Metzuyanim be-Halacha - Kitzur Shulchan Aruch*, no. 181 who quotes Maharsham as ruling this way in any case where a defendant appears before secular court without requesting that the case be brought to *beit din*, regardless of the degree of involvement of the defendant in court. It follows, that a defendant who participates to some degree in secular court proceedings is subject to Rama’s ruling to the same degree as the plaintiff who initiated secular court proceedings.

It should be noted that Maharsham’s logic seems to be based on the assumption that the ruling of Rama under discussion is based on the reasoning that appearance in court implies acceptance of

## 2. AWARD NOT IN ACCORDANCE WITH JEWISH LAW

Someone who appears before secular court when not permitted to do so according to Jewish law and is granted an award that is more than he or she would be entitled to according to Jewish law may not accept such an award and is guilty of theft if he or she does so.<sup>42</sup>

The centrality of the prohibition against litigating in secular courts cannot be overstated. The comparison of one who violates the prohibition to “one who worships idols” and one who “raises a hand against the Torah of Moses” highlights the fact that with adherence to this commandment we are recognizing the Torah’s legal system and none other as the guiding principle in our lives. On the flipside, violation of the

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the secular court decision. As such, Maharsham’s ruling should only apply if we accept that reason and should only apply if the secular court proceeding reached the point of a final decision. *Netivot ha-Mishpat* and *Biurei ha-Gra*, who preferred the other explanation of Rama’s ruling set forth above, would not necessarily apply Rama’s ruling to a defendant. However, see *Teshuvot ve-Hanbagot* III, no. 443 who writes that while someone who is summoned by a non-observant Jew to secular court cannot be held accountable for not attempting to bring the case to *beit din* since he may have justly assumed his attempt would be futile, someone summoned by an observant Jew who does not protest may be subject to penalization as well since he should have tried to bring the case to *beit din*. Also see *Teshuvot ve-Hanbagot* III, no. 441 sec.3. See *Imrei Binah, Choshen Mishpat*, no. 27, who cites those who ruled that a defendant who did not voice his opposition to being brought before a secular court loses his right in *beit din* to demand repayment for legal expenses spent in secular court. *Imrei Binah* himself rejects such a view.

<sup>41</sup> In cases involving a party requesting a *get* (Jewish divorce) the Beth Din may determine that a *seruv* is appropriate notwithstanding prior secular court proceedings, since the issue of the *get* is only justiciable in *beit din*.

<sup>42</sup> *Shu”t Tashbetz* II, no. 290 writes that where a secular court issues an award in excess of what a *beit din* would award, a litigant who collects on such an award violates the prohibition of theft (in addition to any violation of the prohibition of litigating in secular court, to the extent the prohibition applies in the given case). Such an individual would be labeled a “thief” and disqualified from serving as a witness, and title to any property collected on such a judgment would not vest under Jewish law. He writes that “this point is so obvious that it does not need to be written.” *Chiddushei R. Akiva Eiger, Choshen Mishpat* 26:1 quotes Tashbetz and *Chidushei Haflaah, Choshen Mishpat*, 26:2 makes a similar point. Also see R. Batzri, *Dinei Mamonot* I, no. 5:6.

Many authorities assume that this is the case even if one or both of the litigants had received prior permission from *beit din* to go to secular court. It is for this reason that *Netivot ha-Mishpat* 26:3 does not allow a *beit din* to give permission to a plaintiff to go to secular court unless the plaintiff has demonstrated to the *beit din* that the case is compelling (lest such permission result in an improper award by the secular court to the plaintiff). Although normative *halacha* does not follow this practice, the concern nevertheless remains. See R. Avrohom Borenstein (1838-1910), *Teshuvot Avnei Nezer, Yoreh Deah*, no. 133:2 who writes that an adversary’s refusal to follow the laws of the Torah does not make it permissible to steal from the adversary. *Teshuvot ve-Hanbagot* III, no. 445 warns that one should consult a halachic authority before going to secular court. However, he adds that one who knows they are owed a certain sum but lacks the witnesses to receive the award according to Jewish law, is not in violation of theft if the amount is received through an award from secular court. See *Teshuvot ve-Hanbagot*

prohibition serves as a rejection of the Torah itself. It is the hope of this author that a greater understanding of the issues at hand and a clearer perspective on the rules and exceptions will aid the reader in properly observing this vital commandment, ultimately leading to the fulfillment of our daily prayer for “restoration of our judges as in earlier times, and our counselors as it was at first.”

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III, no. 444 where he permits accepting an insurance award for injury that is not in accordance with Jewish law, since the parties bound themselves to such a monetary agreement. R. Yosef Shalom Elyashiv is quoted by R. Mordechai Ralbag, “*Hitdayanut bi-Arkaot bi-Heter Beit din*,” *Techumin* XXV (2005): 250-251, as saying that one must speak to a *balabchic* authority before accepting an award and suggests that *beit din* mention this point when granting permission to go to secular court. R. Weiss, *Mimchat Asher Devarim*, 3:4 also writes that one must go to a *beit din* after going to secular court in order to ensure that the reward is appropriate according to Torah law. Also see R. Landesman, “*Teshuva bi-Inyan Arkaot*,” 706, who also assumes that permission granted by *beit din* to appear before secular court is on condition that one will not collect more than the amount deserved according to Torah law. Also see, R. Bleich, *Contemporary Halakhic Problems* V, 26-27, 35 who makes this point as well.

See, however, R. Willig, “*He’arot Bireish Perek Zeh Borer*,” 23 who suggests based on a view of *Or Zarua* that the prohibition of theft only applies when one is not allowed to be in secular court. When one has permission to appear before secular court the prohibition is lifted and the principle of “*dina demalchuta dina*” applies. Also see *Teshuvot ve-Hanhagot* III, no. 441, who deals with the question of why one may go to secular court when an adversary refuses to go to *beit din*, despite the fact that appearance in secular court is biblically prohibited. He suggests that *beit din*’s approval of appearance in secular court is really a way for *beit din* to punish a non-compliant individual by subjecting that individual to whatever the secular court decides. The implication of such an argument is that it would be permitted in such a case to accept an award granted by secular court even though it is in excess of the award that would be granted by Torah law. R. Kohn, “*Akipat Kiyum Psak Pasbranim Al Yedei Arkaot*,” 191, uses a similar argument to explain the practice to not follow the view of the *Netivot ha-Mishpat* cited above. Since permission to go to secular court is viewed as a way for *beit din* to punish a non-compliant individual, it is irrelevant if the individual is guilty or not since that individual is responsible for the loss he or she will incur. The implication again, is that in such a situation one may accept an award greater than the amount that would have been awarded in *beit din*. This would not be viewed as theft but as a punishment that the non-compliant individual brought upon himself or herself.